REPUBLIC OF NAMIBIA

REPORTABLE

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 09/2020

In the matter between:

THE STATE

and

ERNST JOSEPH LICHTENSTRASSER **ACCUSED**

Neutral citation: *S v Lichtenstrasser* (CC 09/2020) [2022] NAHCMD 657 (05 December 2022)

Coram: LIEBENBERG J
Heard: 19 – 22 July; 17 – 21 October 2022
Delivered: **05 December 2022**

Flynote: Criminal Procedure – Trial within a trial – Confession – Objection to admissibility – Legal representative not present.

Summary: The accused stands charged with several counts relating to a double murder committed where the deceased died of multiple gunshot wounds. The trial proceeded up to the stage where the defence raised a single objection to the admissibility of a confession made by the accused to the investigating team of the Serious Crime Unit of the Namibian Police. During the testimony of the accused further issues were raised pertaining to whether the accused was in sound and sober mind due to the accused having been on a hunger strike at the time. In addition, the accused hinted at acting under duress when making the confession and that the confession was made to a non-commissioned officer without satisfying the requisites of s 217 of the Criminal Procedure Act 51 of 1977.

Held that the accused was cognisant of his rights pertaining to legal representation, including his right to remain silent as borne out by the evidence and which rights the accused invoked during earlier interviews conducted with him.

Held further that the accused in his own words, during the first interview on the day the confession was made, agreed to be interviewed, subject to him withdrawing when he feels like it which was respected.

Held further, the making of the confession was consequential to the accused stating that he wanted to confess and be brought before the investigating team for that purpose. Whilst the accused was familiar with his rights and had the opportunity to invoke same, the accused implicitly waived the rights available to him by choice.

Held that the contention by the accused that he was prevented from having contact with his lawyer, wife and his doctor is confirmed by the entry in the Occurrence Book/Register.

Held further, in the absence of evidence showing otherwise, the court is not persuaded that the accused's lawyer at the relevant time was in fact obstructed from consulting the accused, notwithstanding the OB entry.

Held further that in the absence of an explicit waiver, the only reasonable conclusion to come to is that the accused implicitly waived his rights.

Held furthermore, that the court is satisfied that the state has made out a case showing that the accused waived his rights to remain silent and legal representation when opting to make a confession.

Held, as regards the question whether the accused acted within his sound and sober senses prior to the making of the confession and the accused's evidence about certain incidents being 'hazy' as a result of his hunger strike, largely manifested during cross-examination when the accused was required to explain inconsistencies in his version. *Held further*, based on the evidence of the accused there is nothing from which it could be inferred that he was not of sound and sober mind when making the confession.

Held that the court is unable to see how the presence of non-commissioned officers and their interaction with the accused during the interview could nullify a confession made in the presence of commissioned officers confirming the actual confession made by the accused.

Held further that a confession made to a commissioned officer need not be reduced to writing at the time of its making. Where the confession is mechanically recorded and transcribed at a later stage, it does not change the circumstances under which the confession was made. It remains a confession made to a commissioned officer.

ORDER

The confession made by the accused on 15 May 2019 is ruled admissible into evidence.

RULING

TRIAL-WITHIN-A-TRIAL

LIEBENBERG J:

Introduction

[1] The accused is on trial in which he stands charged with several counts relating to a double murder committed on 15 April 2019 at Arandis, in the district of Swakopmund, when Eckhart Mueller and Heinz Hellwig died of several gunshot wounds. Besides two counts of murder, further charges under the Arms and Ammunition Act 7 of 1996, theft and defeating or obstructing or attempting to defeat or obstruct the course of justice form part of the indictment. The accused pleaded not guilty to all counts.

[2] The trial is at the stage where the state intends leading evidence of the events which took place on 15 May 2019 regarding an alleged confession made by the accused during an interview conducted by the investigating team at the offices of the Serious Crime Unit, Walvis Bay.

[3] Mr Titus, representing the accused, objected to the admissibility of the confession made by the accused, as alleged, on the basis that the accused indicated that he wanted his legal representative present during the interview, but which was ignored. It is further contended that on diverse occasions prior thereto, the accused requested access to his lawyer but these were equally refused. That includes the day of 15 May 2019 when the said statement was recorded.

[4] A trial-within-a-trial was ordered to determine the admissibility of the said statement. Ms Verhoef, representing the state, presented the evidence of five witnesses, all of which being police officers who formed the investigating team. The accused was the only witness testifying for the defence.

[5] As submitted on behalf of the accused, if the accused's request to have a lawyer present during the interview is found to be true, then this would amount to a violation of his right to a fair trial as enshrined in Article 12 of the Namibian Constitution. On the contrary, the state disputes that the accused in fact made a

request for a lawyer to be in attendance prior to participating in the interview and where the accused was acquainted with his rights, he waived his right to have his legal representative in attendance when giving his statement to the investigating team on the day.

[6] I agree with counsel for the defence when submitting that the court is tasked to the making of a factual finding based on the evidence presented and, if found that the accused's request to have a lawyer present was indeed ignored, then that would constitute a violation of the accused's fundamental right and render his statement inadmissible as evidence.

[7] Despite the limited scope of the objection raised by the defence as stated, the accused during his testimony shifted the goalposts to also include the issue of whether he on the day acted within his sound and sober senses, based on him having been on a hunger strike for some time. In addition, he testified about two occasions prior to 15 May 2019 when he was booked out from the cells and taken elsewhere for interrogation and, primarily, to pressure him to confess; also immediately before giving a statement referred to as a confession. This suggests that there was undue influence on the accused at the time of making the statement. Whereas counsel for the accused did not pursue this as an additional ground of objection in his written submissions, the court did not *mero motu* consider the question as to whether the accused made the confession under duress.

[8] Lastly, counsel took issue with the legal requirements for a confession as set out in s 217(1)*(a)* of the Criminal Procedure Act 51 of 1977 (CPA) and that the confession made by the accused fell short thereof.

[9] Logic dictates that, where the state is unable to show on a preponderance of probabilities that the accused took an informed decision when waiving his right to have a lawyer present when making the confession or, alternatively, that he made the confession under duress, this would render the confession inadmissible and the remaining issues moot.

Rights of the accused

[10] The state led evidence regarding the rights of the accused having been explained to him on diverse occasions after his arrest by different police officers. Despite the challenges during cross-examination regarding the nature and extent of some of the explanations given to the accused, any doubt that might have existed about the accused being apprised of his rights was laid to rest by the accused when he admitted during his testimony that he fully understood his rights prior to the making of the confession. This is consistent with the objection raised by the accused pertaining to the investigating team's refusal to allow the accused to have a lawyer present and not about their failure to inform him of his rights. The enquiry as regards the accused's right is thus considered against this background.

[11] It is the accused's contention that court records and entries made in the Occurrence Book (OB register) kept at Walvis Bay police station confirm his version of events, showing that a pattern manifested itself by which the accused was refused access to a lawyer.

[12] With regards to the events of 18 April 2019 at Arandis police station when the accused was questioned by Warrant Officer Van Graan, Inspector Kantema, Inspector Maletzky and Inspector Ipumbu (hereinafter 'the investigating team'), it is not disputed that the accused at some point during the interview requested to speak to his wife and lawyer. He was offered the use of a phone by W/O Van Graan and he contacted his wife. After their arrival and the accused having spoken to his lawyer, the late Mr Mbaeva, the accused returned to the investigating team saying that he was advised to remain silent. His decision was respected which brought the interview to an end. The clothes the accused was wearing at the time was seized by the police for forensic examination and his wife gave him a fresh outfit. The accused was subsequently transferred to the holding cells of the Walvis Bay police station.

[13] It is the accused's case that he was thereafter refused any contact with his lawyer, his wife and medical doctor and relies on entries made in court records and the OB register, the first being on 23 April 2019 when he appeared in the Karibib Magistrate's Court. The court record for that day reads that the accused elected to have a lawyer for the trial and that he 'encountered restrictions to contact his lawyer

Mbaeva'. Also that he would go on a hunger strike if he is obstructed from speaking to his wife.

[14] The accused further contends that while detained at Walvis Bay police station, he repeatedly asked to speak to his lawyer and wife which, according to him, was ignored. He finds confirmation for his contention from an entry dated 4 May 2019 in the OB register which reads that he should not be visited. A further entry made after cell visits by officers on 7 May 2019 reads that the accused 'Ernst Lichtenstrasser is still on a hunger strike, demanding to see and talk to his wife, doctor and lawyer'.

[15] Though Sgt Mulauli during his testimony explained that the entry of 4 May 2019 was erroneously recorded in that it was supposed to read that the accused should not receive any visitors with the exception of his wife and lawyer, the state left it at that and did not call the officer who made the entry to clarify the ambiguity that arose during the testimony of Sgt Mulauli. The entry of 7 May 2019 thus confirms that the accused was on a hunger strike at the time and demanded to see his wife, doctor and lawyer.

[16] With his first appearance on 9 May 2019 in the Swakopmund Magistrate's Court, the accused informed the presiding magistrate that he was on a hunger strike but made no mention of him being obstructed to make contact with his lawyer or advance reasons for being on a hunger strike.

[17] The accused further contends that prior to the interviews conducted on 15 May 2019, he was taken from the cells on two occasions to be interrogated by the investigation team during which it was attempted to persuade him to make a confession. This he claims, is fortified by entries made in the OB register on 13 May 2019 when booked out for purposes of investigation at 15h14 and again booked in at 18h47; while the pages of the register placed before court for 14 May 2019 merely reflects 16h36 as the time the accused was booked in after investigations, but not the time he was booked out. This notwithstanding, the accused said he did not make any confession during these interviews.

[18] The alleged interrogations on 13 and 14 May 2019 was disputed by Sgt Mulauli who had the accused checked out and in on those dates. Counsel for the

defence challenged the credibility of the officer regarding the purpose of having the accused booked out and, in my view, rightly so, as the OB register tells a different story. It can therefore safely be accepted that the purpose was not to formally charge the accused (this was already done on 8 May 2019 by W/O Geiseb) as testified. Furthermore, bearing in mind that the register reads that the accused was checked out for investigating purposes which lasted approximately three-and-a-half hours, the explanation advanced that it was merely to have an informal chat to the accused has a hollow ring to it.

[19] Be that as it may, equally surprising is that the accused's version of the events on 13 and 14 May 2019 were not put to members of the investigating team during cross-examination. See *President of the Republic of South Africa v South African Rugby Football Union (SARFU)*.[1] Moreover, where the accused relies on these events as proof of him having been subjected to interrogation aimed at mounting pressure on him to make a confession. It is the accused's testimony that he did not make a confession on these occasions.

[20] The testimonies of members of the investigating team are consistent as far as it relates to the explanation of the accused's rights to him on diverse occasions, prior to the meeting with the accused on 15 May 2019. As mentioned, the accused knew his rights at that stage, including his right to remain silent which he invoked during subsequent interviews conducted with him. That much is evident from him already informing the investigating team on 18 April that he was advised by his lawyer not to continue with the interview and to remain silent. It further serves as confirmation that the accused by then also knew his rights pertaining to legal representation during pre-trial and trial stages, respectively.

The first interview on 15 May 2019

[21] It is not in dispute that the investigating team on the morning of 15 May 2019 sought an interview with the accused which, in their view, was necessitated by a ballistic report made available by the National Forensic Science Institute (NFSI) and the MTC call register of the accused's wife, on which clarity was sought pertaining to a phone call between the wife and a certain Jason at the time of the murders. Despite

[1] *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000(1) SA 1 (CC).

disputing that this was the purpose of him being interviewed at the time, the accused did not come up with another reason besides contending that these interviews were merely to get him to make a confession. He said the so-called new information was already known during the interviews of 13 and 14 May 2019.

[22] The testimony of W/O Van Graan is that after Insp Ipumbu explained the accused his rights, he responded saying that he was willing to do the interview, but that he will inform them if he no longer wished to continue, and return to his cell. On this point, the accused during cross-examination stated it as follows: 'If this is going too far I will stop'. The accused's testimony confirms that of the officers of the investigating team that at some point in the interview, the accused opted out, bringing the first interview to an end. The accused then stepped out of the office, escorted by Sgt Mulauli.

[23] It would appear from the above that the undisputed evidence is that the accused agreed to be interviewed, subject to him withdrawing when he feels like it. Counsel for the state's contention that the accused at that stage did not invoke any of his rights is therefore not without merit. Also that the accused in his evidence in chief made no mention of him requiring the presence of a lawyer during the interview. This was raised for the first time during cross-examination when the accused said that he asked for a lawyer immediately when W/O Van Graan confronted him with the MTC records. The accused's evidence on this point is not only contradicted by three state witnesses testifying to the contrary, but is also inconsistent with the accused's own evidence that he agreed to the interview without requiring the presence of a lawyer. The only condition he had was that he could end the interview when he wished to do so, and that is what happened.

[24] When considering the accused's version that he, from the beginning, agreed to do the interview as corroborated by state witnesses, then his belated explanation of him requesting the presence of a lawyer during the interview, in circumstances where the court is faced with two opposing versions, seems highly improbable. If the accused was adamant to have a lawyer present in the interview, one would not have expected of him to utter words to the effect that he would see how far it goes, a clear indication that he was willing to speak to the investigating team without a lawyer present. I am

accordingly not convinced that the accused requested the presence of a lawyer during the first interview and find that he impliedly waived his right in that regard.

What transpired between the first and second interview on 15 May 2019

[25] There are material differences between the versions of the accused and that of Sgt Mulauli as to what happened between them on their way to the cells. All they seem to agree on is that, when they reached the courtyard behind the main building, the accused requested Sgt Mulauli to shoot him, but that he refused.

[26] The evidence of Sgt Mulauli is that, whilst on their way back to the cells, the accused asked Mulauli to shoot him and after refusing, they entered the office of the late W/O Anna Kapena. It is not in dispute that she and the accused are acquaintances since the liberation struggle and maintained a good relationship. There was some interaction between them when Mulauli overheard words to the effect that the accused wanted to speak the truth, where after W/O Kapena comforted him. In light thereof, Sgt Mulauli called Insp Maletzky and informed him of the new development and they returned to the office where they waited in the corridor to be called in.

[27] Contrary to it being put to Sgt Mulauli in cross-examination that they did not enter the office of Sgt Kapena (and the accused making no mention thereof in his evidence in chief), he confirmed that he was invited into her office but was barraged and confronted with accusations about destroying his wife's life and told to confess. This was the time when he said that he must be taken (back) and that he 'will confess'. The accused's latter version stands in sharp contrast with his earlier evidence in chief about Sgt Mulauli having received a phone call to say that they must go back and accused asking rather to be shot. According to him they then proceeded to the office and whilst waiting in the corridor, W/O Van Graan came and spoke to him.

[28] While there exists reason to approach the evidence of Sgt Mulauli with caution where uncorroborated, the contradicting evidence of the accused cannot be ignored and must, in the absence of any reasonable explanation for the divergent explanations, equally be approached with some caution. Despite the difference in the accused's respective versions, part thereof ties in with Sgt Mulauli's evidence about

the accused wanting to confess. This was not disputed by the accused. Defence counsel however countered by arguing that the accused's remark must be seen in the context of him already being told that they must go back to the office (where the investigating team was). With deference to counsel, during the accused's testimony about him having to be taken back to the investigating team, the accused did not include words to the effect that he must go back to confess. These were words uttered by the accused without him knowing for what reason he had to return to the investigating officers; least, to make a confession. I am therefore respectful of the view that the submission has no merit.

[29] Another discrepancy between the accused's version and that of Sgt Mulauli concerns what transpired between W/O Kapena and the accused whilst in her office. The accused testified about the good relationship between him and W/O Kapena which started during the liberation struggle. To this end the accused's evidence supports that of Sgt Mulauli as regards the interaction between W/O Kapena and the accused. The accused's version of him coming under attack and told by W/O Kapena to confess for the better of his wife, appears to be out of the ordinary as regards their relationship. It further seems unlikely that, whatever advice the accused got from her, it was such that it prompted him to say that he wanted to make a confession. In my view, it raises doubt as to the veracity of the accused's explanation on this point.

[30] There is however another material difference between the versions of Sgt Mulauli and that of the accused which concerns the events immediately before the accused entered the office for the second interview.

[31] According to the accused W/O Van Graan stepped out of the office and found him and Sgt Mulauli waiting in the passage, as told. He said W/O Van Graan then threatened him by asking whether he wants to be confronted whilst his wife was handcuffed or whether he will confess. Also that he told W/O Van Graan at that stage that he wanted to contact his lawyer but that his request was again ignored. Contrary thereto is the evidence of Sgt Mulauli that he and the accused remained in the passage until called inside. Neither he nor W/O Van Graan was challenged during cross-examination about threats made to the accused at that stage. Again, given the seriousness and gravity of threats made to the accused to influence him to make a

confession against his will, it could reasonably be expected of the accused to challenge evidence to the contrary when afforded the opportunity. Such omission could either be attributed to the defence counsel's failure or, that this aspect of the accused's defence was not shared with counsel and only raised during his testimony. The latter possibility, in the circumstances, seems to be more likely; increasing the risk of an afterthought favourable to the accused's version.

[32] When objectively looking at the accused's evidence that he was called back at the behest of the investigating team for purposes of making a confession, one would expect the officers to have been prepared and the recording equipment ready for the occasion. Contrary thereto, the undisputed evidence is that Sgt Mulauli and the accused had to wait outside for some time, allowing the officers to set up W/O Van Graan's cell phone and camera for the interview. The delay was caused because of them being shortly before that informed by Sgt Mulauli, namely, that the accused wanted to return to make a confession. This is yet another instance where the probabilities do not support the accused's version of the events leading up to the making of the confession.

[33] From the preceding paragraphs it is evident that the probabilities do not favour the accused. What it does show is that the accused wished to be taken back to the investigation team and that he wanted to confess.

The second interview on 15 May 2019

[34] It is common cause that the interview with the accused was recorded and subsequently transcribed (Exhibit 'GGG'). Also common cause is that the record of proceedings immediately before the alleged confession does not reflect that the accused requested to have his lawyer present during the interview. The reason for this, submitted on behalf of the accused, is because he already made this request to W/O Van Graan and the investigation team shortly before commencing with the recorded interview. The argument went on to say that the accused at that stage should have been allowed to return to his cell.

[35] The state produced evidence to the contrary, namely, that the interview started off with W/O Van Graan informing the accused that procedure required that the

accused must again be informed of his rights. The testimony of W/O Van Graan was corroborated in material respects by Inspectors Ipumbu, Maletzky and Nginamundova.

[36] When considering the opposing versions as regards the accused's main objection ie to have his lawyer present at the time of the interview, the following established facts are taken into consideration: Firstly, the accused was fully acquainted with his rights at the time; secondly, after the accused's rights were again explained to him and recorded, he had the opportunity to place on record that he sought the presence of his lawyer, which he failed to do; thirdly, minutes before that, the accused stated that he wanted to confess without expressing any pre-condition of having his lawyer present. When considered together with the probabilities discussed above, these facts support the state's version of events leading up to the recording of the alleged confession and negates the unsubstantiated explanation advanced by the accused.

[37] Counsel for the defence concedes that an accused may waive his right to legal representation or his right to self-incrimination. In the present matter the state is relying on the common-law principle of waiver and relies on *S v Mathebula*[2] where the following appears at 25c-g:

'I have no doubt in my mind that an informed waiver of constitutional rights is not only reasonable but also necessary in an open and democratic society based on freedom and equality. Such waivers take place daily in our criminal courts where legal representatives make concessions on behalf of accused persons. It is also essential that the law of waiver should operate in order to prevent undue formalism. For example, if a legal practitioner were to be arrested and he were to stand by in silence while a pre-trial procedure is conducted without insisting that he be warned of his constitutional rights, a Court would be hard pressed not to find that he in fact had waived compliance with these guarantees. I think it imperative and thus necessary that the law of waiver should act as a justified limitation of these constitutional rights in certain circumstances. Furthermore, the law of waiver is a body of law well known and practised in all civilised and democratic countries based on freedom and equality. Also, waiver need not negate the essential contents of the constitutional right because in each instance the doctrine of contractual waiver will indicate which and to what extent those rights have in fact been waived. It will be a factual enquiry in each instance as I will shortly demonstrate when analysing the facts of the case.'

[2] *S v Mathebula* 1997 (1) SACR 10 (WLD).

I respectfully endorse the statement quoted above.

[38] Though stated in the context of the right to legal representation, the court in *S v Bruwer*[3] in similar vein stated at 223C-D:

> 'I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal interpretation. However, I fail to see how it can be said, even against this background, that a trial will be less fair if a person who knows that it is his right to be legally represented is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice is, as in most other instances where a failure of justice is alleged, a question of fact.'

[39] It is trite that the waiving of any rights by an accused is part of our law, provided that the accused fully understood the purview of his rights, thus allowing him to make an informed decision. Though the record of the proceedings does not show that the accused in the present instance explicitly waived his rights, the question to be answered is whether he did so implicitly? The answer obviously lies in the present facts.

[40] I earlier alluded to facts considered as to whether the accused elected to make a confession without having his lawyer present which, in my view, equally find application in deciding whether or not the accused implicitly waived his rights.

[41] Counsel for the defence extended the ambit of the inquiry to also include events subsequent to the making of the statement, namely, when the accused was taken to a magistrate in Swakopmund that same day for purposes of recording a confession made by the accused. It is common cause that no confession was recorded as the accused opted for a lawyer. Also that he complained of being obstructed to contact his lawyer.

[42] I pause to observe that evidence was adduced to the effect that the accused only requested to call a lawyer the following day and mentioned the name Amoomo of whom he did not have the contact number, with which he was assisted by the

[3] *S v Bruwer* 1993 NR 219 (HC).

investigating team. After making the call from W/O Van Graan's phone, the accused remarked that lawyers only want money. This evidence was neither challenged nor disputed and tends to show that the accused had no instructed legal representative at that stage.

[43] In furtherance of the argument counsel referred to instances where the accused, prior to 15 May 2019, expressed the desire to have a lawyer, contending that it goes against any probability that the accused willingly and intelligently waived his right to legal representation on the day when making the confession. Though there may be merit in the submission, counsel seems to lose sight of the facts and circumstances surrounding the individual incidents referenced and relied upon. Instead of following a blanket approach regard must be had to the different circumstances under which the accused sought legal representation and for what purpose. And further, how did the accused react in the particular circumstance.

[44] It started off at Karibib when the accused was interviewed by the police following his arrest and after his rights were explained to him. He then willingly responded to questions put to him up to the stage where he decided not to elaborate any further on the explanation he had given. Much the same happened at Arandis during a subsequent interview until the accused asked to contact his wife and, after she arrived with Mr Mbaeva, the interview stopped. Of note is that the accused on both occasions elected to willingly tender information to the police and when he decided to stop, his decision was respected. This equally happened on 15 May 2019 during the first interview.

[45] Other instances referred to by counsel were on those dates when the accused appeared in court at Karibib and Swakopmund. The purpose of the accused indicating to the respective courts that he elected to be represented by a lawyer was clearly aimed at consequent court proceedings. It is not in dispute that the accused during these incidents informed the court that he wanted legal representation. What the accused however did not mention during his appearance in the Swakopmund Magistrate's Court on the murder charges, is that Mr Mbaeva was his lawyer, seeing that his counsel was not in attendance; neither did he testify to that effect in the present inquiry. In fact, the accused did not say or even suggest that Mr Mbaeva (still)

represented him subsequent to 18 April 2019. It then appears to me reasonable to infer that the accused did not instruct Mr Mbaeva to represent him in the matter as the former features nowhere after their first meeting. Such inference is fortified by the fact that the accused only on 16 May 2019 contacted Mr Amoomo.

[46] From the foregoing, it would be reasonable to accept that the accused during the interviews under consideration did not have an instructed lawyer, contrary to what the accused wanted the court to believe. But, it goes further.

[47] Much was made during the inquiry about the entry in the OB register dated 4 May 2019 about the refusal of visiting rights to the accused. Though that may be indicative of an infringement of the accused's rights, such infringement would only occur when there was an actual refusal to his lawyer to have contact with his client. No evidence to that effect was presented by the accused or any person to such effect. The current inquiry takes place more than three years later which provided the accused sufficient time to establish whether there were indeed instances where his lawyer attempted to visit him but was refused. I have no doubt that any legal practitioner in this country would know what processes to institute if that were the case. Accordingly, this court is not persuaded that any lawyer representing the accused at the relevant time was in fact obstructed from consulting the accused, notwithstanding the OB entry.

[48] I am neither persuaded by counsel's submission that the accused, when brought before a magistrate later that day for the purpose of making a confession and then indicating that he wanted legal representation, confirms his earlier requests for a lawyer when interrogated by the police. I say so for the following reasons: Firstly, the accused's evidence in that regard is after the fact and further, amounts to self-corroboration. Secondly, it does not negate the established facts which existed at the time before and during the making of the alleged confession. These facts, for reasons already stated, do not support counsel's contention that it is highly probable that the accused on 15 May 2019 requested to have his lawyer present during the interviews.

[49] Therefore, in the absence of an explicit waiver, based on the above-stated facts, the only reasonable conclusion to come to is that the accused implicitly waived his rights.

[50] With regards to the waiving of rights by an accused in criminal proceedings, state counsel relies on *S v Shipanga*[4] where stated at 166D-H:

'The fact that the second appellant had indicated at the time of his arrest and at his first appearance in court that he wanted to remain silent and/or he desired a legal representative (and was actually assisted to apply for one through legal aid) did not preclude the police from obtaining a confession or a pointing-out from the second appellant in circumstances where he voluntarily indicated his willingness to tell the truth.

[52] In *Miranda v Arizona* supra the Supreme Court of the United States had this to say:

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

[53] The authorities above correctly articulate the position of our law on confessions and pointings-out. In the circumstances of this case, where the appellant voluntarily indicated his readiness to offer a confession and pointing-out, the police's obligation was to warn him again of his right to legal representation, which they did, and ensure that if he waived his right to legal representation, he knew and understood what he was doing. The latter is a question of fact and has to be established.'

[51] When applying the above-stated principles to the present facts, I am satisfied that the state has made out a case showing that the accused waived his rights to remain silent and legal representation when opting to give a statement, regarded by both parties to be a confession. Accordingly, there exists no reason in law or fact to disallow its admissibility on the stated ground of objection.

---

[4] *S v Shipanga* 2015 (1) NR 141 (SC).

[52] Next I turn to consider the remaining concerns which emerged during the accused's testimony and which were not specifically relied upon when opposing the admissibility of the confession under consideration.

Did the accused on the day act within his sound and sober senses?

[53] Though conceding that this contention was not initially raised as an objection, counsel submits that the court may consider it in the interest of justice. The relevance of the accused's state of mind is to be found in s 217(1) of the CPA which requires that '… if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings'. See also *S v Shikunga.*[5]

[54] The question primarily turns on the accused's testimony that he was affected by the hunger strike he was on for some time prior to the making of the confession. It is common cause that the accused was indeed on a hunger strike. In the absence of medical evidence to assist the court in deciding this vexed question, the court is primarily confined to consider circumstantial evidence and the opinions of witnesses expressing themselves on the mental state of the accused at the time; including that of the accused who also had his own opinion as to his mental state.

[55] On the accused's behalf it was submitted that he was 'weak and confused' with 'heightened levels of anxiety', primarily because he had been on a hunger strike for more than three weeks. Counsel further argued that, in light of the accused's evidence that he had not eaten a substantial meal for the period of his hunger strike, it is highly probable that the accused would have been fatigued as a result thereof. It was furthermore said that this culminated in his request to Sgt Mulauli to shoot him which, in itself, demonstrates that the accused was not of sound and sober mind at the time.

[56] In my considered view it would be wrong to merely look at the 'conditions' relied on by the defence in reaching the conclusion that he was not of sound and sober mind without having regard to evidence adduced by either the state, or the

[5] *S v Shikunga* 1997 NR 156 (SC) at 164A-B.

accused, showing otherwise. The accused during his main testimony was clear and specific as regards the events that took place on 15 May 2019 and was adamant that he throughout insisted on his right to be legally represented. The evidence given by state witnesses was challenged and disputed by him with particularity and corrected where necessary. He was even able to recall and quote the specific words used by persons who interacted with him immediately before making the confession. Based solely on the accused's own evidence, there is simply no evidence on record from which the court, when objectively viewed, would be able to infer that external influences were such that it adversely impacted on the accused's state of mind.

[57] The accused's evidence about certain incidents being 'hazy' as a result of his hunger strike, largely manifested during cross-examination when he was required to explain inconsistencies in his version. The accused's explanation in this regard is undoubtedly inconsistent with his earlier testimony and the trier of fact would be forgiven for thinking that it was done with an ulterior motive. Moreover, when this decisive possibility was never considered when raising the objection at the beginning of the inquiry.

[58] As for defence counsel's interpretation of the accused's request to Sgt Mulauli to shoot him, I am not convinced that the only inference to draw from such request is that the accused was not of sound and sober mind at the time. Firstly, the request made in the existing circumstances was not only unreasonable, it was absurd. Why would anyone unlawfully kill another simply for the asking? Though such request is indeed out of the ordinary, sight must not be lost of the circumstances the accused found himself in at that stage, especially where he had minutes before that been informed that he could be linked to the crime scene by way of spent cartridges found at his home. This was clearly considered a breakthrough in the investigation and the consequences thereof likely to have dawned on the accused.

[59] Be that as it may, the accused's explanation for his request was that he did not want to face the investigation team for further interrogation. He was thus capable of assessing the situation he found himself in and probed the possibility of having himself killed; something he must have realised was not possible.

[60] When considering the totality of evidence relevant to the question of the accused's state of mind at the stage of making a confession, I am unable to conclude that the accused was not in sound and sober mind when he so acted. There is accordingly no merit in the issue raised.

[61] This brings me to the last issue, namely, whether the requisites for a confession have been met on the day.

Whether the requirement of a confession made to a commissioned officer was satisfied

[62] It is common cause that the confession complained of was not made to an individual person, but to the investigating team, consisting of two commissioned officers (Ipumbu and Maletzky) and two peace officers (Van Graan and Nginamundova). It is further not in dispute that W/O Van Graan posed questions to the accused and that the commissioned officers participated in the interview. In view thereof, it is contended by the defence that the confession for all intents and purposes, was made to W/O Van Graan, a non-commissioned officer. Furthermore, where the confession was not confirmed and reduced to writing in the presence of a magistrate, it was argued that it did not satisfy the requirements of s 217(1)(*a*) of the CPA and therefore, rendered inadmissible.

[63] Counsel further took issue with the confession not having been reduced to writing in the presence of any of the commissioned officers as it was recorded and later sent to be transcribed.

[64] The proviso in s 217 makes plain that where a confession is made to 'a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in s 334, a confession made to such peace officer … shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.' As mentioned, while W/O Van Graan and W/O Nginamundova were peace officers, Inspectors Ipumbu and Maletzky were commissioned officers. The latter clearly fell outside the ambit of the requirement to have confessions made to them confirmed and reduced to writing in the presence of a magistrate. The upshot is that a

confession made to a magistrate or a commissioned officer is admissible without first having it reduced to writing.

[65] In this instance the undisputed evidence is that two commissioned officers were present when the confession was made to them and non-commissioned officers in attendance, whereby the requirements of s 217 of the CPA were met. I am further unable to see how the presence of non-commissioned officers and their interaction with the accused during the interview could nullify a confession made in the presence of commissioned officers; confirming the actual confession made by the accused. Counsel's submission that the interview was conducted by W/O Van Graan and therefore the confession was made to him, is clearly taken out of context. The undisputed evidence is that the individual members partook in the interview and were present when the confession was made. The submission is accordingly found to be without merit.

[66] As stated in the preceding paragraphs, there is no requirement that a confession made to a commissioned officer must be reduced to writing at the time of its making. Where the confession is mechanically recorded and transcribed at a later stage, as was done here, it does not change the circumstances under which the confession was made; it remains a confession made to a commissioned officer. Neither was the authenticity of the transcript challenged during the inquiry. There is accordingly no reason in law why the confession should be ruled inadmissible for non-compliance with the provisions of s 217 of the CPA.

Conclusion

[67] After due consideration of the objection and additional legal issues raised, the court finds as follows:

67.1 On 15 May 2019 prior to the making of a confession to the police the accused waived his rights to legal representation.

67.2 At the time of making the said confession the accused acted in his sound and sober senses.

67.3 The confession satisfies the requisites set by s 217 of the Criminal Procedure Act 51 of 1977.

[68] In the result, the confession made by the accused on 15 May 2019 is ruled admissible into evidence.

_____

JC LIEBENBERG

JUDGE

APPEARANCES:

STATE:	A Verhoef Office of the Prosecutor-General, Windhoek.
ACCUSED:	A Titus Directorate of Legal Aid, Walvis Bay.