



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 10/2022

In the matter between:

THE STATE

and

PETRUS ABUSEMA**ACCUSED**

Neutral citation: *S v Abusema* (CC 10/2022) [2023] NAHCMD 111 (13 March 2023)

Coram: USIKU J

Heard: 20 and 21 February 2023

Delivered: 13 March 2023

Flynote: Criminal Procedure – Trial within a trial – Warning statement – Accuracy of content disputed – Right to legal aid not explained – Factual dispute – Failure to rebut the evidence fatal – Legal aid explained – Warning statement admissible.

Summary: When the trial commenced on 20 February 2023 the accused faced a charge of murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

On the first day of the trial after the charges were put to the accused, he pleaded not guilty. He offered no plea explanation and indicated through his legal representative that he wishes to remain silent, indicating further that he acted in self-defence and that details thereof will emerge during the course of the trial.

Before one witness testified on behalf of the state, several documentary exhibits were handed in, numbered and identified by both the state and the defence. A trial within a trial in respect of the admissibility of a warning statement was conducted after the only state witness commenced with his testimony during the course of the main trial.

ORDER

The warning statement is ruled admissible evidence in the main trial.

RULING IN THE TRIAL WITHIN A TRIAL

USIKU J

[1] During the night of the 17 July 2020 or the early morning hours of the 18 July 2020, the deceased Katrina Hendrik an adult female lost her life as a result of asphyxia where after the accused who is alleged to have been involved in an actual or perceived intimate or romantic relationship with her was arrested and charged with her murder.

I will refer to the evidence of the state's witness in detail:

[2] Detective Chief Inspector Andries Quim testified that he is a police officer stationed at Gobabis in the Omaheke region. He has been a police officer for the past 30 years. He was previously attached to the Commercial Investigation Unit from where he was transferred to the Serious Crime Sub division since 2020. He came to

know the accused person through the investigation about a murder case which took place in Gobabis's Kaanan Location during the night of 17 and 18 July 2020.

[3] During the morning of 18 July 2020, he received information about a murder case involving a female victim. Accompanied by another police officer, they drove to the Kaanan location where they were directed to the crime scene by other officers.

[4] Upon arrival on the scene, he conducted preliminary investigations by approaching the deceased's father. It was reported to him that the deceased was killed in her shack house which was not far from the deceased father's house. Those houses are made from zinc structures.

[5] Detective Inspector Quim entered the shack house of the deceased and observed the deceased's body which laid on a bed. Upon inspection he observed blood on the deceased's mouth and nose.

[6] In order to make more observations, he pulled up the t-shirt of the deceased but did not observe any visible injuries. He noticed blood stains on the deceased's private parts which appeared wet. The deceased at the time wore socks on her feet.

[7] Having made observations on the deceased's body, the body was removed by members of the pathology department and driven to Gobabis state hospital mortuary. At the time of the visit it was day light and visibility was clear.

[8] After removal of the body, Detective Inspector Quim started his investigations by interviewing the deceased's father. He inquired whether the deceased had been in the company of other persons the previous night. It was reported to him that the deceased had 3 visitors the previous night and had been drinking a local brew. Statements were obtained from the relevant people.

[9] When the deceased's father was interviewed further about the possibility of the deceased having had a boyfriend, he could not confirm it, though he indicated to have seen a male person entering the deceased's house during the previous night when they were about to retire to bed. Further information was received that the

deceased would usually sleep with her two minor children and when her boyfriend would visit, the children would sleep with their grandparents. The deceased's boyfriend was not known as it was a new relationship.

[10] It was further established that the deceased and the accused's relationship started at their work place. The "new" boyfriend was known by a nickname "Ouboet" whom the detective inspector started to trace.

[11] Ouboet's house was then visited on the following day but he could not be found. On 20 July 2020, the same house made from zinc was again visited by Detective Chief Inspector Quim. He then called out the name Ouboet and Ouboet responded that he was coming to him. That was about midnight between 11 and 12 pm. After Ouboet finally emerged from the shack house, Inspector Quim introduced himself to him as a police officer and his reasons for the visit. He further explained to him about the allegation of murder and that he was entitled to obtain a legal representative of his own choice if he was able to afford one. He also explained to him the right to apply for a state funded lawyer where after he loaded the accused in the police van and drove him to the police station. The accused person was later on charged.

[12] The next morning, on 21 July 2020, Inspector Quim visited the accused and called him in order to charge him and to obtain a warning statement from him. He explained his legal rights after he had introduced himself as a Detective Chief Inspector. He informed him about his right to remain silent and that he was not obliged to answer any questions pertaining to the charges. He further explained to him the seriousness of the offence he was facing and warned him to be careful about what he was going to say as that could be used against him in the court proceedings. The right to get a legal representative of his own choice if he could afford one was again explained to him. Furthermore, Detective Chief Inspector Quim explained to the accused that if he could not afford a private legal representative of his own choice, he could apply for a state funded lawyer at the magistrate's court with the assistance of the Clerk of the court. These rights were explained to the accused in the Damara>Nama language which they both understood and were translated into the English language. The accused indicated that he understood and

opted voluntarily to explain to the Investigating Officer what transpired on the night of the incident.

[13] It was at this point where the defence raised an objection in respect of the warning statement made by the accused to Detective Inspector Quim. As a result, the court had to go through a trial within a trial in order to establish whether the warning statement was freely and voluntarily made and whether the evidence in respect thereof is admissible.

[14] It was Detective Inspector Quim's contention that he explained the accused's rights and accused indicated to him that he understood those rights, where after he opted to explain what transpired that night. As he explained the rights, he recorded the accused's responses and the accused indicated that he will apply for a legal aid lawyer at the time he will be appearing before the magistrate. Accused was clear and did not raise any complaint as they understood each other well. Neither was he forced nor influenced in any manner whatsoever.

[15] During the course of the cross examination, the defence took issue with the fact that the proforma that are being used to record warning statements had a provision for the interpreter's signature which remained uncompleted. A question was posed why this had been left open. It was the Investigating Officer's contention that since he acted as a charging officer and played the role of an interpreter, he did not find it necessary to complete that part usually used when there is an interpreter present during the taking of a warning statements.

[16] It is now common cause that after the state closed its case in the trial within a trial, the defence did not testify and opted to make oral submissions only.

[17] With regard to the defence's claim that accused was only asked to sign the document and did so, this was vehemently denied by Chief Inspector Quim.

[18] I find it quite interesting that counsel for the defence presented arguments including Constitutional issues in his submissions which were never put to the state witness. I therefore do not find it necessary to decide on those issues. It is however

my *prima facie* view that the warning statement made by the accused was freely and voluntarily made in the accused's sound and sober senses and without him having been unduly influenced to make it. In fact it is clear from the state witness' evidence that the legal rights were not only explained to the accused upon his arrest on 18 July 2020 but also on the date when he was taken by Chief Inspector Quim to obtain a warning statement from him. Thus, the legal rights were explained to the accused person on more than one occasion and he must have understood them.

[19] Furthermore, if regard is had that Inspector Quim is a senior police officer with vast experience of 30 years in the force, it is highly unlikely that he would proceed to take a warning statement from the accused without explaining the accused's legal rights.

[20] In terms of Articles 12(1) (f) and 12(1) (d) of the Namibian Constitution, an accused cannot be compelled to give evidence against himself and has the right to be presumed innocent until proven guilty according to law. In the matter of *S v Katari*¹ the court held:

'The entrenchments of those rights do not mean that an accused's election to remain silent in the face of incriminating evidence against him is without consequences in the overall assessment of the evidence by the court.'

[21] The evidence presented by the Investigating Officer is that accused informed him that he did not require the services of a legal representative at that point in time but only at the time of the court proceedings. That evidence remains unchallenged as the accused opted not to testify during the course of a trial within a trial.

[22] The position of our law was properly expounded in the following words by Langa DP in *S v Boesak*² when he stated as follows:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face

¹ *S v Katari* (CR/ 124/2004) [2005] NAHCMD 13 (16 June 2005).

² *S v Boesak* 2001 (1) SA 912 para 39.

of such evidence, a court may well be entitled to conclude that the evidence is sufficient to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence’.

[23] What is stated above is consistent with the remarks of Madala J, in *Osman and Another v Attorney-General, Transvaal*,³ when he had the following to say:

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilty beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence.’

[24] Whereas we are not dealing with the guilt of the accused or otherwise, these statements find application in *casu*, as the accused opted to remain silent whereby the state’s evidence remained unchallenged.

[25] In my view this is not an appropriate case where the accused can safely opt to exercise his right to remain silent and it is safe to find such evidence conclusive warranting the admissibility of the warning statement.

[26] The accused specifically made it clear to the witness that he intended to give his warning statement without the assistance of a legal representative.

[27] On the issue of the interpreter, the defence’s contention is that Inspector Quim had failed to sign the certificate in his capacity as an interpreter as well as the charging officer. His reason is that they communicated in the same language which is Damara>Nama, a language they both spoke and understood fluently. In essence, there appears to be no issue between them not having been able to understand one another.

[28] As already stated herein, the witness testified that the accused’s right to legal representation was explained in a language they both understood fluently. It is

³ *Osman & Another v Attorney-General, Transvaal* 1998 (2) SACR 498 (CC) at 501B-D.

however a pity though that the accused person who bore the *onus* to prove the allegations of the violation of his constitutional right chose not to testify in the face of strong evidence to the contrary. This court in the absence of evidence from the accused, has no choice other than to consider the only evidence presented before it by the prosecution. There is no doubt in my mind that the prosecution had proven beyond a reasonable doubt that the warning statement was properly taken after the legal rights of the accused person had been fully explained.

[29] This court is therefore satisfied that the warning statement was made by accused freely and voluntarily whilst in his sober and sound senses and without him having been unduly influenced to make it.

[30] Consequently, the warning statement is ruled admissible evidence in the main trial.

D N USIKU
Judge

APPEARANCES:

FOR THE STATE:

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