

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

TRIAL-WITHIN-A-TRIAL (RULING)

<b>Case Title:</b> The State v Edward Eddy Haihambo	<b>Case No.:</b> CC 12/2021
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Kesslau J	<b>Delivered on:</b> 16 April 2024
<b>Neutral citation:</b> <i>S v Haihambo</i> (CC 12/2021) [2024] NAHCNLD 39 (16 April 2024)	
<b>It is hereby ordered that:</b>  1. The warning statement, made in respect of the count of murder, is ruled admissible.	
<b>Reasons for the order:</b>	
KESSLAU J:  <u>Introduction</u>  [1] The accused is indicted before this Court on six charges <i>to wit</i> : Robbery (with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977	

(CPA); Indecent assault; Assault by threat; Escaping from lawful custody (common law); Theft (from a motor vehicle) and; Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003). It appears from the indictment that the alleged offences were committed on different dates and places. This resulted in separate investigations being conducted by various investigating officers.

[2] The accused, represented by counsel, pleaded not guilty to all charges and gave no plea explanation. He admitted that he and the deceased in the count of murder were in a domestic relationship.

[3] The State had called various witnesses thus far, however, wishes to present into evidence the warning statement made in respect of the charge of murder. Officer Shigwedha was the investigating officer in this regard.

[4] Counsel for defence raised three objections to the admissibility of the warning statement *to wit*: That the accused was not properly informed of his legal rights in that his right to Legal Aid, and the manner in which to apply, were not explained; that the statement was fabricated by the investigating officer and; that the statement was obtained from the accused under coercive circumstances. The objections necessitated a trial-within-trial on the admissibility of the statement.

#### Summary of the evidence relevant to the trial-within-a-trial

[5] Officer Shigwedha testified that he was a sergeant at the time and attached to the Gender Based Violence Unit at Oshakati. He confirmed that he was the investigating officer on the charge of murder in which the accused was a suspect. After a region-wide search, the accused was arrested on 1 September 2019 and brought to Oshakati Police Station. The next day officer Shigwedha met the accused for the first time when he formally charged him on the allegation of murder.

[6] Officer Shigwedha explained that on that day, due to the multiple charges that the accused was facing, there were three other officers also present to charge the accused. The accused was taken to an area separate from the charge office. All four officers were present and they were taking turns to charge the accused. He was the third or fourth

officer to charge the accused that day. The accused was handcuffed due to the pending case of escaping and their fear that he might abscond. He was present when the previous officer Namupala, charged the accused with theft from a motor vehicle. He overheard Officer Namupala explaining to the accused his full rights. When they were done, he charged the accused in the presence of officers Namupala and Aludhilu.

[7] Officer Shigwedha testified that he explained to the accused the charge he is facing and his detailed rights as an accused. It was done in Oshiwambo with the officer translating the information onto the warning statement. The accused was told that he has the right to remain silent or to make a statement. Furthermore, that everything he said will be written down and be used in a court of law. He also explained to him the right to legal representation including legal aid. He testified that he told the accused that he can apply for a legal aid lawyer at the clerk of court Oshakati, which lawyer will then be provided at no cost. He then explained the right to apply for bail.

[8] Thereafter, the accused indicated that he understood all his rights and elected to proceed without any legal representation. Furthermore, the accused chose to make a statement. The accused was then asked if he will be giving his statement freely and voluntarily, if he was forced or coerced and, if he understood the consequences of providing a statement. After satisfactory answers were recorded on all these questions, the statement was taken down and recorded by officer Shigwedha. The statement was read back to the accused, who indicated he is satisfied, and he signed the document. An injury was noted, being a cut on the finger of the accused. It was also noted that the accused was calm and cooperative.

[9] Unfortunately, the template (Pol17) that officer Shigwedha used to note the warning statement, was the outdated version that did not include the right to legal aid.<sup>1</sup> He testified that he included the right to legal aid in a verbal explanation, without noting it. He testified that the template used by Officer Namupala, who charged the accused before him, was the updated version which included the right to legal aid. The accused similarly told Officer Namupala that he will conduct his own defence.

[10] During cross-examination, he confirmed that he was a sergeant at the time and

---

<sup>1</sup> Exhibit "U".

that the statement was not repeated before a commissioned officer or magistrate. The purpose of this line of questioning was unclear as it appears that the statement contained an admission<sup>2</sup> and not a confession<sup>3</sup>. Furthermore, it was alleged that Officers Shigwedha and Namupala, being friends, coordinated the bulk charging of the accused. The officer denied this allegation. He insisted that legal aid was explained in detail to the accused. On the coercion alleged by the accused, this witness denied that he promised the accused that bail will more easily be granted if he makes a statement and cooperates. The final part of cross-examination was concentrated on pointing out that the accused had no privacy at the time, as all the officers were present. The witness answered that they needed to be present to witness the process as a precautionary measure.

[11] Officer Aludhilu testified that she was stationed at the Criminal Investigation Division in Ongwediva. She met the accused on 23 August 2019 when investigating a case of theft of a laptop. The accused got injured by a family member of the complainant in that case and was admitted to hospital under police guard. She visited the accused in Oshakati hospital whilst investigating the allegation of theft against him. She left without charging the accused and was subsequently informed he escaped from the hospital. She confirmed that, after the accused disappeared from hospital, two additional cases were opened against him. These were theft (from a motor vehicle) and murder. She said the whole region was informed to search for the accused. After his arrest, she was alerted by Sergeant Shigwedha. On 2 September 2019 she went to charge the accused at the Oshakati Police Station for the theft of the laptop. She found the accused already booked out of his cell and charged him in the presence of other officers. Using Oshiwambo, she explained his rights in detail upon which the accused indicated he understood and will waive his rights to legal representation and legal aid and elected to remain silent.

[12] The Pol 17 she used was the updated template which included the part explaining in detail the right to apply for Legal Aid.<sup>4</sup> She said the accused was sober at the time and cooperative. He had an injury on his right hand. When she was done charging the accused he was thereafter charged by Sergeant Namupala, followed by

---

<sup>2</sup> See section 219A of the CPA.

<sup>3</sup> See section 217 of the CPA.

<sup>4</sup> Exhibit "TW1".

Sergeant Shigwedha and lastly Constable Tjiveze. She was present throughout and testified that detailed rights were explained by all of them separately. Even Officer Shigwedha, who used the outdated template which excluded the right to Legal Aid, explained to the accused the right to apply for Legal Aid and where to apply. She said that after the explanation from Officer Shigwedha, the accused indicated that he understood, that he chose to conduct his own defence and, wished to make a statement. She confirmed the manner in which the statement was then drafted and recorded where after the accused signed it.

[13] Cross-examination was concentrated on the fact that the officers took turns to charge the accused and, that they have done so separately, without them referring to procedure followed by their colleagues. She insisted that Officer Shigwedha also explained the right to legal aid in detail to the accused. She said she was asked to remain present because the accused was a flight risk having the pending matter of escaping. Officer Aludhilu denied that her presence was required for corroboration should the accused dispute anything regarding the process followed. She contradicted officer Shigwedha by saying that the accused was not handcuffed.

[14] Officer Namupala testified that he was attached to Oshakati Criminal Investigations Unit. He confirmed the evidence from the other officers in that he was part of charging the accused. He said his unit was informed of the arrest of the accused. They were instructed to charge him if they have outstanding matters with the accused as suspect. He confirmed that the accused was taken to a separate area. He charged the accused after officer Aluvilu was done. After introducing himself, he explained to the accused that he is facing a serious charge of theft (from a motor vehicle) and proceeded to explain his rights in detail. He used the updated Pol 17 which included the detailed right to apply for Legal Aid and the manner in which to apply.<sup>5</sup> The accused indicated he understood and waived his rights to legal representation and Legal Aid and, chose to remain silent.

[15] In his presence, officer Shigwedha then charged the accused. He heard officer Shigwedha introducing himself and telling the accused that he is facing a charge of murder. He confirmed that officer Shigwedha gave a detailed explanation on the right to

---

<sup>5</sup> Exhibit "TW2".

apply for legal aid. He testified that the accused said he understood his rights, however, wished to proceed without any form of counsel. The accused chose to give a statement. The accused spoke in Oshiwambo with officer Shigwedha translating and noting down the statement. Thereafter the statement was read back to the accused and translated back into Oshiwambo. The accused was asked if he wished to make corrections, however, the accused was satisfied with the statement and signed it. He confirmed an injury on the hand of the accused. Furthermore he confirmed that the accused appeared sober. This witness denied that the accused was intimidated to make the statement and said this was done voluntarily without any influence from any of the officers.

[16] Cross-examination was again focused on the fact that the officers charge the accused separately and without them referencing the processes followed by the others. This witness could not recall if the accused was handcuffed. It was pointed out that the other officers did not mention that the accused was given the opportunity to make corrections. He insisted that Officer Shigwedha explained the right to Legal Aid in detail. This witness denied that the statement was fabricated by Officer Shigwedha with the accused then merely agreeing to sign. He also denied hearing that Officer Shigwedha promised the accused an easier bail application if he cooperates. That concluded the evidence presented by the State for purposes of the trial-within-a-trial.

[17] The accused testified, confirming that four different officers charged him with the respective cases on 2 September 2019. It was done in an area that is part of the Oshakati Police Station. According to him, Officer Shigwedha was the last of the four to charge him. The accused confirmed that the first three officers in detail explained to him comprehensive rights where after he waived his rights to legal representation and legal aid and informed them that he wished to remain silent. He said that Officer Shigwedha informed him he is facing a serious charge of murder, that he has the right to remain silent and that he can appoint an attorney if he so wished. The accused replied that he had no money for a lawyer. The officer did not explain Legal Aid to him. Then the officer told him to co-operate. Officer Shigwedha further told him that he will write a favourable statement on his behalf which will result in a lenient sentence if convicted. The accused believed him, and Shigwedha started writing. Once he was done writing, the accused was ordered to sign. He complied without reading the fabricated statement. The content was also not read or translated to him by Officer Shigwedha. He said that, in retrospect,

he would have applied for Legal Aid in the murder matter, if it was explained to him. He testified that he was surprised by Officer Shigwedha not explaining Legal Aid to him, but thought maybe it is unnecessary in the case of murder. He said that the other officers remained at a distance from where he was charged, resulting in them not being able to overhear the respective charging processes.

[18] During cross-examination, the accused denied that he made a statement. It was pointed out to the accused that the version presented to the witnesses was that he was coerced into agreeing to the statement by Officer Shigwedha, promising a favourable position on bail, whilst in his testimony in contradiction, the coercion was that a lenient sentence would be his reward. The accused denied that he was fully aware of his rights by the time Officer Shigwedha charged him explaining that he thought these rights might not be the same for different charges. He conceded that he did not enquire from Officer Shigwedha why the right to Legal Aid was not included on the charge of murder. The accused could not explain how Officer Shigwedha would be aware of all the details to fabricate a statement consisting of multiple pages. The accused insisted that he was deceived by Officer Shigwedha into signing a statement that was fabricated by the officer. The accused testified that he has a limited knowledge of the English language as he failed Grade 8. Finally, the accused said that he elected to remain silent in the three charges prior to the murder charge, because those officers made no promises of favours to him.

[19] Counsel for the State submitted that it was proved that comprehensive rights were explained to the accused. Furthermore, that there was no coercion and that the statement was thus made freely and voluntarily. Counsel for the accused submitted that the statement should be ruled inadmissible in that it did not meet the requirements for a fair trial. It was argued that the accused was not in a position to make an informed decision considering the lack of explaining his rights to legal aid; the State has not proven that the accused is the author of the statement and; it was not proved that the statement was made without undue influence. Both counsel appear to be in agreement that s 219A of the CPA applies, thus agreeing that the statement contains an admission of some sort.

The law applicable and application

[20] The admissibility of an admission by an accused is regulated in s 219A of the CPA which states:

'(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence . . .'

[21] I will consider the objections on the admissibility of the warning statement in turns. The first objection was that the accused was not fully informed of his rights to legal representation, in particular, the right to apply for legal aid.

[22] In *S v Kapika* and others,<sup>6</sup> it was held that the onus is on the State to prove that the police have done all that they are obliged to do, already at the pre-trial stage, including the Constitutional requirement of informing an accused of his rights. A failure of such duty by the police would result in rendering a subsequent statement inadmissible.<sup>7</sup> In *S v Munuma*<sup>8</sup>, when similarly the right to apply for legal aid was not expressly noted on the warning statement, it was disallowed for not passing the test of a fair trial envisaged in Article 12. The evidence of an officer testifying to the contrary was found not to be sufficient proof.

[23] The facts surrounding each case will determine if an omission to expressly note the right to Legal Aid will result in disallowing such statement. Evidence from the accused is that, even though full rights were explained to him repeatedly by the other officers in the respective cases, Officer Shigwedha failed to do the same on the count of murder. The accused noticed the failure, however, was under the impression that Legal Aid might not apply to the count of murder. He did not enquire from the officer regarding the position.

[24] The template used by Officer Shigwedha did not contain the right to Legal Aid. If

<sup>6</sup> *S v Kapika and others* (1) 1997 NR 285 (HC).

<sup>7</sup> *S v Dausab* 2014 (3) NR 652 (HC); *S v Malumo and Others* (5) (CC 32 of 2001) [2010] NAHCMD 1 (1 March 2010).

<sup>8</sup> *S v Munuma* (CC 03/2004) [2020] NAHCMD 11 (21 January 2020).



indeed he did explain that right to him, he must have realised immediately that he is using the outdated template. Nothing prevented him from inserting the information by hand or, better yet, to request an updated template from his colleagues who all made use of such.

[25] The officer is not a single witness to the fact that detailed rights were explained with two other officers testified that they overheard same. Due to the workload of the police, it is important that they note what was done in each case. To remember individual tasks, particularly those repetitively or routinely performed, would be impossible.

[26] When considering the corroborating evidence from the other officers, there were some contradictions pointed out. These were minor, however, an indication that their attention was not necessarily with the process followed by Officer Shigwedha. Had they been attentively involved at this stage, it begs the question why they did not inform Officer Shigwedha to make use of the updated template which all of the other officers used. The abovementioned and the failure to expressly note that the right to legal aid was explained, creates enough doubt in my mind to give the accused the benefit of the doubt in this regard.

[27] That is not the end of the matter. The question to determine would be if the accused was unaware of his detailed rights. The accused himself testified that detailed rights were explained three times prior to the last charge. This was done over a time period of not more than two hours. Further to that, on instructions put to the witnesses in the main trial, it appears that the accused on a previous occasion was arrested for an unrelated matter and was charged and obviously had court appearances. Thus, in all probability, detailed rights were explained to him prior to this day. Technically, detailed rights should have been explained to the accused in each matter, however, I am satisfied that the accused was fully informed of all his available rights. Therefore, the first objection is dismissed.

[28] In respect of the second objection, that the State has not proven that the accused is the author of the statement, it was rightfully submitted by counsel for the State that this is a question of fact that should be determined during the trial and not the trial-within-a – trial. I am in agreement, in particular because the content of the statement is not before court yet and to make a decision in that regard would be impossible and unfair towards

the State. The second objection is dismissed.

[29] The last objection was that the statement was obtained from the accused under coercive circumstances. The coercion being that Officer Shigwedha made certain promises to the accused. These were denied by all the State witnesses. Unlike the repetitive and routinely explanation or omission of the right to Legal Aid, such extraordinary promises will be memorable to any officer present. Further to that, the instructions put to the witnesses were contradicting, on the one hand saying that the officers acted in a group and there was no privacy for the accused, whilst on the other hand claiming that they were too far a distance away to overhear. Additionally, the instructions were conflicting in nature in that the accused was offered a favourable bail which then changes to a lenient sentence. I am not convinced that any of these, even if true, would influence any normal person, regardless of his educational level, to sign a statement. Particularly a statement of which the content is unknown. Equally this objection is dismissed.

[30] In conclusion, the warning statement, made in respect of the count of murder, is ruled admissible into evidence.

<b>Judge signature</b>	<b>Comments:</b>
KESSLAU J:	None
<b>Appearances</b>	
For the State: <b>V T Shigwedha</b> Of the Office of the Prosecutor-General, Oshakati	For the Accused: <b>L P Shipila</b> Of the Directorate of Legal Aid, Oshakati