



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

TRIAL-WITHIN-A TRIAL

Case No: CC 10/2011

In the matter between:

THE STATE

and

JONAS P SHINANA

ACCUSED

Neutral citation: *S v Shinana* (CC 10 - 2011) [2017] NAHCMD 53 (2 March 2017)

CORAM: NDAUENDAPO J

Heard: 8 December 2017

Delivered: 2 March 2017

Flynote: Criminal Procedure – Trial within a trial – Warning statement – accuracy of content disputed – Right to legal aid not explained – Factual dispute – Right to legal aid explained – Warning statement admissible.

Summary: The state sought to introduce into evidence a warning statement taken from the accused. The defence objected to it on the basis that the content of the statement does not accurately reflect what the accused told the police officer. Furthermore that his right to legal aid was not explained to him.

Held, that the accuracy of the content of the warning statement is a factual issue that can only be determined once the warning statement has been ruled admissible.

Held, further that having regard to the totality of the evidence, the right to legal aid was explained.

Held, further that, the warning statement is ruled admissible.

ORDER

The warning statement made by the accused to Detective Shivolo dated 28th December 2009 and signed by the accused is ruled admissible.

JUDGMENT

NDAUENDAPO, J

[1] The state sought to introduce a warning statement allegedly taken by Detective Shivolo from the accused. The defence objected to that and the basis of the objection is contained in the pre-trial memorandum and it is stated as follows:

“The content of the warning statement does not reflect accurately the accused person’s version he told the police. He agrees in parts with the content and in some parts it does not accurately reflect the accused person’s version as conveyed to the police officer.

The accused person contends that the Police Officer who took his statement and warning statement at the time, threatened the accused person that if he does not sign the statements he will not get his clothes, since the accused person at the time of his arrest was not wearing a t-shirt and shoes. The accused further contends that the content of this statement was not of his own making, although he signed the statement, he also did not place his signature thereon freely and voluntarily.

At the commencement of the trial-within- a trial counsel for the accused informed the court that a further objection to the admissibility of the warning statement is that the accused was not fully warned or informed of his rights, especially his right to legal aid.

Detective Shivolo

[2] He testified that he has been with Namibian police for 15 years. On 28 December 2009 he charged the accused with 2 counts of murder. The case was booked to him and he prepared the case for court. He testified that during the morning of 28 December 2009, he found the accused in the police cell at Wanaheda police station and he took him to his office. The accused appeared to be sober. In his office he put questions to the accused as per the pro-forma warning statement. The accused provided him with his personal particulars. He asked him whether he wanted to make a statement or to remain silent and he chose to give a statement. He warned him about his rights to legal representation including the right to legal aid and he asked him whether he understood and he said yes. He also asked him whether he was assaulted or injured and he said no. They were both speaking Oshiwambo and he wrote down the statement in English. After he finished writing the statement, he read it back to him in English and translated it in Oshiwambo. They started before 15h00 and finished at 15h30. He denied that the accused was threatened and also testified that the accused had his clothes, a t-shirt

and slippers on when he fetched him from the cell. He denied that he forced the accused to give a statement and to sign same. He also testified that he knew the facts of the case as he did his own investigation. The witness was subjected to intense cross-examination. It was put to him that he did not inform the accused of his right to apply for legal aid as the pro-forma form does not state that the accused has the right to apply for legal aid. The witness testified that although the form does not state the right to apply for legal aid, he did inform the accused about it. It was also put to the witness that the accused did not have his t-shirt and shoes when he was found in the cell and taken to his office and that he threatened him to sign the statement otherwise he would not be given his t-shirt and shoes if he failed to sign it. Detective Shivolo denied that vehemently and testified that the accused had a t-shirt and slippers on. He denied that he is the one who gave that to him.

Defence's case

[3] The accused testified that he was in hospital for one day after the incident. After that he was taken to Wanaheda police station. He testified that Detective Shivolo collected him from the cells and he was only wearing a jean and no shoes or shirt. He was then given shoes and t-shirt by Detective Shivolo. The shoes were his that Detective Shivolo apparently got from his house whereas the t-shirt was not his. He testified that he was collected at 14h00 and the conditions in the cell were bad. The toilet was not flushing and there was water all over the floor and that is why he needed his shoes and t-shirt because he was feeling cold. He further testified that in the office whenever he told Detective Shivolo something, he would say that he was a liar and Detective Shivolo became angry and told him that he was wasting his time. After the statement was taken, Detective Shivolo threatened him that if he does not sign, he will not get his clothes and because of that, he signed the statement. He denied that he was informed of his right to apply for legal aid.

Submissions by counsel for state

[4] Counsel for the state argued that Detective Shivolo had not seen the accused prior to the taking of the warning statement and therefore he had not pre-planned. He argued that Detective Shivolo testified that the accused had clothes on, a t-shirt and slippers when he made the statement. Detective Shivolo's evidence must be believed as he had no prior knowledge. Accused says/testified that he had sandals black in colour, but with dust, court should accept the evidence of Detective Shivolo. He contended that it was argued that the accused is an honest person, he was given a t-shirt of unknown origin and he does not ask the origin of the t-shirt, shows that he had a t-shirt. Although Detective Shivolo was a single witness, he was a credible witness. What Detective Shivolo did is corroborated by the pro-forma warning statement, there is a document that corroborates what he testified and it gives credence to his testimonies.

[5] Counsel further argued that the accused was asked whether he had injuries and he said no. If the accused had pain in his neck, as argued by his counsel, he would have said that to Detective Shivolo, but he failed to do that and that shows that the accused was making up his case as he was going along. Detective Shivolo was honest and he told the truth to the court. More credible than the accused and if the court accepts that Detective Shivolo is credible then his evidence must be accepted. Counsel further argued that there was effective communication between the accused and Detective Shivolo and there is no way that Shivolo could have forced the accused to use another language. There is no evidence that the translation was wrong. Counsel further argued, rightly in my view, that the accuracy of the content of the statement is a factual dispute and has no bearing before the statement is admitted. Counsel further submitted that in the reply to state pre-trial memorandum the issue of the right to legal aid was not raised and therefore it was a non-issue. It was only raised in court and that is an indication that the accused was building his case as he went on. Counsel submitted that the rights were explained that is why they were not raised in the reply.

There is evidence that accused was not forced to sign the warning statement. The warning statement must therefore be admitted, he submitted.

Submissions by counsel for accused

[6] Counsel argued that the warning statement should not be accepted because the accused was not fully informed of his right to obtain legal aid. The fact that it was not stated in the reply to the state's pre-trial memorandum is neither here nor there. At all stages the accused must be informed about his rights. Detective Shivolo testified that he first had to do investigation so as not just to accept the version of the accused. Shivolo acted as an investigator, interpreter and peace officer. He contended that the accused's rights were breached. At the pre-trial investigation stage the accused's rights must be explained. He argued that Detective Shivolo already made up his mind that the accused was guilty that is why the accused testified that Shivolo was saying to him he is wasting his time. He argued that the accused is sure that his right to legal aid was not explained. He further argued that the accused's clothes were brought to him after the warning statement was obtained. He was told that if you do not sign you will go to court without clothes and that is degrading and inhuman treatment and for four days he was without shoes and t-shirt. Counsel argued that already in 2011 the reply showed that the accused would challenge the admissibility of the warning statement based also on the lack of shoes and t-shirt. The accused's version should be accepted, the court must be careful of overzealous police officers who want to secure a conviction. Why not adhere to set down procedures such as having an interpreter, he contended.

[7] Counsel further argued that the minor discrepancies in the accused's testimony does not mean that the accused's version must be rejected. Accused's version must be accepted as true as to what had happened when the statement was taken. He contended that the accused did not understand his rights fully.

[8] Counsel argued that where the pro-forma form is silent on the right to legal aid, then he should have written it down, and he did not do that and that shows that he did not explain it and therefore the statement must be ruled inadmissible. The pro-forma

form states that the accused has a right to legal representation and Detective Shivolo testified that the accused told him that he will conduct his own defence, but that is not written down, nor is legal aid explanation written down.

[9] Mr Basson argued that accused is a credible witness and his version should be accepted.

[10] Mr Basson referred this court to the case of: S v Dee Wee, 1999 NR 122 HC Mtambanengwe J at 288F – G of the judgment referred with approval to the case of S v Melani and others 1996 (1) SACR 335 € Where Froneman J said the following, and I propose to quote the quotation relied upon by Mtambanengwe J in full at 347E – H: *'The right to consult with a legal practitioner during the pre-trial procedures and especially the right to be informed of his right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which "have for 150 years or more been recognized as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision" (in the words of Kentridge AJ in the Zuma case.)*

In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognize the importance of informing an accused of his right to consult with a legal advisor during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country, but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognizing the right to be informed of the right to consultation with a lawyer.'

Evaluation of the evidence

[11] The objection that the content of the warning statement does not reflect accurately the accused person's version as he told the police, is a factual issue that can only be determined once the court has ruled that the warning statement is admissible, in the absence of that, the court will not know what is accurate in the statement. It is only after the statement is ruled admissible that the accused will be able to say which part of the statement is accurate and which part is not and then the court can adjudicate on that. The purpose of a trial within a trial is to determine whether the statement was made freely and voluntarily and whether the accused's rights were explained to him before making such a statement and has nothing to do with the accuracy of the content of the statement. That objection is therefore meritless. The objection that the accused's right to legal representation, including legal aid was not explained to him, was never raised in the reply to the state's pre-trial memorandum. That issue is fundamental to the admissibility or otherwise of the warning statement and the fact that it was not raised in the reply gives credence to the evidence of Detective Shivolo that he did inform the accused of his right to legal aid and that is why it was not raised when the accused was consulted to prepare the reply to the state pre-trial memorandum. If indeed his right to legal aid was not explained, the accused would have raised that in the reply from the very beginning, but he did not and that tend to show that he was satisfied that it was explained to him.

[12] The accused also informed the court that he was threatened to sign the statement and that if he does not sign, he will not be given his clothes. He testified that the toilet in the cell was not flushing, the floor was wet and that is why he needed his shoes and t-shirt as he was getting cold and he therefore signed the statement not freely and voluntarily but in order to get his clothes. There is no evidence that Detective Shivolo was aware of the bad condition in the cell, nor did the accused testified that he

complained to Detective Shivolo that he was getting cold in the cell and therefore he needed his clothes. The accused was detained in the cell during summer time and for him to complain about getting cold seems to be an exaggeration. Detective Shivolo testified that when he fetched the accused from the cell, he had a t-shirt and slippers. He denied that he threatened the accused that if he does not sign he will not get his clothes. He had no reason to do that as the accused had his clothes on. Having considered the evidence as a whole, I come to the conclusion that the warning statement was signed freely and voluntarily and that his rights, including the right to legal aid were explained to him.

[13] In the result, I make the following order:

1. The warning statement made by the accused to Detective Shivolo dated 28th December 2009 and signed by the accused is ruled admissible.

G N NDAUENDAPO
Judge

APPEARANCES

FOR THE STATE

Mr P Khumalo
Office for the Prosecutor General

FOR ACCUSED

Mr Basson
Instructed by the Directorate of Legal

aid