

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON TRIAL WITHIN A TRIAL

Case no: CC 17/2016

In the matter between:

THE STATE

v

ANASTANCIA NALUCHA LUBINDA

FIRST ACCUSED

DAVID MATALI

SECOND ACCUSED

DAVID KONDJARA

THIRD ACCUSED

ABUID UAZEUA

FOURTH ACCUSED

DONALD HINDJOU

FIFTH ACCUSED

DOLLAM DOLLAM TJITJAHUMA

SIXTH ACCUSED

Neutral citation: *S v Lubinda* (CC 17/2016) [2018] NAHCMD 48 (05 March 2018)

Coram: SALIONGA AJ

Heard: 08 November 2017 – 15 January 2018

Delivered: 05 March 2018

Flynote: Criminal procedure – Trial within a trial – Admissibility of a confession - Objection thereto – State must prove that confessions were made freely and voluntarily without undue influence - Confessions were made in sound and sober senses - Rights to legal representation including legal aid properly explained -Accused persons were not assaulted – Confessions admissible

Summary: The accused 1-6 are jointly charged where applicable with two counts of Murder, Robbery with aggravating circumstances, Conspiracy to commit murder, Possession of Dependency Producing Substances and Defeating and or Obstructing the course of justice and they all pleaded not guilty to all charges.

Held that having regard to the totality of the evidence, the confessions in respect of all accused are admissible.

ORDER

The confessions made to Magistrate Horn, Savage and Stanley dated 2nd April 2015 and signed by all accused persons are ruled admissible.

RULING

SALIONGA, AJ

[1] Mr. Olivier appears on behalf of the State, Mr. Engelbreght appears on behalf of first accused, Mr. Ntinda on behalf of third accused and Ms. Kenaruzo appears on behalf of fifth accused. All defense counsels are instructed by the Directorate of Legal Aid. At the commencement of the trial, the State led evidence from eight witnesses before it sought to produce three confessions in terms of Section 217 of the Criminal

Procedure Act 51 of 1977 as amended and given by accused 1, 3 and 5. The defense objected to the production of the same on the following grounds:

a) First accused: the confession was not made freely and voluntarily, the accused was not informed of her constitutional rights, in particular Article 12 (e) and (f) of the Namibian Constitution in a language of her choice, was assaulted during interrogation by certain members of the investigation team, more particular Nuule, the accused was influenced by Nuule and certain promises were made to her.

b) Third accused: that the confession was not made freely and voluntarily, as contemplated by section 217 of the Criminal Procedure Act, and the accused was assaulted by Ipinge and Nuule, the accused was unduly influenced by Nuule to make a confession, that his rights were not properly explained and that the interpreter did not interpret correctly;

c) Fifth accused: that the confession was not made freely and voluntarily as contemplated by section 217 of the Criminal Procedure Act 51 of 1977, that rights in terms of Article 12 of the Namibian Constitution were not explained and accused was severely assaulted by Constable Ipinge and Nuule that he was unduly influenced by Nuule to make a confession.

For the sake of convenience all three confessions were dealt with in a trial – within – a trial:

[2] The first witness was Mrs. Horn the Divisional Magistrate for Windhoek division, she testified that she is a magistrate with 37 years of experience and on 2nd April 2015 in the afternoon she recorded the confession of the first accused and used a pro-forma that was read into the record and marked Exhibit “A”. She was approached by Chief Inspector Musweu during the course of the morning, enquiring if she had magistrates available to take confessions of the persons who are being arrested. She indicated that

herself, Mrs. Savage and Mrs. Stanley were available. First accused was brought to her office by Sergeant Gustav at around 14:50 and she could clearly remember the first accused person as it was hot that day but she was covered with a small blanket.

[3] The witness further testified that she inquired from her which language she speaks and she said English. She also asked whether accused did not need an interpreter from her home language to English and she said no, she is conversant and fluent in English. The witness said she confirmed again from her because she could determine from the surname that accused is from Caprivi Zambezi and there was a Lozi interpreter available. Mrs. Horn then proceeded to explain the procedure and rights of accused as per pro forma in English and accused replied: 'yes, I understand and I want to tell what is in my heart and what I did before I talk to my lawyer'. These rights include the right to legal representation which includes the right to obtain the services of a private lawyer at her own costs or legal aid if she is unable to afford a private legal representation. The pro forma form was read into the record and marked exhibit "A". She stated that she was very cautious because when a confession is taken down, deponents sometimes dispute the confessions. At no stage did it appear to her from their conversing that accused did not understand English.

[4] The witness further testified that accused did not tell her about the assault nor could the witness observe any injuries on her body. That if the accused had injuries on her, Magistrate Horn would have noticed them at the stage when accused stood up and lifted her dress to show the witness that she has no injuries.

[5] According to the witness, the accused was in a sound and sober sense and was not under the influence of liquor. The accused was calm but emotional and had tears in her eyes and the witness perceived that the accused had something.

[6] During cross examination, Mrs. Horn was asked whether she was aware that all conversations made with accused person during the taking of a confession have to be recorded and whether she regarded questions about accused's mother tongue and the

right to have a lawyer present as important to be recorded. The witness replied that she was well aware and regarded the questions as important, however she did not record her inquiries about the accused's mother tongue because she had already indicated that accused person does not make use of interpreter, on the pro forma and the confession was taken in English and her explanation she gave to her was clear, otherwise accused could not have answered the questions posed. The witness was also asked whether she complied with the principles as laid down in a judgment of S v Tjihorero 1993¹ and she replied that she did comply because accused understood correctly what was being asked and the witness had no uncertainty. Horn maintained that she recorded all conversations as required by section 217 of the Criminal Procedure Act, Act 51 of 1977.

[7] The witness was also asked whether the first accused reply 'yes' before I talk to my lawyer, didn't suggest that the accused had a legal practitioner and she replied that she had informed the accused of her rights and she perceived the accused will engage a legal practitioner at the trial and she wrote down what accused had told her. She was also asked why she did not stop the proceedings after she was informed by the accused that she expected bail and a lenient sentence and the witness replied that, that is what she expected but not what she was promised.

[8] She was adamant the statement was read back to the deponent, confirmed the content as correct, initialed each page and affixed her signature on the last page. Thereafter, the witness handed over the first accused and the confession to the officer who brought her.

[9] Mrs. Savage was the second witness to testify in a trial within a trial. She testified that she is employed as a magistrate at the Office of the Judiciary for eight years, stationed at Mungunda Street Magistrate's Court. She took a confession on the 4th day of April 2015 in the afternoon from third accused who was brought to her by Nampila.

¹ 1993 NR 398 (HC).

Savage testified further that she recognized the document shown to her by the state as a confession pro forma she used when she took a confession.

[10] According to the witness, she communicated to the accused in English and made use of an interpreter. She further testified that the deponent was informed that he is in the presence of the justice of the peace who is a peace Officer; that he has nothing to fear and that he should therefore speak the truth. The deponent was further cautioned that he is not obliged to make any statement and that should he wish to make a statement it will be reduced in writing and used as evidence against him. That he has the right to legal representation. He can obtain the services of a legal representation of his own choice or he can apply for legal aid that will be provided by the State free of charge. Should he want to apply for legal aid, he has to lodge his application with the clerk of court who will forward the application to the Directorate of legal aid within the Ministry. The witness was satisfied that accused understood the explanation and replied 'yes I understand I will speak without a lawyer'.

[11] During cross examination, it was put to Savage that she was supposed to extensively explain the process of legal aid in detail because the third accused is uneducated and a lay man, and she replied that she was satisfied that the deponent understood what she had explained and what he was going to do. It was also put to her that on that specific day two interpreters were involved. The witness replied that it was not in her office because only Tsaubaloko was in her office. On a question whether the witness asked accused if he expected any benefits after making the statement, the witness said it might be an error on her part not to record the answer on the pro forma but it is highly unlikely that she did not ask that question.

[12] It was also put to the witness whether she enquired properly from the accused person whether he had injuries and that accused was not prepared to make a statement but the police said he can make one in front of the Magistrate. She replied that at no stage did the accused indicate to her that he was assaulted by Nuule or Ipinge and when she enquired whether accused was assaulted he said he was not. She did not also observe any injuries on him. She insisted that it is not correct that the third accused

did not want to make a statement in front of a magistrate but she took it that he got information from the police officers that he can make a statement to a magistrate.

[13] The witness was adamant that she read back the statement to the third accused and the deponent confirmed the content as correct, initialed each page and affixed his signature on the last page. Thereafter, the witness handed over the third accused and the confession to the officer who brought her.

[14] Mrs. Victoria Tsoubaloko is the permanent interpreter at Mungunda magistrate court for the past 23 years and she interprets in Oshiwambo, Herero, Damara, English and vice versa. She testified that Oshiwambo is her mother tongue but regards Otjiherero as her second language, because she was born in Usakos and were taught in Otjiherero from grade one – seven and also speaks the language at home. She attended a one-week training at UNAM and her duty was to interpret exactly what the person is saying not to add or omit anything.

[15] She stated that she was the interpreter in the proceedings before Magistrate Savage's when she took down the confession of third accused and interpreted from English to Otjiherero and vice versa. She further testified that she interpreted the warning the accused was given by the magistrate as well as the questions that were asked from the pro forma and accused when asked whether he understood, accused replied "Yes I will speak without a lawyer" and he started telling the story

[16] In cross examination the witness maintained that she was the only interpreter who interpreted the confession and she was able to communicate well with the accused without any difficulties. She further stated that

'If there was communication problem or difficulties she should have brought it to the attention of the magistrate.' At no stage accused had indicated that he did not understand or was not following or that he did not want to go ahead with a confession.'

[17] She denied that accused showed her a wound or a mark and at no stage did he tell her of the assault or that he was manhandled by the two police officers, namely Nuule or Ipinge. She insisted that she interpreted what was said and there is nothing in the statement to conclude that he did not understand her interpretation.

[18] It was also put to the witness that the signatures on all four pages are not the same. The witness replied that they are the same and explained that the one on page 1-3 is her shortened signature and the one at the end of the pro forma is her full signature. She insisted that she was the one who interpreted the confession from the beginning to the end.

[19] Vennesa Michell Stanley is a magistrate for the past 8 years stationed at Luderitz Street and she was a prosecutor for 10 years. She testified that she took down a confession of fifth accused on the 2nd of April 2015 at 11h30 at Katutura Magistrate's Court who was brought to her by Chief Inspector Musweu. She further testified that they were only two of them in the office and conversed in English because the deponent did speak fluent English and they understood each other clearly.

[20] Stanley said she explained the right to legal representation to the accused including legal aid. She further testified that she informed the deponent that she is the justice of the peace, a peace Officer and that he has nothing to fear and that he should therefore speak the truth. She also informed him that he is not obliged to make any statement and that should he wish to make a statement it will be reduced down in writing and used as evidence. That he has the right to legal representation, in that he can obtain the services of a legal representation of his own choice at his own cost and if he does not have sufficient funds he can apply for legal aid for the government to provide him with the services of a lawyer and such legal practitioner appointed by legal aid will be free of charge or at a minimum fee. She further explained the procedure to apply for Legal Aid to him that that he has to lodge an application with the clerk of court and his application will be forwarded to the Directorate of legal aid within the Ministry.

The witness testified that the deponent indicated to her that 'no, I will just speak without a lawyer', and was satisfied that accused understood the explanation.

[21] The witness was asked in cross-examination if she paraphrased when she recorded the confession. She replied that she didn't, she used the direct words spoken by the accused. On the issue of legal aid she explained that it is an application and usually if you apply for something your application has to be considered and can be approved or not. On the issue of assault that accused was assaulted, Stanley replied that she specifically asked the deponent if he had any injuries and accused indicated he was assaulted by prisoners. She even went further to ask if the police had assaulted or threatened him and he indicated that it was not the case.

[22] Nuule is a Detective Sergeant in the Namibian Police for the past 17 years and the investigating officer. On 31 March 2015 he was on standby when he received a call from Detective Sergeant Kuyendani about a person who was found dead in a vehicle in the Goreagab dam area. He contacted Shakumeni who accompanied him to the scene.

[23] He stated that at the scene he found Eigab, who gave him a report. He requested for the printout data from Mobile Telecommunication Limited (MTC) because he was also supplied with the number of the deceased as well as the number of the deceased wife who is now first accused.

[24] Nuule further testified that after he received the data, went through ,he noticed the data where accused as well as the deceased's number and another strange number appeared and decided to go and see the deceased's wife in order to establish who the last person to speak to the deceased was.

[25] Nuule said he drove to Bornbright house where the first accused was and upon arrival he introduced himself as member of Nampol and the purpose of his visit. He communicated to the accused in English and requested accused to assist them with the investigation. He was accompanied by sergeant Libala and constable Ipinge.

[26] Nuule stated that at that stage the accused was a victim and not a suspect; therefore, he did not warn her in terms of the Judges Rules or in terms of Article 12. The witness testified that he only arrested accused on 2nd April 2015 in the early morning hours, but before he arrested the accused, he took out his appointment certificate, introduced himself as a police officer and investigating a murder case. He also informed her that the crime is serious and she has the right not to give incriminating evidence; about the right to be legally represented by a lawyer of her choice and if she so wishes to apply for the services of government attorney and that she can ask more about the procedure to apply if she wants legal aid, and his right to remain silent.

[27] The witness stated that after he arrested first accused he detained her on 2nd of April 2015 and an entry was made in the Occurrence Book, well received by detective sergeant Nuule meaning no injuries on the suspect was recorded. According to him accused appeared very emotional and was crying and she had tears in her eyes but she was in a sound and sober sense.

[28] Accused waived her right to remain silent and indicated that she wanted to give a confession. He then informed his Unit commander detective Chief Inspector Musweu who took over the accused and later accused was brought back to him together with a confession.

[29] Nuule testified that he also arrested the third accused at the service station as he was about to tell him what happened. Nuule stopped accused person from telling him further and warned him of his rights among others, the right to remain silent, to be legal represented by a lawyer of his own choice, to apply for legal representative provided by the state, right to self-incrimination and he waived his right and decided to talk. At 08h00 Libala booked out third accused for further interview and before he was interviewed Nuule personally warned him about his rights as stated earlier and he again indicated that he wanted to confess. The witness made arrangement with the Unit Commander

for the accused person to be taken to a Magistrate for a confession. At that stage the witness had a skeleton docket and he did not brief the head of CID about the case.

[30] Nuule denied having assaulted the accused and at no time was accused assaulted in his presence. He did not see the accused being slapped or her hair being pulled by a member of the investigating team and in the condition where accused was, she looked vulnerable and Nuule felt sorry for her that she lost her husband. Nuule stated that the accused has been in custody but to date no docket or case was opened

[31] In cross examination the witness maintained that he did not assault any of the accused persons and did not see accused one, three and five being assaulted by the member of the investigating team. He was adamant that their rights were fully explained at the time of arrest and before the interviews and he did not influence them in any way.

[32] In respect of the fifth accused, Nuule testified that he was arrested by Ipinge and Libala booked him out for further interview the early morning hours. Nuule stated that he personally warned accused 5 before the interview of his rights amongst others, the right not to give incriminating evidence; right to be legally represented by a lawyer of his choice and if he so wish to apply for the services of government attorney and that he can ask more about the procedure to apply for one if he wants; and that he has the right to remain silent. Accused indicated that he wanted to give a confession. The witness again made arrangements with Chief Inspector Musweu for the accused to be taken to the magistrate for a confession and later received accused and a confession from the Court.

[33] Nuule denied to have assaulted fifth accused and did not see Ipinge assaulting him. According to Nuule, the fifth accused did not report any assault case to date.

[34] Fabian M. Musweu is the Deputy Commissioner in the Namibian police currently stationed at drug law enforcement. During 2015 he was the Head of Criminal Investigation at Wanaheda and was a Chief Inspector. He knew Nuule as the

investigator at Wanaheda and on the 2nd of April 2015 he was requested to arrange an officer or magistrate to obtain the confessions. He said he made arrangements with Magistrate Horn and he was told to take the accused to the Katutura Magistrate Court and according to him he was normal and did not observe injuries or anything on him.

[35] He explained that if an inmate is in custody and has a complaint to make, there are officer who visit the cells hourly and such inmate can report to a visiting officer and the Station Commander will take action. He further testified that as the Head of the Criminal Investigation Division (CID), at no stage was a report or complaint was made to him by the first, third or fifth accused.

[36] Musweu also testified that if a member of CID wants a particular inmate from the cell, there are members in the cells who book in and/ or out an inmate for whatever purpose and have to make entry in the occurrence book (OB) registers. The witness said at that stage Nuule didn't give him the details of the case as the investigation was still at an initial stage.

[37] Helena Magano Gustav is a police officer employed at Wanaheda CID office. She testified that she was called to take the first accused to court at Mungunda Magistrate Court on the 2nd April 2015. When they got there, Chief Musweu knocked and took accuse person in the office and came back. She testified that she remained outside and after the magistrate finished with her she handed the documents and accused to them and took accused back to the station.

[38] Martha Kaunapawa Nampila is a police officer employed in the police force for 13 years, stationed at Wanaheda since 2015. She testified that she got involved in this case when she took the third accused to the magistrate for a confession. It was Thursday, the 2nd April 2015 when she was called by constable Ipinge to take accused to court. The witness testified that they handed over the accused to the magistrate and she remained outside. The magistrate came outside handed over accused and documents to them.

[39] Ipinge Augustinus is a Detective Constable in the Namibian Police and a member of the investigation team. He arrested the fifth accused at his residence, detained him and was present when the first and third accused were arrested. Ipinge testified that he met the fifth accused outside his house and introduced himself. As he was introducing himself, the accused allegedly told him that he was not the one who killed him but was killed by his co-accused. Before accused spoke further Ipinge warned the accused that he is a detective investigating a murder case and he is a suspect that he has the right to remain silent and anything he says will be used against him as evidence and also explained to him the right to consult a lawyer.

[40] In cross examination the witness seemed not sure about the phases of the interview conducted and said the interview was conducted in two phases, first one by Nuule alone on one-on-one and the other by all three police officers present. The witness was adamant that he was present when the first, third and fifth accused indicated that they wanted to confess. He maintained that he did not assault any of the accused nor did he see accused persons assaulted in his presence.

[41] Libala is a sergeant in the Namibian Police currently employed at Kongola Police Station, but was at Wanaheda Police Station, Criminal Investigation Directorate in 2015. He stated that he became involved in the investigation of the murder case during April 2015 after Nuule requested him to assist. The witness confirmed the evidence of sergeant Nuule in that third and fifth accused were arrested and detained.

[42] According to his testimony, the witness was present when the first, third and fifth accused were arrested. He was the one who booked out the third and fifth accused at 09h58 and signed in the OB, and an entry was made well received without injuries or any complaints. He further stated that he was present in the interviewing room and accused were interviewed one by one. The witness stated that the three accused persons indicated in his presence, Ipinge and Nuule that they wanted to confess. He also testified that he was present when their rights were explained by Nuule in English.

The witness further said at Bornbright's house first accused was asked what language she wanted to use and she preferred to speak English.

[43] Jeremia Petrus is a police officer employed by NAMPOL for the last 7 years at Wanaheda charge office. During 2015 he was working in the charge office and his duty was to receive complaints and detain suspects. He made entry no. 41 of 2015 of April at 00h50, suspects detained, well received meaning that the suspect was received in good condition. She testified that the entry she made was in respect of Anastancia Lubinda, the first accused. She explained that well received meaning the suspect was received free from injuries.

[44] Calorina Nambanzi was a police officer at Katutura police station in 2015, working at charge office and her duties was to record all the happenings in the OB. She made entry no 6 in the OB, at 00:58 and recorded 'no complaint and free from injury' in respect of Dawid Kondjara, the third accused. She asked accused if he had injuries/complaints before making entry and he said 'no', she did not see any injuries on the accused persons. In cross examination a question was posed whether she physically inspected or checked if accused had injuries before making entry and she said as a woman she cannot go to them and inspect but she confirmed from him.

The above concludes the State's evidence-in-chief and the State closed its case.

Defense Case

[45] Annastancia Nalucha Lubinda, testified that she was picked up on the 1st of April 2015 from Bornbright's house in Khomasdal where the funeral arrangements for her late husband were made. While there, police officers whom she came to know later as Nuule, Ipinge and Libala and Warrant Max came there. She confirmed that upon arrival Nuule introduced himself by producing a card showing, that he is a police detective and that he was investigating the death of her husband. However he did not ask her which language she preferred to speak. Nuule wanted to know from her the owner of a cell

phone number which was written on a paper to which the witness responded that she is not good with numbers unless if she can check it on her phone.

[46] The police requested her to accompany them to the police station and in the car was herself, Nuule, Ipinge and Libala, who drove to Wanaheda. The witness denied having told Nuule that the strange number was for Deon of Dolam in Katutura.

[47] At the police station, the witness was asked the same questions repeatedly as to whom the number belongs and later she was requested to take them to Klein Windhoek. They drove to Matali's house but did not find him and returned to the station where she was kept in the radio room.

[48] The witness testified that she was in the radio room till late midnight when she was arrested. She recalled Constable Petrus, working at Wanaheda but only came to know him the time she was taken to be locked up in the holding cells. He never asked her about the injuries or complaints she had.

[49] She further stated that on the 2nd April 2015 in the morning she was called to Nuule's office because Mbala, together with his children came to see her and she was still in the radio room.

[50] The witness testified that she was later told by Nuule that she will be taken to the Magistrate to give a statement. According to her, she was not ready to give a statement before the magistrate but requested a paper to write her own statement with her own handwriting. However, Nuule advised her that she must go and give a statement before the Magistrate because there are some benefits attached i.e. bail to be granted and lenient sentence if she was to make a statement. She was willing to write something with her own hand writing but Nuule refused and insisted she should go to the magistrate. The witness agreed and went along to his office and later was taken to Dep. Commissioner Chief Musweu's office who took her together with a female police officer to the magistrate.

[51] The witness testified that she could not refuse to go to the magistrate because Nuule insisted, telling her to go and meet the magistrate. She said she could equally not inform the Chief Inspector Musweu that she was not ready to go to the magistrate because she was afraid and thought if she refuses they will assault her even more. She said she was assaulted in the foyer outside the radio room and it was on the 1st of April 2015 by a police officer. At that stage she believed that Nuule being the investigator is in a position of authority and such benefit can be given to her.

[52] The witness stated that at the magistrate's office she was called in and the magistrate introduced herself but did not ask her which language she prefer neither was she asked if she was comfortable or wanted a Lozi interpreter. She also did not tell the magistrate that she was not conversant with English because she was following Nuule's instruction.

[53] The witness confirmed that the Magistrate asked her if she is from Caprivi to which the witness answered yes. She was asked questions and she recalls one of the questions asked was about a lawyer and she told the magistrate that she wanted to talk to her in front of her lawyer.

[54] She said she could not follow the proceedings because she was mourning and could not understand English well. She conceded that the magistrate explained the effect of a confession, the right to remain silent and that there is no need to incriminate herself but not in a language she understand. The witness did not inform the magistrate that she was assaulted by the police because she feared the police.

[55] When asked in cross-examination up to what grade she advanced in school the witness said she failed English as she got a G and got D in Silozi in grade 12 and was employed as an Assistant Packaging prior to her arrest. She further stated that the medium of instruction was English and Silozi but the National Examinations she wrote was in English. When asked that if she had communication difficulty, why didn't she ask

Libala who was with Nuule, in her language. The witness replied she could not have asked Libala as he was throwing everything to Nuule.

[56] Dawid Kondjara, the third accused, testified that he only went to school till grade 5 at Karundu Primary School. He was assaulted by Nuule and Ipinge on the day he was arrested at the Single Quarters service station and by Nuule some hours before the interview at Wanaheda Police Station. He further testified that he was kicked, beaten with belt and was handcuffed in a number 8 position. He had a mark on his shoulder which he firstly showed to the fifth accused and at later stage to Mr. Andima his witness.

[57] The accused stated that Nuule told him what to say to the magistrate and warned him that if he does not abide to his instructions he will be in trouble because the confession the third accused was making, will come back to him.

[58] The witness testified that Nuule did not explain his rights to remain silent, right not to incriminate himself and his right to seek the services of a lawyer. But confirmed that the Magistrate did inform him about his rights but he couldn't understand the interpreter clearly.

[59] During cross examination witness denied that the signature that appeared in the confession was his, stating that he only signed the last page and the other signatures that appear on the document were not his. It was put to the accused through cross examination why was it not put to Nuule that he coached him and accused replied he does not know. On the question by state counsel what he was told to say to the magistrate accused responded that he cannot remember.

[60] The next witness called to testify on behalf of the third accused was Thomas Andima. He testified that he is a legal practitioner of this court and that he has been practicing for five years. He further testified that he met the third accused at Wanaheda police station when he went to consult with the sixth accused. He could see that the

accused persons weren't walking properly and the sixth and third accused told him they were assaulted by the police.

[61] Andima further testified that he observed bruises on both the sixth and third accused when they lifted up their shirts and these injuries appeared to him as if the accused persons were in a car accident.

[62] In cross-examination Andima was asked by State counsel whether these wounds on the sixth and third accused were fresh or old and whether they could be linked to the incident of the 2nd of April 2015 but he couldn't describe them. All what he said was he cannot give opinion but injuries appeared as if accused persons were in an accident of some sort.

[63] Donald Hindjou is the fifth accused in this matter, testified that he attended school till grade seven at Bethold Himumuine Primary School. He resides in Windhoek, Katutura. After grade seven he left school and started building corrugated iron shacks, despite the fact that he passed grade seven. The fifth accused testified that his English isn't that good.

[64] He further testified that on the 1st of April 2015 when he was arrested, Nuule assaulted him by beating him with his fist and Ipinge struck him with an unknown object from behind which resulted him falling down to his knees.

[65] The fifth accused also testified that on the 2nd of April 2015 he was booked out from Katutura Police Station to Wanaheda Police Station for interrogation. He stated that while in Ipinge's office and shortly after Nuule had taken the third accused to his office he heard screams from the direction of Nuule's office. After a while the third accused was brought back to Ipinge's office and showed him the marks that he was assaulted by Nuule.

[66] The accused testified that he was also taken to Nuule's office for interrogation and while he was being interrogated he was severely assaulted by Nuule. The fifth accused further testified that after the assault, Nuule took out a paper coached him what to go and tell the magistrate and he gave it to Musweu to take it along to Katutura Magistrate Court.

[67] When the fifth accused got to Katutura Magistrate Court, the magistrate did not explain to him the purpose and effect of the confession neither did she explain to him the right not to incriminate himself.

[68] Through cross-examination, State counsel, asked the accused what happened to the paper Nuule had whether it was taken along to the magistrate court and accused replied that he saw Nuule giving the paper to Deputy. Commissioner Musweu and it was a blank paper with lines on. Accused was asked what Nuule had told him to go say to the magistrate and responded that he could not remember what he was told.

The defense closed its case in the trial-within-a-trial.

State's submissions in respect of the first accused

[69] Counsel for the State in his submission thirdly outlined the legal principles as enunciated in the matter of *S v Shikunda and Another* 1997 NLR at page 156 and at 4 A-D where Mahomed CJ indicated that:

'The prosecution should prove that the confession has been freely and voluntarily made by the deponent in sound and sober senses and without having been unduly influence in making the statement'.

[70] In making reference to the case of *S v Malumo and others* (2) 2007 (1) NR 198 (HC) which judgment was cited by defense counsels throughout the trial within a trial counsel for the State is of the view that *Malumo* case can be distinguished from the

case before court because in that particular case one state witness corroborated the version of the accused that the accused persons were assaulted and forced which is not the case in this particular case.

[71] Counsel correctly argued that he could not understand how Article 12 (f) of the Constitution could be raised as objection unless if defense counsel can explain further, on this issue, otherwise Article 12 (f) is not applicable in the current setting where accused is charged with murder of her spouse. Counsel submitted that the first accused was asked if she needed an interpreter and she replied that she does not need an interpreter as she is conversant and fluent in English and the magistrate rightly proceeded with a confession. Defense counsel argued that the magistrate failed to record all conversation the magistrate had with accused person during the taking of a confession in non-compliance with Tjihorero's case but counsel for the State submit that it was not recorded because the witness said she already put it down on the pro forma that accused did not make use of the interpreter and the confession was conducted in English. The witness said she recorded all what is needed to be recorded in compliance with Tjihorero's case. On the issue that accused was not properly informed of his rights when the confession was taken, in a language she understands in particular Article 12, Counsel for the State argued that the rights were properly explained to the accused and she waived her right and answered 'Yes I understand and I want to tell what is on my heart and what I did before I talk to my lawyer'. Magistrate Horn testified that she asked accused if she wished to have a lawyer present before proceedings start. She maintained that she explained the rights to the accused person in more detail as set out in exhibit A because she knew she was dealing with a laymen. This is visible in the testimony of all three magistrates who took up confessions that the process of applying for legal aid through the clerk of the court was explained. The witness maintained throughout the cross examination that she was satisfied that the deponent understood her rights that she was in his sound and sober senses. On the question, whether the magistrate informed the accused of the seriousness of the crime, counsel argued that it is not possible for a magistrate to inform the accused because the magistrate did not

know what the accused was going to tell her. When the accused is brought to court usually the magistrate has no insight into the charges the accused faces.

[72] On the issue of language, it was put to her that at no stage did she ask the accused whether or not she could understand or is fluent in English. She responded that she did ask the accused person twice and out of her demeanor and her answers to the questions posed it was obvious she did understand English and was fluent. It is counsel submission that Magistrate Horn has 37 years of experience and well conversant with the legal principles applicable. The accused in her testimony supported Magistrate Horn in as far as the inquiry into the fact that her name suggests that she comes from Caprivi/Zambezi region and counsel submit that the fact that the confession consists of eight pages, and had taken about five hours to complete is an indication that there was some kind of communication between Mrs. Horn and the deponent. It is also improbable that Mrs. Horn with her 37 years of experience would have continued with the confession if there were communication barriers.

[73] Counsel for the State on the issue of undue influence argued that what the accused had answered when she was asked on page 3 of the pro forma 'if she expect any benefit after making a statement and her answer was bail be granted and lenient sentence' submit that there is a difference between promises made and expectation. In this case the question of promises was dealt with before the one on expectations. Counsel argue that what accused answered was that she expected and not what was a promised to her. Counsel therefore submit that there is a vast difference between the two and the witness was right in continuing with the confession.

[74] In connection with an issue of assault, Counsel for the State argued that the first accused was not assaulted and submit that the allegation is mere fabrication which was concocted in November 2017 at the start of the trial. All three police officers denied to have assaulted her or that the accused was assaulted in their presence. Magistrate Horn who took a confession was not informed of the assault and she also did not observe any injuries. Accused in cross examination conceded that she did not inform

Magistrate Horn of the assault, because she was afraid of Nuule who was nowhere near the court nor did he assault her.

[75] Counsel for the State further submitted that in cross-examination accused indicated that she informed her family member about the assault inflicted on her but she failed to present that in her evidence in chief, failed to call any of her family member to testify and on their part never did anything about the serious allegation brought to their attention. That accused lawyer on record was appointed three weeks after their first appearance on the day of 7 April 2015, strange enough no efforts were made to report the assault either to the police or on record when the accused persons appeared to date. Therefore counsel referred the court to a case of *S v Dausab* (CC 38/ 2009) [2014] NAHCMD 2 (15 January 2014) where Siboleka J stated that

'In this country police charge office are open day and night, they never closed for business at all. Any member of the public who has been assaulted may go and lay a charge against the assailant free of charge.'

[76] Counsel agree with the proposition and that the allegation of the assault be rejected as mere fabrication.

State's submissions in respect of the third accused

[77] Counsel for the State argued that the rights of accused were explained to the accused and he waived his rights to remain silent. Mrs. Savage testified that she explained the process of applying for legal aid through the clerk of the court. On the issue of the right of accused in terms of Article 12, Savage spoke to the accused in English but made use of the interpreter and was satisfied that accused understood the language spoken because she did not observe any kind of confusion even if she does not understand Herero. In cross examination the witness was asked if sufficient time was given to the accused and the witness indicated that if accused indicated that he wished to apply for legal aid then he would have been provided sufficient time to do so.

The witness maintained throughout the cross examination that she was satisfied that the deponent understood his rights that he was in his sound and sober senses.

[78] Counsel for the State on the allegation of assault or manhandled, submitted that the confession taken was free and voluntary. Magistrate savage was not informed of any assault and she did not observe any injuries. Savage further testified that when she inquired from the accused if he was assaulted; accused replied he was not assaulted. When asked in cross examination what has she to say if accused is saying Nuule and Ipinge assaulted him, she responded that she cannot testify on behalf of them? She was further asked whether she informed the accused of the seriousness of the crime the witness replied that she did not know what accused was going to tell her. Counsel further submit that when accused is brought before the magistrate, the magistrate has no insight into the charges the accused faces.

[79] Counsel argued that there also is evidence from three police officers that accused was not assaulted and they did not see accused being assaulted in their presence. No medical evidence was presented and the mark accused had shown could not be linked to the alleged assault of the 2nd of April 2015 or any assault or does not prove what happened to the accused person as it is a mark, nothing more and nothing less.

[80] The witness for third accused testified that he observed bruises on the body of accused three and looked as if they were in a car accident or was beaten. He was also not sure when his visit to accused six was. The said mark was never shown to magistrate Savage, or to the interpreter or to Sergeant Nampila and it was also not put to the key witnesses. Accused only stated in cross examination said that he laid a complaint with warrant officer Nuuyoma and this was never put to Nuule who testified and the same warrant officer never called to testify. It is the state submission that there must be nexus between the injuries and the date of the 2nd April and evidence should have been tendered in evidence in chief and whatever injuries the witness saw could

have been caused by anything like a fight in prison as it is clear accused had no difficulties in laying a charge.

[81] Counsel for the State submitted that on the allegation whether Nuule dictated to third accused what to say to the magistrate, this was not put to Nuule to react to the allegation that he coached the accused what to say to a magistrate. The State argued there is evidence on record that accused and Nuule spoke in English and it was impossible for Nuule to coach accused in the six pages long confession contains such details that Nuule could not have had at that particular time. Therefore the State is submitting that it was an afterthought and accused was the author of a confession.

[82] Counsel for the State submitted on the issue that the confession was not taken down in the language that accused person could properly *understand* is a fabrication by the accused person because Magistrate Savage disputed that two interpreters were used and Ms. Tsaibaloko said she interpreted from the pro forma from the beginning to the end. Counsel submitted that the defense unsuccessfully attempted place the ghost interpreter during the taking of a confession. Which was denied by the magistrate and the interpreter Ms Tsaubaloko. Counsel referred the court to a matter of *R v Lucio* AD 1946 on page 877 to 879 where the only requirement in law was laid that 'interpreter has truly and correctly interpreted what was said.' The magistrate confirmed the evidence of an interpreter in that there were no other interpreter in her office.

State submission in respect of the fifth accused

[83] The confession of third and fifth accused dated the 2nd of April 2015 was not given freely and voluntarily because the accused 5 were severely assaulted by Ipinge and Nuule.

[84] Counsel submitted that there is evidence from Magistrate Stanley who testified that she took a confession from fifth accused on the 2nd of April 2015 and she stated that accused person was conversant in English. She was in a position to understand the accused without any difficulties. She also explained to him his rights to legal aid that he

can apply through the clerk of court. In cross-examination the witness was firm that she never had impression that the accused person could not understand and when she was asked whether she paraphrased she responded that she used direct words. On the issue of assault Stanley said she specifically asked the deponent 'do you have any injuries', the accused only indicated that he was assaulted by prisoner and the magistrate went a step further to ask if the police did assault or threaten him and he indicated that is not the case. Counsel argued that it should be remembered that it was not put to the witness that at one point she explained in Afrikaans and counsel submit it is an afterthought.

[85] The accused indicated that the third accused showed him a wound or mark on his shoulder and that was the only wound he saw. If one was to follow the third accused's version, the beating was so severe and more marks could be visible and counsel submit it is void of any truth and is trying to protect his co-accused. Counsel further submit that the fifth accused stated in his evidence, an issue which was not put to Nuule, Stanley or Musweu is the paper which Nuule had when he was teaching the accused, gave it to Musweu and was left in Stanley's office and counsel submit it is an attempt to try and mislead the court. Again the accused testified that after the confession was finalized and handed back to Nuule, the accused wanted to open a case suddenly he was no longer afraid of him. State submit nothing at that stage could have stopped Nuule from assaulting him as he was still in police custody.

[86] The three police officers who arrested and interviewed the fifth accused maintained that they did not assault the accused and did not see the accused being assaulted in their presence. There is also evidence that accused person was booked in without injuries and although there was an omission on the side of the police to keep proper record in the OB of the 2nd of April 2015, the omissions do not vitiate what transpired on that particular day. Nampila, who accompanied Chief Inspector Musweu to court for a confession were not informed of any assault and they did not observe any injuries on the accused. Mrs. Stanley who took the confession was not informed of any assault neither did she observe any injuries on her even after the accused was asked if

she was assaulted by the police. I am satisfied that the State proved that no assault was inflicted on the accused.

[87] Counsel for the State submitted that the allegations are afterthought which the accused came up with after he heard two of his co-accused testifying and being cross-examined. On the other side is the evidence of the magistrate who left a good impression on court as being competent and punctual in the performance of her duty. In the absence of medical evidence or even any report of any kind, leaves the accused person standing alone and that there is no reason why her evidence should be rejected and this court can comfortably rely on her evidence.

Defense submissions for first accused

[88] Counsel in his submission gave a background on the need to hold a trial within a trial, restated the grounds of objection to the admissibility of the evidence of the confession identified in the summary of this ruling. He further cited passages from the case law relevant to the enquiry and referred to the summary of the evidence led by the State and the defense, highlighted the discrepancies and contradictions, discussed the legal principles and the questions put to the accused in the pro forma as well as accused answers to those questions.

[89] Counsel for the first accused correctly argued that the need to hold a trial within a trial is to determine the admissibility of evidence and the State must prove beyond reasonable doubt that a confession had been made freely and voluntary by the accused person. He quoted a passage in *S v Kasanga* 2006 (1) NR 348 at 53E-F where the court stated that:

'In my view, the starting point in determining the fairness of a trial as envisaged in article 12, should always be whether or not the accused is informed. Without an accused being properly informed one cannot even begin to speculate whether or not rights have been exercised or indeed waived.'

[90] Counsel also argued that it is the duty of judicial officers to adequately inform an accused person of his or her constitutional right to legal representation and failure of the magistrate to inform the accused person of his entitlement to free legal representation system in order to eliminate any misunderstanding is an omission on her part.

[91] Counsel further argued that promising a benefit to a suspect is not according to the requirements of section 217 and amounts to a fatal irregularity.

[92] Counsel for the defense argued further that nowhere was accused informed that the charges are very serious with a possibility of severe sentences, the advantage and disadvantages of a confession and the consequences thereof; the advantage of having a lawyer present neither was he asked the language she prefer to speak and in this regard counsel referred the court to a case of *S v Radebe* 1988 (1) SA 191 TPD at 196 that

'The magistrate was obliged to do more than merely recording what was said by the accused person by posing further questions in order to pierce the veil adverted to in Gumede's case and failure to do this results in failure to comply with the admissibility requirement.'

[93] The court was referred to the case of *S v Nyanga and Others* 1990(2) SACR 547(CK) where Heath J explained the duties of a presiding officer when explaining the rights of the accused. Counsel concluded that accused failed English in grade 12 and given that his home language is Lozi .and the confession was taken down in English it cannot be said that the state had proved beyond reasonable doubt that the accused had clearly understood the explanation of his rights.

Defense submission in respect of the third accused

[94] Counsel submitted that the requirements for admitting confessions in terms of section 217 of the Criminal Procedure Act 51 of 1977 are very clear in that a confession

can only be admissible if it was made freely, voluntarily and without undue influence. Counsel further argued that the third accused was assaulted therefore could not render that he made such a statement freely and voluntarily and referred the court to a case of *S v Tjihorero and another* 1993 NR 398. Counsel agreed with counsel for the State that the criteria to be used is improper bending, influence or waving of the will not its total elimination as a freely operating entity. Counsel argued that the interpretation that was conducted on that specific day was not proper and that there were two interpreters involved of which it resulted the accused person not understanding the interpretation, as result accused did not make such a confession while in the sound mind.

[95] Further that the magistrate failed to ask all questions from the pro forma most importantly whether accused expect any benefit after making a statement and the witness conceded that she did not ask the question meaning that she did not place the accused person in that position to answer that question. That accused person was assaulted or manhandled and his evidence was corroborated by witness Andima who testified for the defense. Accused tried to seek help with the opening of a case by approaching the lawyer for accused six who could not help him. He tried to seek medical attention by reporting the assault to warrant officer Nuuyoma to no avail.

[96] Counsel further argued that the rights to apply for legal aid was not properly explained. He also referred the court to a case of *Malumo and 116 others*² where the Judge Hoff held that whatever the magistrate enquires further as well as answers thereof should be written down on the pro forma and that magistrate Savage did not explain the process of applying for legal aid and submit that is fatal on her part and she again referred the court to a case of *S v Nyanga and others* 1990 (2) SALR 547 which states that:

'The explanation to the accused of his right is never a mere formality. It should always be supplemented to cover the particular circumstances to do justice to the particular accused. That the magistrate is not a mere recording machine he must satisfy himself that accused understand and appreciates the explanation and his rights.'

² CC 32/2001, unreported and delivered on 14 February 2007.

[97] On the issue of assault counsel submit that indeed accused was assaulted by Nuule and Ipinge in that he was handcuffed tightly and was manhandled by Ipinge, whereas Nuule took him to the office and assaulted him with a belt handcuffed him in a number 8 position and told him what to go and say.

[98] Counsel disagreed with counsel for the State that his instruction about the mark that was shown to the interpreter was not put and argued that the record will show that it was put to her. On the issue of two interpreters, counsel argued that it is difficult to rely on Mrs. Tsaubaloko because she could not remember most of the things on her own but relied more on what is on the pro forma. The confession is dated the 4th of April 2015 while in reality it was taken on the 2nd of April 2015. Counsel submitted that the evidence of both Magistrate Savage and the interpreter is not reliable and should be approached with caution.

[99] In conclusion counsel argued that the interpreter maintained her position that the signatures appeared on each page and at the end is the same, however anyone can tell that it is not the same signature. Counsel submits that her explanation be rejected and court to accept third accused version. Counsel therefore submits that the State had failed tremendously to prove beyond reasonable doubt that these confessions were made freely and voluntarily and without undue influence and is guided by the principles laid down in *S v Malumo and 116 others*³ as well as *S v Malumo and 112 others*.⁴

Defense counsel submission in respect of the fifth accused

[100] In her submission with regard to fifth accused, counsel referred to the legal principles as outlined in the High Court case of *Calvin Lusilo Malumo and 116 Others*⁵ (and already referred to by her learned counsels in their submissions) at page 24 para 53:

³ CC 32/2001, unreported and delivered on 14 February 2007.

⁴ *S v Malumo and Others* (CC 32/2001) [2011] NAHCMD 104 (07 April 2011).

⁵ (CC 32/ 2001) [2010] NAHCMD 1 (1 March 2010).

'Nothing was said by the magistrate as to what had taken place to the accused person and the police prior to the appearance of the accused before him. The magistrate took down what was said as new statement previously made and this seems to be a practice commonly followed namely that an accused or suspected person is interrogated by the police and that when as a result of such interrogations he has been brought to a confessing state of mind. He is taken to a magistrate and then makes his statement before him as if he were making it for the first time. The result is that the proceedings before the magistrate is faithfully recorded by him may convey a very misleading impression of spontaneity on the part of the person making the statement. When as a matter of fact, the statement is not really made spontaneously but as a result of a series of interrogations.'

[101] Counsel agreed with the propositions in that fifth accused when he was arrested prior to the 2nd of April 2015, he knew nothing about the case and the information narrated to the magistrate was information provided to him by Nuule after this intense interrogation, and submit, he was brought to a confessing mind.

[102] Counsel also referred the court to a case of *S v Tjihorero and another* 1993 NR 398 at para 83 where it was said that:

'In deciding whether a confession or admission was obtained as a result of undue influence the test is not whether there was in reality no free will at all the criteria is the improper bending, influence or swaying of the will not its total elimination as a freely entity.'

She further referred the court to *S v Kasanga*⁶ and *S v Bruwer* 1993 NR 219 (HC) and *S v Nyanga and Others* 1990 (2) SAR 547 where it was stated that

'The explanation to the accused of his rights is never a mere formality. That explanation should always be supplemented to cover the particular circumstances to do justice to the particular accused. The presiding officer is not merely a recording machine he must satisfy himself that the accused understands and appreciates the explanation and his rights.'

⁶ 2006 (1) NR 348.

Counsel fully agreed with the propositions and submit that witness Stanley did not do that to satisfy herself.

[103] It is also counsel submission that on the strength of *Tjihorero*, not only that explanation have to be explained to the accused person but should be recorded on this pro-forma or on an additional piece of paper

[104] Counsel argued that the person explaining the right to legal aid must explain the whole process because if this is not done, it amounts to the rights not explained at all., that the fifth accused was assaulted and indicated to several police officers that he wanted to lay a charge or case of assault against the police officer that assaulted him but they refused to assist him. Same issue was raised at the first appearance and nothing was done as well and not recorded, the fact that there is no J88 should not be held against the accused as he was not taken to the Doctor or hospital. The fifth accused was not in a financial position unlike the sixth accused and was left at the mercy of the police .Counsel submit that the State failed to discharge its onus in as far as providing beyond reasonable that this confession given by the fifth accused was given freely and voluntarily.

[105] Counsel disagreed with State counsel when quoted from the case of *Dausab*⁷ in which Judge Siboleka said that:

'In this country police charge office are open day and night, they never closed for business at all. Any member of the public who has been assaulted may go and lay a charge against the assailant free of charge because this case is applicable to accused person who are on bail and not in custody and in this case accused 5 was in custody at the mercy of the police who assaulted him.'

The case is distinguishable because in that case accused were on bail and not in custody.

[106] Counsel argued that the fifth accused's level of understanding English is very low and in this confession exhibit "C" no interpreter was used. No duty on accused to

⁷ (CC 38/ 2009) [2014] NAHCMD 2 (15 January 2014).

confess and if he does it must be free and voluntarily without any undue influence and accused person must not be brought to a confessing mind. It is common cause that the confession was brought back to Nuule, he looked at it and was satisfied with it.

[107] Counsel finally submits that they have placed evidence before court that would justify and providing that this confession was not given freely and voluntarily including the giving of the confession and also the contents was not freely and voluntarily.

Evaluation of evidence

[108] For a confession to be admitted in evidence, it should satisfy the requirements of section 217 of the Criminal Procedure Act. The court must satisfy that the confession had been made freely and voluntarily and without undue influence. In addition the Court must be satisfied that accused has been properly advised of his rights to legal representation which includes the right to apply for legal aid. The court must further be satisfied that the accused made the confession whilst in his sound and sober senses.

[109] The onus is on the State to prove beyond a reasonable doubt that the above mentioned requirements are met.

[110] Whether first, third and fifth accused were warned of their constitutional rights and in particular their rights to silence, to legal representation and their rights not to incriminate themselves as well as the issue that the accused was never warned in terms of Judge's Rules or her constitutional rights and whether what third and fifth accused were coached what to say to the magistrates

[111] On this issue, Nuule testified that he had warned first and third accused according to the Judges Rules which in his evidence he said he explained what these Rules entails in detail. He stated that he explained to each accused amongst other things her or his rights to remain silent, the rights to legal representative of his or her own choice or a lawyer appointed by legal aid if accused persons could not afford a

lawyer of his or her choice. Nuule also said he explained the rights to the accused persons on two occasions namely for first accused at Wanahenda police station before arrest and later before the interview was conducted and third accused at the single quarter's service station where he was arrested and at Wanahenda police station before the interview and the accused persons indicated that they wanted to speak. Nuule further said Ipinge arrested fifth accused at his residents, however he was the one who warned fifth accused before the interview was conducted. Ipinge confirmed Nuule's evidence that he arrested fifth accused. He further stated that he informed him of his rights according to the judges Rules. Apart from Nuule's testimony that he did explain the accused persons rights and that of Ipinge, there is also evidence from Magistrate Horn , Savage and Stanley who took confessions from accused one, three and five respectively. As mentioned before the magistrates used pro formas where the rights to be explained to deponents are recorded in detail and these have already been referred to in the evidence. It should be noted and remembered that when first accused was asked what she elected to do after her rights were explained she is recorded as having said 'yes I understand, I want to tell what is in my heart and what I did before I talk to my lawyer 'and third accused replied 'yes I will speak without a lawyer while fifth accused said "No I will talk without a lawyer' The evidence on record is that Magistrate Horn and first accused spoke in English and Savage made use of an interpreter. While magistrate Stanley conversed with fifth accused in English All accused persons contended that they did not understand certain phrases and questions properly. Although accused persons contended that they did not understand some of the phrases and questions put to them it was Magistrates Horn, Savage and Stanley's evidence that the accused persons did not bring these to their attention.

[112] In addition to the above objection third and fifth accused also disputed the contents of the alleged confession as far as to say that Nuule dictated to them what to say to the magistrates. These versions were not put to Nuule to give him a chance to react to it. In any case certain information contained in the alleged confession of third accused was within his knowledge and could only come from him. Looking at the evidence as a whole more specially that Magistrate Horn, Savage and Stanley are

senior magistrates with vast experiences', it is highly unlikely that they did not explain the accused person's rights. Third and fifth accused when cross examined could not remember what they were told to say to the magistrates and if they cannot remember how it was possible for them to remember what contained in a five to six pages' documents. Especially when Nuule talked to them in English and their level of understanding English is very low. It is the finding of this court that the accused person's versions that their rights to legal representation including legal aid were not properly explained are highly improbable. I am satisfied that the rights of first, third and fifth accused were properly explained to them by Nuule, Ipinge Magistrate Horn, magistrate Savage and Magistrate Stanley and they understood their rights as explained. All accused elected to give statements in their own words.

[113] Whether first, third and fifth accused were physically assaulted or threatened to make confessions and in connection with the issue of assault all state witnesses namely Nuule, Libala and Ipinge who were members of the investigating team on the dates of arrest, of interviews testified that accused persons 1, 3 & 5 were not assaulted by them or in their presence. They also did not observe any injuries on the accused persons. The accused persons were taken to the magistrates but they never informed these magistrates that they were assaulted. First accused feared for Nuule who did not even assault her nor was he at court where a confession was taken. First, third and fifth accused stated that they could not understand the proceedings properly but there is evidence that first accused understand English well, that there was only one interpreter at third accused confession and fifth accused could converse properly in English and the magistrate Stanley did not explain in Afrikaans at some points. First, third and fifth accused also stated that they did not inform the magistrates that they were assaulted because they were threatened with the assault if they do not comply with Nuule's instructions. If the accused were assaulted hours before the confession, the atmosphere was not going to be relaxed after they gave their statements for them to have said they attempted to report the matter. They were still in police custody and Nuule could have still assaulted them. There is also evidence that third and fifth accused persons were booked in and or out without injuries, according to the entries of the 2nd April 2015

recorded well received and this was just hours before confessions were made. Sergeant Gustav and Chief Inspector Musweu and Nampila who took accused persons to court for a confession did not observe any injuries on them. Magistrates were not informed of any assault and did not observe any injuries on them. State witnesses corroborated each other on many aspect and in the absence of evidence to the contrary It is my respective view that the versions of first, third and fifth accused that they were assaulted before they were taken to make confessions are mere fabrication and am satisfied beyond reasonable doubt that first, third and fifth accused were not assaulted and gave the confessions freely and voluntary and without undue influence

Whether first, third and fifth accused were of sound and sober senses

[114] Accused's evidence before court is that she was emotional, crying and tears were coming from her eyes because she lost her husband However there is no evidence that accused was not having full control of her mind. In the circumstances where accused had full control of her mind it does not make any difference even if she was too emotional at the time she gave a confession. Magistrates who recorded the confessions testified that accused were not under the influence of liquor and observed them to be in their sound and sober senses .Mrs Horn stated that first accused was calm with tears coming from her eyes and her evidence was corroborated by Nuule's testimony. Lansdown & Campbell rightly pointed out at 869 that 'it need not be shown that the accused was in a state of quiet serenity free of physical or mental discomfort.' In the circumstances the fact that accused was mourning her husband cannot be said that she was not in her sound and sober senses. In the circumstances accused was in full control of her mind when she gave a confession on the 2nd day of April 2015. In the result I am satisfied that first, third and fifth accused were in their full sound and sober senses when confessions were made.

Whether first, third and fifth accused were unduly influenced to make the confession

[115] Nuule in his evidence stated that when he interviewed the first, third and fifth accused on the 2nd of April 2015 the accused persons indicated to him that they would like to confess and his evidence was corroborated by the two police officers who were present when the interview took place. Apart from the evidence of Nuule, first accused when asked by Magistrate Horn whether she was influenced to make a confession, she replied in the negative and same with third and fifth accused when asked by magistrate Savage and Stanley respectively. Counsel for the first accused wanted to know from the magistrate why she did not stop recording a confession if first accused said she expect benefits after making a statement and the witness responded that she did not stop recording because in her view first accused answer does not amount to a promise but is what first accused expected. Accused one in her testimony said she had indicated that she wanted to write her own statement in her own hand writing but Nuule advised her to go to the magistrate as there is same benefits of bail to be granted and lenient sentence. This on its own cannot be a promise especially if Nuule only advised the accused to go to the magistrate because he cannot take a confession. I find that indeed there is a difference between a promise and expectation and accused expected to be granted bail and lenient sentence if she made a statement and the magistrate was correctly proceeded with a confession and that all accused were not unduly influenced to give confessions.

[116] On counsel's submission that this court should consider the accused replies in the pre-trial memorandum, I agree with the defense counsel that it is an issue of credibility and intent to deal with the same in detail in the main trial.

[117] Having regard to the totality of the evidence, the merits, demerits and the probabilities I am in agreement with State Counsel that the Malumo's case can indeed distinguished from the facts of this case. I am satisfied that the confessions made by first, third and fifth accused were made freely and voluntarily and accused persons were in their sound and sober senses when they made confessions. That accused persons were not unduly influenced and no promise was made. I am also satisfied that each accused rights were in fact explained to them before they made the confessions.

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

The confessions made by first accused to magistrate Horn, third accused made to magistrate Savage and fifth accused made to magistrate Stanley on the 2nd April 2015 are ruled admissible.

.....

J T SALIONGA
ACTING JUDGE

APPEARANCES:

THE STATE:	M. Olivier Office of the Prosecutor General, Windhoek
FIRST ACCUSED:	M. Engelbrecht Instructed by Directorate of Legal Aid, Windhoek
SECOND ACCUSED:	T. Bockerhoff Instructed by Directorate of Legal Aid, Windhoek
THIRD ACCUSED:	T. Nhinda Instructed by Directorate of Legal Aid, Windhoek
FOURTH ACCUSED:	M. Siyomunji Instructed by Directorate of Legal Aid, Windhoek
FIFTH ACCUSED:	M. Kenaruzo Instructed by Directorate of Legal Aid, Windhoek

SIXTH ACCUSED:

N. Tjirera

Instructed by Directorate of Legal Aid, Windhoek