



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING TRIAL-WITHIN-A-TRIAL**

Case no: CC 24/2019

In the matter between:

THE STATE

and

FRANS ABRAHAM

ACCUSED

Neutral citation: *S v Abraham* (CC 24/2019) [2020] NAHCMD 233 (18 June 2020)

Coram: USIKU J

Heard: 16 June 2020

Delivered: 18 June 2020

Flynote: Right to legal representation includes entitlement to legal aid – must be explained to unrepresented accused person, especially uneducated and unsophisticated accused persons in such a manner that an accused person is placed in a position to make an informed decision.

Accused person must also be informed how to exercise such right or entitlement. Explanation of rights never a mere formality – Explanation must be supplemented to

do justice to accused person – Accused must understand and appreciate the explanation and his rights.

Failure to properly explain rights – Irregularity which may vitiate the proceedings.

The right to remain silent has application at different stages of a Criminal Prosecution – If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence – Entitled Court to conclude that the evidence is sufficient in the absence of any other evidence.

ORDER

The evidence which the State intends to lead through the investigating officer Sogaib with regard to the oral conversation between him and the accused are ruled admissible.

RULING

USIKU J

[1] The background to this matter is that during the evening of 31 December 2018 and the 1st of January 2019, an incident occurred on farm Spes Bona in the district of Maltahohe in the Hardap Region.

[2] As a result of the said incident, a formal report was made to the police and the victim was transported to Maltahohe and then to the Mariental State Hospital where she succumbed to her injuries on 2 January 2019.

[3] It is common cause that the accused person was arrested and charged with the crime of murder on the first count and attempted murder in respect of the second count to which he pleaded not guilty.

[4] The State proceeded to lead evidence of four State witnesses who basically testified about the events that transpired on the farm. The fifth State witness was the investigating officer Detective Warrant Officer Sogaib.

[5] In his testimony, the investigating officer informed the Court that he knew the accused person from Maltahohe and that he came to know him during his investigations of the murder and attempted murder charges.

[6] On 2 January 2019, he took in the accused person because he suspected him to have been involved in the stabbing of the deceased. He had earlier on received information that the deceased had succumbed to her injuries on the same date.

[7] According to him, Mr Boois who testified earlier before him, had related to him how he had visited the scene and saw the victim who laid on the ground and observed two wounds on the victim, one on the left arm and the other one on the abdomen which appear to be a serious wound.

[8] Based on this information, he took in the accused person and informed him that he was being regarded as a suspect. He proceeded to inform the accused about his legal rights which are, *enter alia*, the right to be legally represented by a lawyer of his own choice, also that the accused had a right to apply for a legal aid lawyer if he had no means to pay for a private lawyer. He also explained the accused's right to remain silent.

[9] It was at this point in time when the defence raised an objection to the effect that the investigating officer did not properly explain the accused's legal rights, taking issues with the manner in which the investigating officer conducted the interview after the accused had made an option to apply for legal aid.

[10] It is common cause that the accused opted to remain silent after the State had led the evidence regarding the issue of the rights having been explained to the accused. Thus, what is before Court is the evidence of the investigating officer that the rights were indeed explained.

[11] The defence submitted that once the accused had indicated that he wished to apply for legal aid, the investigating officer could not have proceeded with the interview, which in my view is the correct approach. It must be noted that what the Court is being asked to determine is the admissibility and contents of the oral statement made to the investigating officer. That would mean that whatever interview took place between the accused and the investigating officer was never reduced into writing. Which further means that there was no warning statement taken from the accused person. It is therefore impossible to prove how such rights were explained in the absence of a written warning statement having been obtained from the accused and *vice versa*.

[12] Furthermore, the accused opted to remain silent and as such, the evidence adduced by the State remained uncontroverted.

[13] It is trite law that, an accused has a constitutional right to remain silent at different stages of a Criminal Prosecution. However, the fact that an accused person is under no obligation to testify, does not mean that there are no consequences attaching to the decision to remain silent. In *casu*, it was the accused who alleged that his rights were infringed because the investigating officer proceeded to interview him without fully and properly explaining his rights.

[14] In my view, evidence presented by the investigating officer is calling for an answer and when the accused chooses to remain silent in the face of such evidence, this court could as well be entitled to conclude that accused's rights were indeed explained in the absence of any other evidence.

[15] Accordingly, the evidence which the State intends to lead through the investigating officer Sogaib with regard to the oral conversation between him and the accused are ruled admissible.

D N USIKU
Judge

APPEARANCES:

STATE:

I M Malumani
Office of the Prosecutor-General
Windhoek

ACCUSED:

M Engelbrecht
Instructed by Directorate of Legal Aid
Windhoek