



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 332 (6 August 2020)

Coram: USIKU J

Heard: 22 July 2020

Delivered: 06 August 2020

Flynote: Criminal Procedure – Pointing out – State carries the burden of proving that such pointing out are made freely and voluntarily – Not induced by threats or promise by any person or authority – Without having been induced by threats or promise by any person or authority – An accused's freedom of will should not be extinguished.

Summary: The charges preferred against the accused are that of murder and attempted murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. In that between the 31 December 2018 and 01 January 2019 at Maltahohe, the accused killed Elizabeth Swartbooi an adult female, the deceased. Secondly on the same dates and place, the accused attempted to kill his 3 week old baby boy, Rivaldo Reville Swartbooi, by causing him to fall on the ground on his head with intent to murder him. The charges are denied.

ORDER

Accordingly the evidence of pointing out is ruled inadmissible.

RULING

USIKU J

[1] At the commencement of the trial, the State led evidence of four witnesses which may be summarised as follows:

Dias Witbooi, he is a farm labourer on the farm Spes Bona. On 31 December 2018, they left the farm to visit on farm Grunau for the New Year celebrations. During that evening, the accused and the deceased got involved in a fight whereafter the farm owner decided to drive them back to farm Spes Bona. Upon arrival, the accused, the deceased and their children proceeded to their house. The accused returned to the witness's house because he wanted to smoke.

[2] A while later, the deceased also joined them asking the accused whether he still wanted to have sex, which made the accused angry. Again the deceased and the accused started to fight each other, but they were stopped whereafter they left for their house. The witness also left to sleep. The next morning they were tasked to slaughter animals after which they had a break for lunch.

[3] During the lunch break, the witness visited the accused's residence and found the deceased laying on the ground with a cloth on top of her. He observed a stab wound on her shoulder whereafter he asked the accused if he was the one who stabbed the deceased. The accused responded that he had even stabbed the deceased in the stomach. The witness also asked the deceased if she had been stabbed elsewhere to which she responded that she was also feeling pain in her stomach.

[4] The incident was then reported to one Wellem who in turn tried to contact the farm owner in South Africa. They were advised to contact the police and the ambulance. Wellem Tiboth confirmed the testimony of Dias Witbooi about having visited a neighbouring farm during the 31 December 2018 for the New Year celebrations. Also that they were driven back to farm Spes Bona because of the fight between the accused and the deceased. They each left for their respective places to sleep. The next morning they found the deceased having been stabbed and was laying on the ground.

[5] Gavin Cassidy Boois testified that he owns a farm in the area of Grunau West. During the month of December 2018, the accused and the deceased were amongst the people who visited his farm. During the night, an altercation occurred between the deceased and a lady who worked on his farm due to jealousy. This culminated into a fight between the accused and the deceased. He then decided to drive the people to their farm, and offered the deceased to stay over but she declined.

[6] The next day when he drove to farm Spes Bona to collect meat for his dogs, he received information that the accused and the deceased continued to fight each other the previous night. Upon arrival at the accused's residence, he met him outside. He also saw the deceased laying in front of the veranda, she was injured. The accused informed him that the deceased fell on the corrugated iron sheet whilst they were fighting. He however did not believe what the accused told him.

[7] Mr Boois drove back to his farm after advising the accused to summon the ambulance and the police. The next day, he was approached by the accused and a

lady who informed him that the deceased was not well. They also informed him that the ambulance could not come through because it was rain season. They requested him to take the deceased to the hospital. He could however not take a risk but called the police. The hospital was also informed about the deceased's condition. In the meantime, transport was arranged to take the deceased halfway to meet the ambulance.

[8] Detective Warrant officer Sogaib a police officer at the Maltahohe police station, testified that he informed the accused person about his constitutional rights and it was at this point, that the defence raised an objection after which the Court went through a trial-within-a-trial. At the conclusion the Court ruled in favour of the State.

[9] Mr Rigert Van der Westhuizen, previously a detective Inspector at Mariental police station testified. At the time of the incident, he was the Unit Commander. He has since resigned.

[10] As a detective Inspector, his duties includes forwarding cases to court and the conducting of pointing out as well as holding identification parades. He was requested to attend to a pointing out at Maltahohe. He met the accused for the first time on the 04 January 2019 at the Maltahohe police station. He travelled from Mariental police station in the company of Sergeant Mukwala, a Scene of Crime officer.

[11] Upon his arrival at the Maltahohe police station, he reported to the Station Commander. Whereafter he met Constable Kastoor whom he requested to bring the accused from the cells to the Criminal Investigation offices.

[12] He also met Sergeant Sogaib as well as one Lucas and Orum. He was offered office Room 5 at the police station. After setting in office Room 5, the accused was brought to him by Sergeant Kastoor. He requested the accused to seat down whereafter he introduced himself to the accused.

[13] He informed the accused that he was a Detective Chief Inspector and a Commissioned Officer. He asked the accused to introduce himself by name and accused informed him that he was arrested on a charge of murder on which he was in custody.

[14] Mr Van der Westhuizen, explained the accused's rights and showed him his appointment certificate. He warned the accused that he was not being compelled to give any statement or to answer any question or to point out any scene. He further informed the accused about his right to legal representation of his choice, by making use of a private lawyer who he has to pay and further that he can also make use of a Government funded lawyer by applying at the Maltahohe Magistrate Court. He informed the accused that the application will be done by him through the assistance of the Clerk of Court and will be forwarded to the Directorate of Legal Aid.

[15] It was at this juncture, the defence objected that the pointing out took place and the accused was involved but it, was not made freely and voluntarily and accordingly the Court went into a trial-within-a-trial on this issue. The evidence of Mr Van der Westhuizen with regard to the pointing out have already been referred to in the passage.

[16] Mr Sogaib said he knew the accused from the time of his arrest on the 02nd January 2019. On the 03rd January 2019 as he prepared to go and investigate the case, he was approached by one member who requested him to take the accused along in order to pick up his belongings as there was no older person to take care of the accused's belongings. The request was made by the accused to a member who in turn requested Mr Sogaib, the investigating officer.

[17] It was on that basis that Mr Sogaib told the member, to bring the accused to him. When accused was questioned about what belongings he wanted to pick up, he mentioned his clothing and bedding. According to Mr Sogaib, he then offered to take along the accused to the farm. Accused was booked out and they drove to the farm.

[18] Upon arrival on the farm, the witness testified that accused remained on the vehicle whilst he went on to take witness statements. After he finished with the taking

of statements, it was when he started to check around to see where the incident could have occurred. At that stage, Constable Kastoor was busy to pack the accused's belongings.

[19] Whilst the witness was busy checking and searching where the incident could have occurred, accused offered to show him where the incident had taken place. Mr Sogaib immediately stopped the accused, as he was not a commissioned officer but a Warrant officer to whom a pointing out could not be made. He explained to the accused further that a pointing out could only be made to a commissioned officer and also reminded accused about his Constitutional right to remain silent. His right to be represented by a private lawyer as well as his right to apply for legal aid through the Court, and that if he apply his form will be forwarded to the Directorate of Legal Aid. He was informed that if successful, the State funded lawyer will not be paid by him. That whatever he was going to convey to the witness will be noted down and could be used against him as evidence before Court.

[20] Accused responded that he did not need a lawyer and was going to speak for himself. The witness further warned the accused that he was not being forced to point out anything and that the witness can contact a commissioned officer in Mariental for that purpose. Accused responded by informing the witness that he was willing to do the pointing out as they drove back to Maltahohe.

[21] Upon arrival at the Maltahohe police station, the witness called Chief Inspector Hawanga and informed him about the accused's willingness to do the pointing out of the scene. Inspector Hawanga confirmed their willingness to assist in the pointing out and promised to send someone the next day. The witness visited the accused at the cells and relayed the information that someone will travel from Mariental for the purpose of the pointing out.

[22] The witness confirmed that on 4 January 2019, Inspector Van der Westhuizen and Mugwala booked out the accused and left for the farm. Warrant Sogaib could not participate in the pointing out because as an investigator, he is not allowed to do so.

[23] He denied to have either forced or influenced the accused to make the pointing out, because such would be unethical. Neither did he persuade the accused to do so. He did not assault the accused or made any promises of any kind to him in the event he chooses to do the pointing out.

[24] Accused testified during the trial-within-a-trial. He was arrested on 2 January 2019, by officer Kastoor and Erastus. According to him, the officers informed him that the warrant was looking for him. No further reasons were given why the warrant was looking for him. Accused testified that on 3 January 2019 he went to the farm Spes Bona in the company of the police. He had been handcuffed. He was kept in the vehicle as police took statements from witnesses. According to the accused, when police returned to the vehicle, they did not want him to take his belongings.

[25] The reason to go to the farm on 3 January 2019 was only to accompany the police. He did not ask the police specifically to accompany them. He was told by the Warrant officer that he must go with them and no reason was given why he should accompany them. Accused did confirm that he wanted to collect his belongings but the police refused him to do so. He also wanted to take his children, whom he collected and dropped them at their grandmother in Maltahohe.

[26] Accused did concede that his rights were explained to him by Inspector Van der Westhuizen, the right to legal representation and the right to remain silent. According to him other rights were also explained though he could not recall them at this stage. They conversed in the Nama language. Accused further testified that after the alleged pointing out, the Inspector did not read back what was recorded to him but merely asked him to append his signature.

[27] It is trite that the admissibility requirements on pointing out are that the pointing out must be done voluntarily and that the right to legal representation includes entitlement to legal aid, which must be explained to an unrepresented accused person, especially those who are uneducated and unsophisticated to the extent that an accused is placed in a position to make an informed decision.

[28] It appears to me that in this case, the inspector merely paid lip-service in explaining the accused's rights prior to the pointing out. The other issue that has arisen is whether the accused was given a reasonable time within which to exercise such rights. It was testified by the investigating officer that when accused offered to do the pointing out to him on 3 January 2019, he immediately stopped him, and told him that such could only be done to a commissioned officer. Nothing further was explained to the accused about the repercussions associated with the right against self-incrimination. It is trite that the right to a fair trial in terms of the Namibian Constitution includes the right against self-incrimination.

[29] It was important for the inspector to specifically have asked the accused whether he knew what the pointing out means, and why he wanted to do the pointing out and further that if he knew that by doing the pointing out was going to incriminate himself and thereafter confirm whether the accused still wish to do the pointing out to him. He would there and then warn the accused about the consequences. Nothing of that sort happened in this case.

[30] This Court is therefore not satisfied that the State that bears the onus to prove beyond reasonable doubt that the pointing out satisfied the admissibility requirements of voluntariness.

[31] Accordingly the evidence of pointing out is ruled inadmissible.

D N USIKU
Judge

APPEARANCES:

STATE:

I Malumani

Office of the Prosecutor-General

Windhoek

ACCUSED:

M Engelbrecht

Instructed by Directorate of Legal Aid

Windhoek