REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

TRIAL-WITHIN-A-TRIAL

Case No: CC 06/202

In the matter between:

THE STATE

and

SIMION SHIDUTE JEROBEAM **FIRST ACCUSED**

FABIAN HIPUKULUKA TANGE-OMWENE LAZARUS **SECOND ACCUSED**

Neutral citation*: S v Jerobeam (*CC 06/2020) [2021] NAHCMD 281 (07 June 2021)

Coram: LIEBENBERG, J

Heard: **02 June 2021 and 04 June 2021**

Delivered: **07 June 2021**

Flynote: Criminal Procedure – Trial within a trial – Warning statement – Not equated with confession – Taking of warning statements by Commissioned Officer not irregular – Warning statement found to be admissible.

Practice Directives – Reply to the state's pre-trial memorandum – Accused bound by answers provided.

ORDER

The warning statement of accused no 1 marked (Exh ‘A – TWT’) is ruled admissible into evidence.

RULING

LIEBENBERG J.

[1] During the testimony of Chief Inspector Litota from the Namibian Police and stationed at the Criminal Investigation Department Swakopmund, Mr *Nhinda*, counsel for accused no1, informed the court that he held instructions to challenge the admissibility of a warning statement purportedly made by the accused during the police investigation. This was unexpected as the accused, in par.54 of his reply to the state’s pre-trial memorandum stated, with regards to the admissibility of the said document, that it is not disputed except for disputing some of the content. The accused in his testimony explained this contradiction to be a mistake on his part.

[2] Initially only three grounds of objection were raised, to wit:

- The accused’s rights were never explained to him;
- The statement was not read back to him afterwards; and
- The content of the statement is disputed.

[3] It was only with the commencement of cross-examination of the witness Litota that counsel for accused no 1 broadened the basis of the objections to include two further grounds, namely:

- That Insp Litota had prior knowledge of the facts of the charges leading up to the arrest of the accused; and
- That the accused acted under duress when the statement was obtained.

[4] The state led the evidence of Insp Litota and Sergeant Tiofe, the latter acting as interpreter. It is common cause that the accused and Sgt Tiofe are both conversant in the Oshiwambo vernacular and experienced no problems in understanding one another. It thus means that where the accused testified that he did not understand what was explained to him, reference is made to the content of the information conveyed to him and not the language used.

[5] I will deal with the respective grounds of objection raised *seriatim*.

[6] The testimony of Insp Litota and Sgt Tiofe corroborate one another in material respects as far as it concerns the procedure adopted when interviewing the accused for purposes of taking down his warning statement. This was to use the Pol 17 pro-forma warning statement by informing the suspect (accused no1) of his rights along the lines set out in the document and to record his response thereto. Sgt Tiofe said that where the nature of the information he had to interpret to the accused was such that it was 'deep', he would simplify it by giving an explanation of what was meant. This prompted defence counsel's contention that the exact words of these interactions between the accused and the interpreter were not included in the warning statement, thus rendering it unreliable and inadmissible. It appears to me that counsel is taking the process of interpretation out of context in that experience in the legal field has taught us that the indigenous languages of this country simply do not have the same vocabulary as the English language. Where an English word is used which is foreign or unfamiliar to, in this instance the Oshiwambo language, the interpreter is required to simplify it by giving some additional explanation as to what is meant. This happens in our courts on a daily basis. This, according to Sgt Tiofe is what he did and that the accused fully understood the explanation given to him.

[7] To this end the accused countered in saying that he did not understand and seems to attribute this to the low level of formal education he completed with little attention given to the teaching of the official language in the North i.e. English. The accused's level of command of the official language is of little consequence if what is

printed in the pro-forma was translated and interpreted to him in his home language. There is no reason why he would not have been able to understand what was conveyed to him. The accused's evidence that he understood nothing of what was interpreted to him is therefore highly improbable. Moreover where his personal particulars, as reflected at the beginning of the statement and which could only have been provided by him, is correctly noted. What is also clear from his evidence is that the accused is very selective as to what he was capable of understanding and what not. He understood that he was asked about a lawyer; that he was asked to say what really happened and when asked whether he would be making a statement, he answered in the affirmative. If he understood the interpreter at the beginning of the interview, then why not throughout the session?

[8] As for the non-recording by Insp Litota of the simplification of the explanations by Sgt Tiofe, it is my considered view that this is not only impractical, it is not required by law to be done. To place such burden on the recording officer is simply unrealistic. What is required of this procedure and, of utmost importance, is for the suspect to fully understand what is conveyed to him through the interpreter and to record his response thereto. This process was fully explained by Sgt Tiofe during his testimony (See *R v Mutche* 1946 AD). I accordingly find the objection raised on this point to be without merit.

[9] The evidence of both officers is that the accused was duly informed and understood his rights as set out at page 2 of the pro-forma. As for the accused's right to remain silent, this is specifically dealt with in a question following after the explanation of the other rights, informing the accused that he has a choice as to whether he wants to make a statement or answer questions after consultation with a lawyer *or to remain silent*. The accused's response, as noted, is that he decided to give an explanation. In light of the discussion above regarding the accused's comprehension of what was interpreted to him, I am unable to see how it could be said that the accused was not informed of his right to remain silent. The information apparent from the pro-forma used during the interview – which is not contested – simply shows otherwise. That the accused understood what was explained to him, is apparent from Sgt Tiofe's evidence.

[10] Turning to the issue as to whether or not the statement was read back to the accused at the conclusion of the interview, this objection is obviously closely linked to the contention that the accused understood nothing that was read to him and that he simply signed because he was told to do so. It is not disputed that the accused appended his signature to the statement as it appears from the document. As set out in the statement, the signing of the statement follows only after the depositor has answered in the affirmative that he is satisfied (a) that what he has said was written down correctly; (b) that the statement or answers given correctly sets out his version of the events; and (c) whether he has any objections as to the manner in which the statement was taken down, or questions put to him. The statement in this instance reads that the accused was satisfied and raised no objections or complaints. To all this, the accused's evidence is that he did not understand what was conveyed or explained to him. In light of the accused's lack of understanding as to what was interpreted to him, the question as to whether or not he fully comprehended the nature and extent of his rights loses significance. If a person does not understand what is conveyed to him, how would he be able to have a proper understanding of his fundamental rights? In my view, this question can only be answered when putting the accused's version in context with the facts presented. The inquiry should thus not be limited to only consider what transpired on the day between the accused and the two officers involved in taking down his statement, but rather to follow a holistic approach, inclusive of other extra-curial evidence relevant to the issues at hand.

[11] On his own version, the accused became aware of his rights during his detention following his arrest. This implies that by the time when his current legal representative consulted the accused on the reply to the state's pre-trial memorandum in November 2020 he already knew about his constitutional rights and what it involved. Had he any uncertainty in that regard and, in particular, the infringement of those rights when his warning statement was taken, then one would reasonably have expected of the accused firstly, to bring this to the attention of his lawyer and secondly, to give instructions that would prevent the production of any evidence obtained in violation of such rights. Neither was done. In this regard see *S v HN* 2010 (2) NR 429 (HC). The

excuse proffered by the accused is that he forgot. In light of the import of the question raised in par.54 of the reply, which specifically deals with the *admissibility* of the warning statement, it seems inconceivable how the accused forgot to inform and instruct his counsel on what he knew would have constituted an infringement of his constitutional rights. The only reasonable conclusion to reach is that the raising of the issue at this late stage indeed came as an afterthought, as argued by the state.

[12] It is inescapable to conclude that the accused's attitude to the admissibility of the warning statement when completing the reply, is consistent with what is recorded in the statement itself, namely, that he had no objections as regards the manner in which his rights were explained to him or how the statement was taken down. In this respect, the accused's reaction subsequent to the recording of the statement and, as reflected in the reply, thus supports the evidence of the witnesses Litota and Tiofe as regards the manner in which the statement was obtained and the accused's willingness to make a statement. Consequently, when considering these facts, it seems inevitable to conclude that the accused's version is not reasonably possibly true and falls to be rejected as a fabrication. I accordingly so find.

[13] Turning next to the latter grounds raised, these can be disposed of with little ado.

[14] There is no legal prohibition for a police officer, or a commissioned officer (as in this instance), to take down the warning statement of a suspect in circumstances where such officer has prior knowledge of the crimes for which the person stands to be charged. It is common practice that a suspect is formally charged by the investigating officer, followed by the completion of a warning statement. From the argument advanced by defence counsel, it would appear to me that the recording of a warning statement is equated with the taking of a confession. This approach is clearly wrong for reasons that are so obvious that they need not be discussed here. The fact that Insp Litota was asked by the investigating officer to take the warning statement in circumstances where he was involved in the arrest of co-accused, *per se,* is not irregular. In the absence of evidence showing otherwise, I am unable to see how Insp Litota's involvement during the arrest of two co-accused at an earlier stage of the

investigation could constitute any basis from which the admissibility of the statement could be challenged.

[15] As for the last ground pertaining to the exertion of undue influence to coerce the accused into giving a statement, particular reliance is placed on the witness statement of Insp Litota recorded on 06 December 2017. In par 22 of the statement it is stated that he was requested by Sgt Gariseb to take the warning statement of accused no 1 and that of a former co-accused (Daniel). It further reads that in the office of Sgt Gariseb were present D/Insp Ushoona and D/W/O Geiseb. The following sentence reads that he used Sgt Tiofe as an interpreter. I pause to observe that the name of Tiofe is not mentioned as one of those being present in Gariseb's office.

[16] The evidence of Insp Litota is that he left Sgt Gariseb's office and went into office no 1 where only he, Sgt Tiofe and the accused were present. This much is confirmed by Sgt Tiofe who said that he found Insp Litota with the accused in the office upon his arrival; this was clearly *after* Litota had moved to the other office. Their evidence could not have come as a cover-up for what has been stated in Litota's statement as, already on the day of the recording of the accused's warning statement (03 August 2017), it was recorded that the interview took place in office no 1 of the CID and Traffic offices in Swakopmund, with the only persons present being the suspect, Sgt Tiofe and Insp Litota.

[17] Although para 22 of Insp Litota's statement might be open for interpretation that the statement was taken in the presence of the other officers, this is not borne out by the evidence of Litota and Tiofe; neither by the warning statement itself. The presence of the other two officers in Gariseb's office is not denied, but this was *before* Insp Litota moved to office no 1 where he was joined by the accused and Sgt Tiofe.

[18] The accused's assertion that officers Ushoona and Geiseb were also present is aimed at supporting his testimony where he said that, after he informed Insp Litota that he did not have a lawyer, he was asked to relate to what happened. When he remained silent, Geiseb remarked that if he does not speak, he will make things difficult for

himself. This, the accused said, frightened him as there were other police officers present in the office. Despite the accused's claim that he was under duress, he maintains that he did *not* make a statement.

[19] During oral argument I raised it with counsel what the significance was of the objection that the accused was under duress when he elected *not* to make a statement and to what extent he was prejudiced? Counsel advanced argument to the effect that there is a statement before the court – the admissibility of which the court is required to rule on – and that the accused would be prejudiced if the statement were to be admitted in the circumstances.

[20] The accused's stance in this regard reminds one of the proverb of *'To have your cake and eat it'*. This is not possible. The accused claims to have acted under duress when making a statement but at the same time denies having made a statement. That is nonsensical. The disparity in the instructions given to his counsel is such that it inevitably impacts on his credibility. Opposed to either of these versions stands the corroborating evidence of officers Litota and Tiofe that the accused acted freely and voluntarily when making a statement, and that the statement recorded and signed by the accused at the time is confirmation thereof.

[21] In light of the discussion above and the conclusions earlier reached herein, I am satisfied that the accused's allegations of intimidation are unfounded and fall to be rejected as false.

[22] In the result, the warning statement of accused no 1 marked (Exh 'A – TWT') is ruled admissible into evidence.

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JC LIEBENBERG

JUDGE

APPEARANCES:

COUNSEL FOR THE ACCUSED 1:	Mr Nhinda Directorate of Legal Aid
COUNSEL FOR ACCUSED 2:	Mr Engelbrecht Engelbrecht Attorneys
THE STATE:	Mr Olivier Office of the Prosecutor-General Windhoek