

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case No: CC 7/2020

In the matter between:

THE STATE

v

JOSEF JOHANNES

ACCUSED

Neutral citation: *S v Johannes* (CC 7/2020) [2022] NAHCNLD 11 (18 February 2022)

Coram: KESSLAU AJ

Heard: 14 February 2022

Delivered: 15 February 2022

Released on: 18 February 2022

ORDER

1. The three written statements of the deceased are ruled inadmissible evidence and the application from the State to present same into evidence is dismissed.

REASONS

KESSLAU AJ

[1] On 15 February 2022 I ruled three written statements of the deceased as inadmissible evidence following an application by the State to have the said statements admitted into evidence. What follows now are the reasons for the said ruling.

[2] The accused is arraigned before this Court on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. Undisputed facts are that there was an incident on the 4th of May 2018 involving the accused and complainant after which the complainant made three statements to a police officer from the Gender Based Violence Unit regarding an assault. On the 19th of May 2018 the complainant passed away. I will henceforth refer to the complainant as the deceased.

[3] The State, represented by Ms. Khama, made an application for the three statements made by the deceased to be admitted into evidence, which application was opposed by defense counsel, Ms. Horn.

[4] The State is relying on Section 222¹ of the Criminal Procedure Act 51 of 1977 for the said statements to be allowed into evidence in terms of the provisions of sections 34, of the Civil Proceedings Evidence Act 25 of 1965.

[5] The parts of Section 34 of Act 25 of 1965 which the State is relying on reads as follows:

‘Admissibility of documentary evidence as to facts in issue

34. (1) In any civil (criminal) proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that

¹ Section 222: The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), shall *mutatis mutandis* apply with reference to criminal proceedings.

fact shall on production of the original document be admissible as evidence of that fact, provided –

- (a) the person who made the statement...
- (i) had personal knowledge of the matters dealt with in the statement...; and
- (b) the person who made the statement is called as a witness in the proceedings unless he is dead....'

[6] Section 34 subsection (3) of the Act² reads:

'Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.'

The State submission is that the complainant/deceased is not an 'interested party' referred to in subsection 3. In this regard the court was referred to case law where a statement was allowed into evidence in terms of Section 34 from a police officer who investigated an accident scene but has passed on before the trial³. The court was also referred to a review matter where it was remarked that Section 34 could have been utilized by the State to introduce the statement from a hostile witness.⁴

[7] Submissions were also made by the State on the definition of interested person by relying on the matter of *Boshoff v Nel*⁵ wherein the interest as per Section 34(3) was explained by Lichtenberg R as:

'The interest is also not confined to a monetary interest, but it includes a personal interest, whether financial or otherwise, provided that such a personal interest is not too remote.'

In the said matter it was found that the statement of a fiancée was inadmissible as she was an interested party. The State argued that there is no reward for a witness at the end of a criminal trial and could there for not be seen as an interested party.

² Act 25 of 1965.

³ *Cremer v Afdelingsraad, Vryburg* 1974 (3) 252 (NC)

⁴ *S v Taapopi and Another* 2001 NR 101 (HC)

⁵ *Boshoff v Nel* 1983 (2) SA 41 (NC)

[8] The State furthermore submitted that the statement of the deceased is simply a statement without any concrete evidence or proof that she had anything to gain from hiding information or inserting false information; that the deceased when making these statements had no incentive to protect herself through lying⁶.

[9] Regarding the right to a fair trial as enshrined in Article 12 of the Namibian Constitution, the State argued that as far as that right is part of our law, similarly so are the provisions of Section 222⁷ and Section 34⁸. The court was referred to the South-African matter of *S v Ndhlovu and others*⁹ in particular the argument that according to their Constitution¹⁰ the right to cross-examine is not guaranteed but instead the 'right to adduce and challenge evidence' by an accused is included.

[10] Finally the State submitted that the deceased's witness statements should be admitted into evidence based not only on Section 34 of Act 25 of 1965 but under the exceptions to the hearsay rule under the English common law.

[11] Defense counsel in opposing the application, submitted that the Namibian Constitution rules supreme to any other legislation. In particular that Article 12 (1) (d) ensures the right of an accused to cross-examine a witness that was called against him. Furthermore that this right cannot be limited in terms of Article 22 of the Namibian Constitution and if so limited it will severely prejudice the accused as the deceased cannot be cross-examined on her statements.

[12] It was also argued that the statements by the deceased were inadmissible as she was an interested party in terms of Section 34(3) of Act 25 of 1965 in that she anticipated that the police will investigate the case made by her; that the statements were made to establish facts and that some of those facts are disputed by the accused.

⁶ *United Tobacco Co LTD v Goncalves* 1996 (1) SA 209 (W); *The South African Law of Evidence* (Zeffert D T et al) page 377 to 389.

⁷ Criminal Procedure Act 51 of 1977

⁸ Civil Proceedings Evidence Act 25 of 1965

⁹ *S v Ndhlovu and others* 2002(6) SA 305 (SCA)

¹⁰ The Constitution of the Republic of South Africa, 1996.

[13] Defense pointed out that the evidence contained in these statements, if admitted, cannot be tested in cross-examination particularly in the light that possible mistakes were made with the translation of the statements from Oshiwambo into English by the police officer.

[14] The issues before this court is thus firstly whether the deceased was an interested party as per Section 34 (3) and furthermore if allowing the statements into evidence is reconcilable with Article 12 (1) (d) of the Namibian Constitution.

[15] The evidence presented by Officer Angula regarding the taking of the statements from the complainant/deceased is that the consultation was in Oshiwambo after which the officer wrote the statements in English. These statements were taken down hours after the alleged attack whilst waiting to see a doctor. The written statements were translated back to the complainant/deceased before she signed them. The reason for taking a third statement was that the deceased omitted something from her first statement and the second statement was the so-called 'bail statement' needed in domestic violence matters.

[16] The deceased, at the time of making the statements, was a complainant who requested the assistance from the police to investigate the matter and deliver justice in her case. The case law referred to by the State, where statements were allowed in terms of Section 34 of Act 25 of 1965, referred to an investigating officer and witness who had no direct interest in the matters. Depending on the facts of each case¹¹ it may differ, but in this matter the deceased was the only one with a direct interest in the successful prosecution of the accused. Taking that into account I am in agreement with the submissions by the defense that the deceased was an interested party at the time when she made these statements. Furthermore that the statements do not fall into any of the common-law exceptions to the hearsay rule¹². In terms of Section 34 (3) of Act 25 of 1965 the three statements made by the deceased is ruled to be inadmissible evidence.

¹¹P J Schwikkard and S E Van der Merwe *Principles of Evidence* 4ed (2016) at page 316

¹²P J Schwikkard and S E Van der Merwe *supra* at 305

[17] This court is also in agreement with the submissions by the defense counsel that the Namibian Constitution is the supreme law of the land. Article 12 (1) (d) guarantees accused the opportunity to cross-examine those called against them. By relying on statements that cannot be tested, the accused is deprived of such right. In these particular circumstances it would prejudice the accused severely if evidence is allowed without giving him or his counsel the opportunity to test such version during cross-examination. It will also amount to a gross irregularity in proceedings¹³.

[18] In the result it is ordered that:

1. The three written statements of the deceased are ruled inadmissible evidence and the application from the State to present same into evidence is dismissed.

E. E. KESSLAU
ACTING JUDGE

¹³ *S v Shikudule* (CR 17/2015) [2015] NAHCMD 126 (5 June 2015); *Gamises v Kakuti* (CA 04/2017) [2017] NAHCNLD 102 (20 October 2017).

APPEARANCES

FOR THE STATE: Ms. D. Khama
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: Ms. W. Horn
W Horn Attorneys, Oshakati
Instructed by Directorate of Legal Aid