

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING: TRIAL WITHIN A TRIAL**

**CASE NO.: CC 4/2010**

In the matter between:

**THE STATE**

and

**DAVID DE JAY**

**ACCUSED**

**Coram:** SIBOLEKA J

**Neutral citation:** *State v De Jay* (CC 4/2010) [2013] NAHCMD 251 (16 August 2013)

**Heard on:** 5, 6 and 7 November 2012

**Delivered on:** 16 August 2013

**Flynote:** Criminal law – Murder, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 and Defeating the course of justice.

Trial within a trial: Admissibility as evidence, the letter the accused wrote to Det.

Chief Insp. Phillander and the confession he made to the Magistrate. He alleges these statements were preceded by assaults and threats perpetrated on him by police officers and should therefore be excluded as required by Articles 8 (2)(b) and 12 of the Constitution.

Held: The accused, a retired economics, business studies and accounting teacher, a degree holder and a Master's degree student, at the time of the arrest should not have found it difficult and fail to tell the Magistrate that he has been assaulted or threatened. He should also not have found any difficulties to tell the same to the two doctors who attended and examined him at different occasions. Any of the two doctors would easily have examined and recorded his findings such as injuries; wounds; swellings; cuts; while still fresh and related to the accused's arrest and or detention on this matter.

Held: It is my view that even a person who has never been to school could not find it difficult and fail to tell the Magistrate, or the doctor where he is injured and feels pain and how these came about.

Held: The accused's version that it was the police who handcuffed, blindfolded and assaulted him with a plastic shambok resulting in bruises on his back and swollen left hand is rejected as false.

Held: He instead freely and voluntarily made these documents

Held: However, the omission on the part of the three officers Chief Insp. Phillander, the C.I.D. Unit Com. Insp. Groenewald, Warrant Officer Kotungondo to inform the undefended accused of his right not to incriminate himself immediately (prior) to him starting to write the letter renders that document inadmissible as evidence before this court.

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## ORDER

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- The letter the accused wrote to Chief Insp. Phillander is not admissible as evidence before this court.
  - The statement (confession) the accused made to the Magistrate is admissible as evidence before this court.
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## JUDGMENT

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SIBOLEKA J

[1] Trial within a trial. The admissibility as evidence of the following documents are challenged:

- A letter written by the accused to Chief Insp. Phillander, and
- the (statement) confession he made to the Magistrate Blockstein Christiaan.

[2] The accused alleges that the police assaulted and threatened him to make the above statements thereby violating his constitutional rights to a fair trial as enunciated in Articles 8 (2)(a) and 12 of the Constitution. Further, that the accused was not warned about his right not to incriminate himself before he wrote a letter to Chief Insp. Phillander.

[3] I will now look at the evidence presented by the prosecution.

[4] Sydney Ettiene Phillander testified that he is currently a Deputy Commissioner at the Regional Headquarters in the Oshana Region, and is 22 years in the police force. During 2009 and 2010 he was a Chief Inspector serving as the Regional Crime Investigation Coordinator at Karas Regional Headquarters, Keetmanshoop. He started to know the accused during February 2009 when investigations about allegations of murder was launched against him which he was informed late Friday afternoon on 13 February 2009 while on his way to Windhoek. On Monday 16 February 2009 he instructed investigators to go back to the scene of crime and search for the knife, which they did and indeed found the knife. He also visited the scene later on.

[4.1] On Wednesday 18 February 2009 Insp. Groenewald telephonically told him the accused wanted to see him and he instructed that he be brought to his office some distance away from the Police Station. That same day before lunch W/O Kotungondo and Insp. Groenewald brought the accused to him. Since it was the accused who wanted to see him, the two police officers remained outside while he invited the accused into his office, sat down, and asked what he could do for him. He observed that he was at ease and comfortable. The accused asked the officer to arrange and avail him a pen, paper, and a place where he could write a letter. He called Insp. Groenewald and instructed him to assist the accused as he had requested, and the two officers left together with him. Besides the request the accused made to him, there was no other conversation between them. It was a straight forward request, which he granted there and then, and he sent him back with the officers.

[4.2] According to Chief Insp. Phillander he did nothing to the accused, and neither did he tell him anything apart from granting the request, the accused did not tell him why he specifically chose to come and see him and apart from the request, the accused did not complain or say anything to him. The accused left the Chief Inspector's office in the same condition and state he had come in, there

was nothing strange about him. Later that same day while on his way to Windhoek Insp. Groenewald called him saying they read about a knife in the accused's letter, resulting in a search and finding thereof. They handed the letter to the Regional Commander, Commissioner Abel and the accused was transferred from the Police Cells to the prison.

[4.3] At some stage Insp. Groenewald called and told him the accused wanted to make a confession. He instructed that he be reminded of his rights and a warning statement be completed as proof that the rights were explained to him.

[4.4] In cross-examination he confirmed he arrived at Keetmanshoop in December 2008 in the rank of Chief Inspector and Regional Crime Investigating Coordinator. All Unit Commanders of all criminal investigation units in the Karas Region report to him. Insp. Groenewald is the Unit Commander at Keetmanshoop. It was the first time for Chief Insp. Phillander to see the accused the day he was brought to his office, but he said Keetmanshoop as a small place it is likely that the accused may have known him before.

[4.5] Responding to a question from the accused's counsel that the accused never asked to come and see him, he said he does not know how the police would have brought the accused to him without any good reason. He said it was not necessary that the accused had to know him before he could ask to see him. It happens, according to this officer that suspects do ask to see senior police officers, and there is nothing wrong with that. He said it was the accused's own choice that he decided to see him instead of seeing the Regional Commander, Deputy Commissioner Abel. Counsel asked the Chief Inspector why he did not ask the accused "... did you request to see me ..." when he came into his office. According to the accused's counsel such a question would have attracted the accused to say "... I did not want to come and see you".

[4.6] In my view a similar question which the Chief Inspector asked the accused

when he entered his office "... I asked him what I could do for him" serves the same purpose. The accused would have informed the Chief Inspector that he did not ask to come and see him or he did not know why he was brought to the Chief Inspector's Office. According to the Chief Inspector knives are not supposed to lay around in police offices, as a result he does not think the accused found the knife in the office where he was put to write his letter at the police station. He stated that from his experience as a police officer, people smuggle things into the cells. He is not sure whether the accused was searched before entering the Cell or not.

[4.7] In his office he did not show the accused his police appointment certificate, but only introduced himself as Chief Insp. Phillander. They shook hands, greeted each other. The accused sat down and appeared to be comfortable. The officer did not see or observe anything strange with him. Since he was already told telephonically about the accused's coming, when the two officers knocked at his door he opened, the accused came in and he told the officers to excuse them. The accused did not tell him what he wanted to write in his letter and neither did the officer ask him anything in that regard. He did not think the accused will incriminate himself in the letter, because prisoners do write letters from the prison. The officer said, if it was him that wanted the accused to make a statement he would have proceeded to show him his police appointment certificate, warn him about his rights that he was before a Justice of the Peace, that if he said anything pertaining the matter it would be written down, rights to legal aid, and legal representation. The accused told W/O Kotungondo about making a confession before the Magistrate, the latter told Insp. Groenewald, who then informed Chief Insp. Phillander.

[5] Barend Jacobus Groenewald testified he is a Detective Chief Inspector, Keetmanshoop and he knows the accused first as a teacher and later as the accused on this matter. He was not fully involved on this matter like was the case with W/O Kotungondo. Wherever these two officers were jointly involved, their

evidence corroborate each other. From Chief Insp. Phillander he took the accused to his office, there he allocated him in one of the offices with just one office between them. The accused told him he wanted to be alone in a closed office and that privacy was provided, to enable him to write his letter. He further provided the accused with a pen, paper, water, and ashtray because he is a smoker. He did not talk to him apart from asking whether there was anything he needed, but he said he was okay.

[5.1] Insp. Groenewald went and continued with his office work. Later the accused requested that he be seen by his pastor and son-in-law, it was arranged and they joined him in the same office. This time the office door was opened to enable W/O Kotungondo to see what they were doing. In the end the accused expressed satisfaction in the arrangement made for him and asked the officer to personally give the letter to Chief Insp. Phillander. However, the latter was out of town and the officer gave the accused's Afrikaans written letter to the Deputy Commissioner Abel, and explained the contents to him. From that day the accused was transferred to prison because in that same letter he threatened to commit suicide. There is also proper guarding there than at the cells where there is overcrowding and easy for unlawful things to be smuggled in. Later W/O Kotungondo informed him the accused wanted to be taken to the Magistrate for a confession, and he on his part informed Chief Insp. Phillander and Deputy Commissioner Abel.

[6] Theodore Kotungondo testified he is Warrant Officer Class 2, working at the Namibian Police Unit Commander Serious Crime Unit in Keetmanshoop. He is 17 years in the force and of these 10 years is at the Criminal Investigation Unit. He initially worked at Tsumkwe, Mariental and back to Keetmanshoop, his place of birth from 2005. He already knew the accused before this incident on another matter whereon he investigated him. On the current case, the Regional Commander, Commissioner Abel instructed him to take charge of the investigation as a senior member.

[6.1] On 18 February 2009 W/O Kotungondo received a message from the Charge Office personnel, Cst. Heinuka that the accused wanted to see investigation officers. At 10h20 he booked him off for investigations. He searched and found nothing on him. He was sober and injury free and he took him to Insp. Groenewald, the Unit Commander of C.I.D. in Keetmanshoop. He asked the accused why he wanted to see the investigators and the accused explained that he in fact wanted to see the Head of Investigators (C.I.D.) who was Chief Insp. Phillander at the time. At Insp. Groenewald's office the accused explained that he wanted to see the Head and talk to him in private. He said he had something to talk with that officer. Insp. Groenewald phoned the Chief Inspector who confirmed that he was in his office. The two officers took the accused there by car. The accused and Chief Insp. Phillander were there behind closed doors, while this witness and Insp. Groenewald waited outside. It was not long when Chief Insp. Phillander opened the door and told them the accused wanted to be assisted with a pen, paper and a place where he can write a letter. It was there that they learnt about the purpose of the accused's visit.

[6.2] They drove back to the Police Station where Insp. Groenewald assisted the accused as requested, he wrote the letter he wanted. Before he started writing his letter, they searched for any weapon the accused may use to injure himself. This officer then left, to attend to other complaints. Insp. Groenewald remained attending to the accused, while also busy with admin work. This officer came to guard the accused there where he was writing his letter whenever he was available. The accused was busy in the office for seven hours, and while the officer was still at the door the accused told him he was finished. The accused came with another request, saying he wanted to see Pastor Basson and his son-in-law, Robert Kasper and he provided contact numbers to Insp. Groenewald. He then phoned them, they came and went in the same office where the accused was writing a letter. The accused told this officer he wanted to share the contents of the letter he wrote with the two persons. As the officer stood at the door he



could hear the accused reading the letter to the two men there inside the office, they concluded with a prayer by Pastor Basson and he took them to Insp. Groenewald. Inside Insp. Groenewald's office the accused put the letter in the envelope, sealed it and addressed it to Chief Insp. Phillander. He was taken back to the cells unsearched.

[6.3] At about 16h25 Commissioner Abel phoned to tell this officer that he read the accused's letter, wherein he learned that he wanted to commit suicide and that there was a knife in the office where the accused was writing the letter. With the assistance of some Charge Office personnel he went to the accused, searched him and found the knife on his person. The cell where he was kept was also searched but they found nothing. He booked the accused out, took him to the Charge Office where he phoned and reported the knife he found to Commissioner Abel. He was instructed to transfer the accused to prison which he did. On 11 March 2009 Pastor Basson brought a message to this officer from the accused that he wanted to make a confession. He conveyed the message to Insp. Groenewald and it also reached Chief Insp. Phillander. They did not quickly do anything because they thought it was a lie. In the meantime, Insp. Groenewald was instructed to obtain a warning statement from the accused. On 16 March 2009 Insp. Groenewald phoned, telling the officer that they should take the accused to the Magistrate for a confession. This officer and Sgt. Katjipuka took the accused and handed him over to the court orderly Sgt. Heinz. While so underway they greeted each other. The court sergeant confirmed receipt of the accused and he handed him to Magistrate Christiaan.

[7] Kavazeua Andries Katjipuka testified he is a Detective Sergeant for more than ten years. He knew the accused as a teacher since he came to Keetmanshoop in 1996. He was part of the team of investigators on the matter. He transported the accused to Windhoek to see a doctor. He is the only driver at the C.I.D. Unit Commander's office. On 16 March 2009 he went to prison to collect the accused and there the accused told him he had to be taken to court

for a confession. He transported and handed him over to the Court Orderly Sgt. Heinz and after he finished W/O Kotungondo went to collect him. In cross-examination he said Insp. Groenewald told them the accused wanted to make a confession. The officer said their culture was that when they are sent to collect an arrested person they have to confirm with him where he wants to be taken and the reason therefore. That is what he also did to the accused. Before he transported the accused to the Magistrate for a confession he personally asked him whether he wanted his lawyer to be present there as well, and the accused said 'NO' not at that stage. According to the officer, the reason why he asked that question was to enable him to help make arrangements for a lawyer to be there as well.

[7.1] According to this officer, Pol. 17 the warning statement of the accused had already been completed several times before the accused was taken to the Magistrate for a confession. The brief interview on the first day was on 13 February 2009 at the scene, he found other officers already there. He did not ask the accused whether he wanted to be legally represented before he was interviewed, because the condition at the scene was such that he was not yet even a suspect in the eyes of the police.

[7.2] The second interview was on 15 February 2009, and that was when his first warning statement was taken. The officer did not inform the accused of his rights and he does not know whether his superior, the Unit Commander who was also there did that to him. When he took the accused to the Magistrate for the confession and later to hospital he physically inspected his face but did not observe any bruises or marks.

[8] Philanda Blockstein Christiaan testified she is a Magistrate and the Head of Office at Keetmanshoop. She was five years and two months in the Magistracy at the time the accused was brought to her on 16 March 2009 for a confession at around 09h00 in the morning by the Court Orderly Sgt. Heinz. The accused

preferred English as the language he would use to speak to her. The Magistrate closed her door and there were only two inside. She told the accused she was the Magistrate, and there was nothing to fear, he should feel free to speak frankly with her. She also told him there was no need to be afraid of anything in her office and that she would provide him with protection if he needed it. She explained to the accused that he had the right to have a lawyer before he starts to give the confession. That she was ready to grant him an opportunity to make arrangements for the presence of his lawyer. She asked whether the accused understood the explanation and he confirmed. The accused told her 'NO' he did not require a lawyer before giving a confession. The confession proceedings and questions that she asked the accused are all contained on a pro forma form usually used for that purpose.

[8.1] She wrote down the accused's answers on the pro forma form. In court she recognized the document as the one she completed in her own handwriting. The court granted her leave to read it into record, which she did. Question 8 reads and I quote verbatim at page 954 of the transcribed record : line 30:

“... have you any injuries and if so of what nature? The answer of the declarant at this stage was none. Part 2 of question 8: How did you sustain these injuries? The answer was also none.”

The Magistrate did not observe any injuries. The accused told her he wanted to make a statement and that he was not assaulted, threatened or persuaded to do so.

At page 955 line no. 19:

“Question 9: Were you influenced or encouraged by any person in any other way to make a statement ... answer: ... Pastor Basson encouraged me as my religious Leader to make the statement.”

[8.2] The accused said he was not promised anything should he make a statement. He told the Magistrate that the circumstances under which he made a statement to W/O. Kotungondo and Cst. Katjipuka were not very pleasant. To the question why he wished to repeat what he already told the police officers he said and I quote verbatim at page 956 the first paragraph of the transcribed record:

“... I did not have the opportunity to say all I wanted to say that was on my heart. Thus the statement was incomplete. That prompted me to come and make a confession with the Magistrate as the police officers were shouting and yelling at me.”

[8.3] The accused told the Magistrate nobody told him what he must say in his confession. He told the Magistrate he wants to make a confession and was not assaulted or threatened by any person to do so. He stated that what he was about to tell the Magistrate was the truth and according to his personal knowledge and that he was in his sound and sober senses. The statement was then taken (written) down, read back to him. According to the Magistrate, the accused told her that by the word ‘encouragement’, was “... that it was for him to just talk the truth.”

[8.4] In cross-examination the Magistrate said she did not explain to the accused the rights to legal aid during the confession proceedings because she already did that in court whereafter the accused indicated his lawyer was Mr Le Roux. She said she found Pastor Tase Basson’s encouragement to the accused to ‘speak the truth’ to be in a positive way because the pastor is the accused’s own religious leader. She does not agree with Mr Isaack’s contention that had it not been for Pastor Basson’s encouragement the accused would not have made a confession.

[8.5] Here are some of the extracts from the cross-examination of the accused which clearly shows how he understood his rights to ‘legal aid’ when he appeared before the Magistrate for a confession. I quote verbatim from the transcribed record as follows:

"Page 1043 line 10:

But on that day the 11<sup>th</sup> March you were already aware about legal aid, is that not correct

--- Yes.

Kotungondo had told you twice in fact --- Yes

And you knew there was Legal Aid on the day that Groenewald came on the 11<sup>th</sup> March

--- Yes.

But on the 11<sup>th</sup> it was the fourth time that you were advised of your rights in the course of these investigations? --- That is correct. You were then taken before a Magistrate. Is that not so on the 16<sup>th</sup> March, 2009 --- That is correct.

Page 1045 line 10:

So the issue of rights as far as you were concerned you are fully appreciative of them --- Yes.

The Magistrate did ask you about whether you wanted your lawyer Mr Karl Le Roux present? --- That is correct.

At line 20:

Did you tell or did you advise the Magistrate that she could proceed without your legal representative? --- That is correct."

[8.6] The fact that the accused was already represented by Mr Le Roux at his first appearance, coupled with the fact that before Cst. Katjipuka brought him to the Magistrate for a confession he asked him whether he would like to be together with his lawyer before the Magistrate, the accused said 'not at that stage'. The Magistrate also asked the accused whether he wanted his lawyer to be present before the start of the confession proceedings, but the accused said no. I am satisfied that the Magistrate's omission to explain the 'legal aid' part of the accused's rights to legal representation did not materially affect his reasoning to make an informed decision in this regard.

[9] Charles Heinz testified he is a sergeant in the police from 1999 working as

a Court Orderly at the Magistrate's Court, Keetmanshoop. He knows the accused as a teacher at GNL School in Keetmanshoop. On the day in question he received the accused from Cst. Katjipuka for a confession. He locked him up in the Court Holding Cell and latter took him to the Magistrate, led him inside, closed the door, waited until they were finished. He received the accused from the Magistrate's office in the same state, and handed him back to Cst. Katjipuka. He did not speak to the accused, who appeared normal to him and did not observe any injuries on his face or arms. He had a rolled up long sleeved shirt on.

[10] The accused testified in his own case and called one witness George Cloete.

[11] David De Jay testified he was currently going up to 62 years of age. He was arrested on 13 February 2009 by W/O. Kotungondo and Cst. Katjipuka in Keetmanshoop. After arrest they took him to hospital and then to the Police Station between 19h00 to 20h00 in the evening. At the Police Station he appeared before six male and one female police officers who started to interrogate him inside W/O. Kotungondo's office. The latter explained to him his rights to remain silent, right to legal representation and the right to apply for legal aid. The accused said he can still recall these rights as explained to him. He did not give a reply to the explanations of his rights and the interrogations started immediately. Later the accused changed and said after the explanations he asked whether he can call his lawyer. He called and talked to his lawyer's wife who told him Mr Le Roux was at the farm and will only be back on 14 February 2009.

[11.1] The accused informed the police officers accordingly when his attorney will be in, and the interrogation started. It was not very pleasant, it was a Friday Valentine's weekend, the police officers were already off duty, were only called to create the two hours interrogation team talking in very loud voices. A female

officer had a lot of questions like "... old De Jay, where is your wife ha, ha, ha." They laughed and made a joke of the matter. His wife had passed away two hours before the start of the interrogation, he felt very bad, confused, sick, and had pain on the prostate. It was done in a violent, cruel manner. Thereafter he was locked in a small cell, no blanket, no mattress, no water, no toilet, no food. Nothing happened the following day 14 February 2009.

[11.2] On 15 February 2009 W/O Kotungondo took him to his office to complete the warning statement. There he read out to him his rights. He told the officer Mr Le Roux was back and he wanted him to be present. W/O Kotungondo said he cannot disturb the lawyer on Sunday, he refused to call him. My choice on legal representation was that I want my private lawyer. From there he was taken to the trial awaiting prisoners cell. There an inmate George Cloete offered to make a bed for him, and it was the first time to see him. On 16 February 2009 before he made his first appearance in court his lawyer Karl Le Roux came to see him at the Police Station. Mr Le Roux represented him in court before Magistrate Blockstein Christiaan.

[11.3] On 17 February 2009 at 10h30 W/O Kotongondo came and fetched him at the main prison in Keetmanshoop and took him to his house where a search of the whole house was conducted. During the search he stood in the sitting room and saw a police vehicle stop outside, the person talked to the officers and drove away. While still there W/O Kotungondo told him Chief Insp. Phillander wanted to see him. He was taken back to the Station and there W/O Kotungondo and Insp. Groenewald were talking and making calls. W/O Kotungondo and another unknown police officer took him to Chief Insp. Phillander. Insp. Groenewald remained behind.

[11.4] According to the accused Chief Insp. Phillander greeted him in a friendly manner saying he was a new person in Keetmanshoop and was informed about his wife's death. He asked the accused if there was a manner in which the

accused can help the police. The accused asked whether he could make a declaration, but Chief Insp. Phillander said no, even a personal letter would be in order. I don't see the reason why a Chief Inspector, a Commissioned Officer would have opted to take the route of getting the accused write a personal letter to him instead of taking a confession there and then in his office. I don't agree with this at all, given the fact that the accused was even willing to make a declaration. In my view even a newly recruited constable would be in a position to know that a suspect cannot write a personal letter to a police officer regarding what happened it should be a confession before a Justice of the Peace, who are Chief Inspectors and above.

[11.5] The accused told Chief Insp. Phillander he did not have any problem in helping the police but he did not have anything on him. The officer said he will arrange for a pen, paper, ashtray and water and he called Insp. Groenewald and instructed him to provide the above. Insp. Groenewald took the accused back to the cells.

[11.6] On 17 February 2009 12h00 at night the accused was handcuffed, blindfolded with a tie taken out of the cells. He was taken to where there were people in the office but only one talked. I cannot understand how the blindfolded accused was able to see that there were people there where the police took him and that only one was doing the talking. He was told to stretch his arms and hold a chair. A person who spoke in English told him "... tonight we want the truth, old man did you hear me." One hurt him by bending his fingers, the one behind hit him on the back, and he told them what happened. After an hour and half they went out of the office and were talking in front of the stoop. In my view all this can surely not be observed by a blindfolded person. The police told him he was an innocent person, but because he was already charged for murder he should write down a statement at Insp. Groenewald's office. The police would then make sure he returned home as a free man. He was taken back to the cells where he told George Cloete he was assaulted. He showed him his hands, small finger, middle



finger, thumb, and assault marks on his back. George Cloete took ointment and applied it on his back and washed his T-shirt and hanged it there in the cell. He told Cloete the police told him if he did not co-operate they will see to it that he walked the same path as Marais Ikale, a trial awaiting suspect who died in detention at Keetmanshoop the previous year.

[11.7] On photo 25 and 26 he showed healed marks on his back which he allegedly did not have at the time of his arrest on 13 February 2009. He was afraid to tell Insp. Groenewald that he was assaulted the previous night.

[11.8] The next day, 18 February 2009 at 10h00 W/O Kotungondo took him to Insp. Heinz's office who was then out on a course. The windows were open and he was given a pen, paper and water. He had his briefcase because he could not leave it behind at the cells for fear of it being stolen. They searched the bag and his person and looked around the office. They left him there and locked the door. He had prostate and gout problems. He first wrote a statement where he bequeathed all the belongings to his children. Then he started to write a letter to Chief Insp. Phillander for approximately an hour. The two person in the corridor told him to write good things. On one of the shelves was a long dagger knife. The police reminded him to write what they told him and to think about Ikale. He was very scared, and by 16h00 he was done. Insp. Groenewald knocked and opened the door, the accused showed him his last will and a testament for which he wanted Pastor Tase Basson and his wife's brother-in-law Robby Caster to come and sign.

[11.9] The accused is silent on whether the will (testament) relating to his property that he wrote was also in accord with the alleged police instructions to write a letter to Chief Insp. Phillander. The accused gave the telephone numbers of the two persons to the officer and they came within a short time. The accused asked them to sit down and he read out the testament to them and they initialed each page and signed accordingly. He also read the statement (letter) to them in

which reference was made to a knife which was allegedly on the shelf. He put the two documents in an envelope, closed it, and addressed it to Chief Insp. Phillander. He put the knife in his briefcase in order to show it to the Magistrate at his next court appearance because it was used to threaten him. He was taken back to Insp. Groenewald's office, his person searched as well as his briefcase where they found the knife. Insp. Groenewald said the accused wanted to commit suicide, and was transferred to Keetmanshoop Prison with strict instructions to the officials. No telephone calls, visitors and was locked up in the trial awaiting prison. Pastor Basson was allowed to visit him frequently and was arranging with the police that the accused's vehicle the Chrysler be parked in the shade.

[11.10]The accused said the Pastor related to him how the police were unhappy that he wrote a letter instead of making a confession before the Magistrate. He said he will think about it because it was the first time to hear about such a thing. Insp. Groenewald visited him at prison and told him the letter he wrote to Chief Insp. Phillander was not valid and he had no choice other than to go to the Magistrate and make a confession. I quote verbatim at page 1000 the first paragraph on the transcribed record, what the accused told Insp. Groenewald:

“Then I said okay I will go then you should arrange for my lawyer to be there. I said you are here today but my lawyer is not at the prison. Where must your lawyer be? Where is there? Lawyer must be there where is that? --- I said if he is the head of the police come to me then he should bring along my lawyer. Sorry just hang on. May you answer my question. You said to him you want your lawyer to be there where is there? --- At the Magistrate's Office. And do what? --- To assist me there at the Magistrate.”

[11.11]It is very clear from the above that the accused had a lawyer and was aware of the purpose of having him. It follows therefore that his judgment on the choices to make regarding his legal representation was not affected by the Magistrate's omission to explain the legal aid part of his rights to legal

representation at the beginning of the confession proceedings.

[11.12]Sgt. Katjipuka is the one who was tasked to transport the accused to the Magistrate for a confession. The evidence of this officer corroborates that of the Magistrate materially in that the same accused answered “not at this stage” and “No” to the Magistrate when he was availed an opportunity for arranging the presence of his lawyer at the confession proceedings.

[11.13]It is therefore my considered view that it was the accused’s choice not to have his lawyer present at the confession proceedings. I am reluctant to accept accused’s allegation that the police officers Kotungondo and Groenewald refused to call his lawyer.

[11.14]During cross-examination the accused conceded that his allegation of a violent interview related to seven police officers interrogating him was never put to Kotungondo and Katjipuka to react to it. The accused said the following about what he meant by a violent interrogation that he went through. I quote verbatim at page 1010 line 10 of the transcribed record:

“What do you mean by violent? --- The question like old De Jay. Where is your wife. Where is your wife and a loud laugh, followed by a loud laugh. When I tried saying something My Lord then they would shout you are lying. So the violence that you spoke of was in their tone, in their voices, not physical violence? --- Their behavior My Lord.”

[11.15]The accused also conceded during cross-examination that he properly understood the explanation of his rights to silence, legal representation and legal aid by W/O Kotungondo. He understood the difference between a private lawyer and a public lawyer, hence his choice to engage a private lawyer Mr Karl Le Roux. The accused further conceded during cross-examination that at the time he was taken to the two separate doctors at different times he had not yet received treatment for his alleged injuries on his fingers and on the back which the police allegedly inflicted on him while handcuffed and blindfolded. In my view,

the two doctors are just like any other medical practitioner. They saw the accused with a view to examining him and to prescribe medication for the treatment of any ailment they would find on him.

[12] While still in pain from the alleged serious injuries inflicted on him by the police the accused was attended and examined by two doctors, Coetzee and Stellenmach on separate occasions but he never told them about these injuries. According to the accused his cell inmate was also able to see that he had problems with his injured hand. He however never received medical treatment regarding these pains and serious injuries on his body. He testified that his injuries had nothing to do with the doctors' that is why he did not tell them. He was only seeing the doctors for diabetes and prostate and not for anything else. Eighteen months thereafter the alleged assault the accused decided to go to Dr Petrus for the x-rays of his hand. In my view it is common knowledge that a doctor is there to attend to paid and sickness in general, irrespective of the cause. He is there to examine and prescribe medication with a view to restoring a patient to his/her normal health life. It is further my considered view that even a person who has never been to school will not find any difficulties in telling the doctor that he is paining, where exactly on his body, and how it came about. I fail to see how the accused, a Degree holder, a teacher of economics, business studies, and accounting since 1974, now retired, a Master's degree student at the time of arrest would have found it difficult to inform such pains and injuries to his son-in-law and the Pastor, his own Religious leader the two persons who visited him at his own request, to the Magistrate and to the two doctors who attended and examined him after the alleged assault by the police.

[13] It is therefore my considered view that when regard is had to the above observations it is highly unlikely that the accused acquired the alleged wound marks in custody after his arrest on this matter. He is not telling the truth in this regard. There is a strong possibility that he could have received the injuries from anywhere in the past two years.

[14] The accused said during cross-examination that while writing a letter to Chief Insp. Phillander an unknown person told him through the window he should write nice things or else he will end up like Marais Ikale who died in police custody. Later on an unknown person again came and told him a knife was left on the shelf. He saw it, took it and put it in his clothing briefcase to show to the Magistrate, which he didn't say he did. He related to it in his letter to Chief Insp. Phillander. Police got alerted and they transferred him from the Police Cells to prison.

[15] George Albertus Cloete, now 38 years old, testified that he came to know the accused on 15 February 2009 when he was brought to a trial awaiting police cell where he was an inmate. They were only two in Cell No. 4. He made a bed for the accused next to himself that is how they came to know each other. On the morning of 16 February 2009 the accused was taken to Court. On 17 February 2009 he was collected by a police officer, and on return the accused told him that Chief Insp. Phillander asked him to write a statement. During the same night the two slept in front of the door, a police man came and called the accused out, if he sees that officer again he will recognize him. After two or an hour and half the accused was brought back. He sat at the foot end of this witness's bed and said the police have assaulted him. He showed this witness where he was assaulted, on his left hand and on his back there were bruises and blood. This witness put some Zam-buk ointment on his hand because it was swollen and on the bruises at the back. The accused asked him about Marais Ikali who died in police detention, he was shivering and was on his nerves. The following day, 18 February 2009, the police came to fetch him to go and make a statement, and he did not return to the police cells thereafter. This witness washed the accused's T-shirt because according to him it was full of blood at the back where there were bruises.

[15.1] In my view it is very strange from this witness's evidence that the alleged healed cut wounds on the accused's back that are still visible four years later and

the then swollen left hand could only have been healed by an inmate George Cloete applying Zam-buk four times on 17 February 2009 in the cells, this is unbelievable. This witness shared the Cell with the accused. According to him, whenever the accused was taken out of the cell by a police officer, on his return he would tell him what happened to him or why they came to fetch him from the cell. That was how he came to know that the accused was required to write a statement to Chief Insp. Phillander. This witness personally saw the fetching and removal of the accused from the cell, but he had to be told by the accused what happened to him when he was out there with the police.

[15.2] It is very strange to note why the accused decided to be so selective in what to tell this witness. For example the accused never said anything to him about when the police came and fetched him to go and search his house. Even more strange is the accused's evidence that on the night of 17 February 2009 the cell door was open when a police officer called him out, handcuffed him in front, blindfolded him with a tie, took him somewhere in the building. The accused further testified that when he was brought back the police officer first unlocked the cell door, then removed the handcuffs the blindfold and pushed him into the cells and locked the door. This clearly suggests that Cloete should have seen it all as well. This witness testified that he did not see the handcuffs and the blindfold placed on the accused when the police came to fetch him that night and neither did he see any of these when they brought him back the same night. Apart from this, the testified that the accused never told him about these happenings. He was only told about the assault, but also not with what or how or the number of officers involved. He however could see bruises on his back as well as his swollen left arm.

[16] The evidence of this witness puts the veracity of the accused's version regarding the assault into very serious doubt because the source of the bruises, and swollen left hand could possibly be something else. More strange is how the Zam-buk ointment could have healed injuries of wounds inflicted with a shambok

during an assault and how the accused was able to see it was a plastic shambok used to beat him while in the same vein claiming that he was blindfolded at the cell, taken out elsewhere within the building, beaten up, returned to the same cell where the blind was removed.

[17] For the reasons aforesaid I come to the following conclusion:

- That from the evidence it is clear that the accused freely and voluntarily elected to write a letter to Chief Insp. Phillander, and latter made a confession to the Magistrate.
- That all the allegations of threats, violence, undue influence allegedly made by the police to the accused are false.
- That Article 12(1)(f) of the suspect's constitutional right against self incrimination was violated by the three officers Phillander, Groenewald and Kotungondo when they failed to warn the accused accordingly, before he started writing the letter.
- That the accused's version that it was the police who handcuffed, blindfolded, and assaulted him with a plastic shambok resulting in bruises on his back and swollen left hand is false.

[18] In the result the Court makes the following order:

1. The letter the accused wrote to Chief Insp. Phillander is not admissible as evidence before this court.
2. The confession the accused made to the Magistrate is admissible as evidence before this court.

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A M SIBOLEKA

Judge

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