

REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK RULING:

TRIAL WITHIN A TRIAL

CASE NO.: CC 38/2009

In the matter between:

THE STATE and

JULIUS DAUSAB

ACCUSED

Coram; SIBOLEKA J

Neutral citation: *S v Dausab* (CC 38/2009) [2014]NAHCMD 2(15 January 2014) **Heard**

on: 08, 09, 10, 11, 17, 18, 21, 22, 23 October 2013 **Delivered on:** 15 January 2014

Flynote: Criminal Procedure: An undefended suspect at the time of arrest has the right to be informed in the language he understands; that he has a right not to incriminate himself; that he has a right to a lawyer of his own choice whom he can pay out of his own resources; if he is unable to afford one, he has a right to apply at the Clerk of the Magistrate's Court for a state funded lawyer. He will be assisted with the completion of the Legal Aid forms; he has the right to have his lawyer present during an interview (questions) by the police, and while appearing before the Magistrate to make a statement of what happened on the matter; he is not obliged to answer questions from any person (including the police) regarding the allegations against him; should he opt to give answers or explain what happened the same may be written down and later used as evidence against him during trial in Court.

Summary: The Otjiwarongo police, on request from their counterparts at Okahandja waited for the allegedly armed accused at the entrance traffic circle from where they drove behind him up to Jimmy's place. There he got out of his vehicle, put his hands up and told one of the officers the firearm was behind the driver's seat, the officer took it out. In the meantime and before being warned of any of his rights by any of the officers, which they conceded, he started to explain what happened and he was searched. He was then taken to Insp. Kharuxab's office at the Police Station where he was allegedly handcuffed behind his shoulders, beaten up by three officers, and told what he should inform his employer regarding the matter.

Held: The accused is a single witness regarding the alleged assault on him against the evidence of the three denying police officers. This allegation has not been supported by any medical examination, neither did the accused lay a criminal charge against his assailants despite the fact that no payment or legal assistance is required for such an undertaking. It follows therefore that the accused's allegation of assault by the three officers has been satisfactorily displaced and is thus rejected as an afterthought.

Held: From Jimmy's place where the accused was taken in custody and started to resort under the control of the officers, a duty to make sure that all his rights were properly explained to him rested on the said officers. This duty was not appropriately carried out.

Held: Therefore any explanation which the accused, an undefended person at the time, may have furnished to any person, including the police while in Otjiwarongo is inadmissible.

ORDER

Any explanation about what happened regarding the charges the accused is facing, that he may have explained to any person including the police officers of Otjiwarongo at the time he was in their custody cannot be admitted as evidence against him on this matter.

JUDGMENT

SIBOLEKA J

[1] This is a trial within a trial which was necessitated by the objections to admissibility of admissions the accused made regarding the allegations he is facing, and these are as follows:

- At the time the admissions were made, the accused was not informed of his rights, especially the right against self-incrimination;
 - The admissions and or statements were not made freely and voluntarily because they were preceded by assaults perpetrated by three police officers namely, Insp Kharuxab, Det. Consts. April and Namaseb.

[2] The accused testified about what the police allegedly did to him and did not call witnesses.

[2.1] Julius Dausab's testimony was to the fact that he was at Ovitoto when he saw the alleged assailant's white sedan car at the scene where his girlfriend and mother-in-law were killed. It was in the evening. However, his bakkie still had to be pushed to a start resulting in him delaying for thirty or more minutes before he started to chase after the suspected killer.

[2.2] The accused chased that car following the trail of dust along the route it had taken. Because of the high speed he drove in pursuit of that car along the gravel road, the top layer of one of its tyres peeled off resulting in the flipping rubber damaging the petrol pipe. The lid to the petrol tank also got lost. The step fender on the driver's side as well as the silencer were also damaged. He had to stop for some few minutes to tie the petrol pipe into position. From there up to the tarred road he was no longer driving fast because of the damage and the silencer that was making a lot of noise. According to him the sound of the silencer could easily have been mistakenly taken for a very high speed. I find this to be reasonable especially given the fact that it is usually difficult for a driver to negotiate a traffic circle at a high speed.

[2.3] When the accused approached the Otjiwarongo entry traffic circle he saw a traffic car and a Nissan vehicle parked on the side and he thought the driver of the Nissan

vehicle was stopped for a road transgression. Nobody stopped him nor was there any sign on the road indicating to him there was a police road block so that he should stop, nothing. It is my considered view that it would normally be very rare for any driver to take the risk of refusing to stop when ordered to do so by the police or traffic officer. Given the fact that the officer who allegedly stood on the road and ordered the accused by way of a hand sign to stop did not testify, I will accept the accused's version that he was not ordered to stop at the entry traffic circle to Otjiwarongo. After driving for some time he noticed that the two vehicles he found parked at the entrance circle were following him. Right behind him was the Nissan followed by the traffic car. He pulled off the road next to a house the police officers said belonged to a certain 'Jimmy'.

[2.4] I will accept the version of the police that at Jimmy's place, the accused impromptu started telling them what happened and Insp. Kharuxab stopped him. This fits well with the accused's own evidence where he testified as follows: I quote verbatim at page 893 of the transcribed record:

"... when I started explaining I was told do not play clever, play to be clever. Do not shoot people dead and play a clever game."

The accused then stopped explaining. He explained further at page 895 of the record:

"... apparently information came through to him (referring to Insp. Kharuxab) from Okahandja that I have shot my wife and her mother."

The officers removed the firearm when they were told it was behind the driver's seat. In the meantime one of the officers was busy searching him. While at Jimmy's place the accused was told to climb together with Insp. Kharuxab in the traffic car, which was driven by an officer of that Unit. Det. Consts. April drove the Nissan 1400 and Namaseb drove the accused's Ford Cortina bakkie. They drove to the Police Station and on arrival the Inspector allegedly said to his officers 'take him to my office so that we can get the truth out of him'.

[2.5] According to the accused from Jimmy's place he was then taken to Insp. Kharuxab's office: I quote verbatim at page 898 of the transcribed record:

"... when I entered Kharuxab's office the first thing that Kharuxab has said you people commit, do things and then you lying, with a strong voice that threatened me, do not kill people at the other side and come here and lie to us, we are already told that you have shot people dead."

[2.6] I cannot see the purpose why the police would still interrogate the accused if in his own evidence, already at Jimmy's place they stopped him from telling them what happened because they were already telephonically informed by their counterparts in Okahandja. This version cannot be truthful.

[2.7] I am reluctant to accept that inside Insp Kharuxab's office the accused's hands were handcuffed behind his shoulders and the three officers Det. Consts April, Namaseb and the Inspector himself started to beat him up by stepping, kicking him while lying down handcuffed. In my view if this had happened the accused would have been very seriously injured.

[3] The Prosecution called three police officers Insp Kharuxab, Detective Constables April and Namaseb to testify about what happened on the day they arrested the accused.

[3.1] According to these officers, Okahandja police alerted Insp Kharuxab about the alleged armed double murder suspect who fled the scene at Ovitoto in a Ford Cortina heading in the direction of Otjiwarongo.

[3.2] The request from Okahandja police was that they should stop, arrest and hand the accused over to them as the allegations against him fall within their area of investigation. Insp Kharuxab climbed in the traffic marked car driven by a uniformed member of that Unit, Det. Cst April and Namaseb drove in a Nissan 1400. They decided to intercept the accused at the Otjiwarongo entrance traffic circle. The Nissan parked on the island of the circle and the traffic car parked on the left side facing the incoming vehicles.

According to the officers, while waiting there, they saw the suspected vehicle approaching at a high speed. The uniformed traffic officer started to stop it, but the accused just drove on. The police got into their vehicles and followed him until he pulled off at Jimmy's house. There, the accused got off, and put his hands up in the air. One officer started a body search on him. When asked about the rifle the accused said it was behind the driver's seat and they took it out. While still being searched and random talking was in progress, before any of the officers could inform the accused of his rights, he without being asked, voluntarily (spontaneously) started to give an impromptu explanation about what had happened. The fact that the accused told the three officers what happened out of his own accord, without being asked by any of them cannot remedy the situation because they had a duty to first explain the rights to him appropriately in the language he understands, which was not done.

[4] In my view, a person suspected of the commission of an offence whether formally charged thereon or not has to be assisted by an attorney. This is a basic right upon which the effective exercise of other rights and the envoking of various remedies hinges.

[4.1] In *S v Melani* 1996(1) SACR 335 at 347 G-H the court quoted with approval from *S v Makwanyane and Another* 1995(2) SACR 1 CC at page 27 paragraphs 49, 50 and 51: where the court said the following about legal assistance:

“In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognize the importance of informing an accused of his right to consult with a legal adviser during the pretrial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves.”

[4.2] According to the officers, the accused was later stopped by Insp Kharuxab. Det. Cst April then warned, explained to him in Damara Nama, Khoe-khoe language which he understands, the right to remain silent, the right to be legally represented, the right to be released on bail, and the right not to incriminate himself, a version the

accused emphatically denied.

[4.3] According to Insp. Kharuxab he informed the accused why they stopped him, the alleged charges against him and that the Okahandja police were on their way to come and collect him. The Inspector took the accused and boarded with him in the traffic car. He instructed Cst Namaseb to drive the accused's bakkie to the Police Station who on arrival was instructed to guard it as it was "the scene of crime" (the accused's Ford Cortina bakkie). The Inspector then took the accused to his office to wait for the Okahandja police. Inside his office was only the accused and himself. Det. Cst April went to his office to do his work there. While still waiting for Okahandja police the accused asked for permission to call his employer on the telephone and he allowed him. The accused was a truck driver. The loading of his truck was completed and it was ready for him to drive out that same morning. This was the reason the accused called his employer to tell him that he was in detention at the Police Station and will not be able to report for duty as scheduled that morning.

[4.4] Later the police from Okahandja arrived and he was handed over to them together with his Ford Cortina bakkie. The three officers deny ever having assaulted the accused saying they had no reason to do that. Det. Cst Namaseb testified that he knew the accused very well from school and are friends. He also knew his green Ford Cortina bakkie as well as his residence. The officers testified that the accused cooperated with them such that despite serious allegations leveled against him, they did not find it necessary to handcuff him.

[5] Whereas in my view, the complainant in a civil matter would require the assistance of an attorney to make a claim, this is absolutely not the case regarding a complainant in a criminal matter.

[6] In this country Police Charge Offices are open day and night, they never close for business at all. Any member of the public who has been assaulted, irrespective of who the assailant is, may go and lay a charge against such a person free of charge. The police officers will only request the aggrieved party to come the next day if they notice or

reasonably suspect that he has consumed alcohol and may be under the influence.

[7] From the evidence placed before this court I am unable to find any good reason why the accused did not proceed to lay a charge of assault against the three police officers if they indeed assaulted him. More surprising is why the accused did not go to the doctor for medical examination report regarding the alleged brutal assaults. The reason he advanced that the officers told him not to tell anybody about the assault on him is unacceptable, and is rejected.

[8] What is before court is a mere allegation by the accused that he was assaulted, without any form of supporting evidence whatsoever. This is against the version of three officers who testified that they didn't do it, and had no reason to do so. I find no legal basis to doubt or to reject the testimony of the three officers in this regard. I am therefore satisfied with the evidence of the prosecution that the accused was not assaulted or threatened as he alleged, at the time of his arrest in Otjiwarongo.

[9] I will now examine the issue of explaining rights to an undefended accused. The three officers had a legal obligation to make sure that the rights were properly explained to the undefended accused in the language that he understands before he started telling them what happened regarding the allegations he is facing, which they conceded they didn't do. This shortcoming is fatal as it militates against the accused's constitutional right to a fair trial enshrined in article 12(f) of the Constitution. The fact that at the time of the accused's arrest at Jimmy's place he was already aware of his rights from his previous arrests cannot remedy the damage caused by such a failure.

[10] In *S v Agnew and Another* 1996(2) SACR 535 at 536 A-C: The police avoided to wait for the accused's attorney for fear that his presence would stifle the information which they wanted to get from him. A police captain proceeded to take a statement from him, and the Magistrate also did the same. The court held that this failure offended the accused's right to silence and the continuing protection to his right of representation from the moment of arrest which are availed by the Constitution. These statements were

ruled inadmissible.

[11] In the result the following order is made:

[11.1] The statements the accused made to any of the three police officers namely Insp Kharuxab, Det. Consts. April and Namaseb is not admissible as evidence in this trial.

[11.2] The statement the accused made to his employer verbally or telephonically while in custody at Insp. Kharuxab's office, awaiting to be handed over to the Okahandja police is also inadmissible.

AM SIBOLEKA

Judge

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