

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON TRIAL WITHIN A TRIAL

CASE NO.: CC 04/2014

In the matter between:

THE STATE

And

TROUGOTH NANUB

ACCUSED

Coram: SIBOLEKA J

Neutral citation: *S v Nanub* (CC 04-2014) [2016] NAHCMD 247 (06 September 2016)

Heard on: 19, 20 August 2015; 14, 17 March 2016;

Delivered on: 06 September 2016

Flynote: Criminal law: Trial within a trial – pointing out of the scene of crime denied – accused alleges absence assault – displaced when he placed himself at the scene during his evidence in chief. He did not testify how and who assaulted him.

Summary of substantial facts: Section 144(3) of Act 51 of 1977 are that on the day of the incident the deceased was walking to her residence with her boyfriend. The accused, her previous boyfriend called her, when she came to him he started beating her. She ran away but was pursued and stabbed several times.

Held: In the result the objection is found to be without merit and is dismissed. Exhibit 'D' is formally accepted as evidence before this court.

ORDER

In the result I make the following order:

The objection is found to be without merit and therefore dismissed. Exhibit 'D' is formally accepted as evidence before this court.

RULING: TRIAL WITHIN A TRIAL

SIBOLEKA, J.

[1] The objection relates to the pointing's out of the scene of crime and various points thereon allegedly done by the accused to D/Insp. likuyu which resulted in the compilation of exhibit 'D', the photo plan and key thereto. The defence argues that this evidence should not be allowed to form part of the record of proceedings because the accused did not do it freely and voluntarily. He was assaulted by the police and thereby influenced to do the pointing out.

[2] The prosecution called the following witnesses to displace the objection.

[3] Erastus S. likuyu testified he is a D/Inspector, the Regional Crime Investigation Co-ordinator for Erongo Region, and the investigator of the matter. In 2013 he was stationed at Walvis Bay, Erongo Region. On 4 February 2013 the Unit Commander of Omaruru Police Station asked him to come over and oversee the pointing out of the scene and be in charge of those proceedings. He did not know the accused and he never met him before. On 5 February 2013 he and Sgt. Shikongo, the scene of crime officer drove from Swakopmund to Okombahe in the Omaruru area. While at the police station at Okombahe the accused was brought and introduced to him by Sgt. Ishmael.

[3.1] D/Insp. likuyu introduced himself to the accused in Afrikaans as follows: That he was a commissioned officer stationed at Walvis Bay Police Regional Head Quarters. That he was informed by Sgt. Narib that he (the accused), was willing to do the pointing out of the scene. The accused replied saying that was true, it was what he told Narib. The accused told the officer he was comfortable talking to him in Afrikaans. This conversation took place in the Charge Office at Okombahe Police Station.

[3.2] According to the officer the accused was very friendly and they understood each other very well. He asked the accused what it was that he wanted to point out to him, and where he got the information in that regard. The accused told the officer that what he is going to show him was from his own knowledge, it is what he knows and witnessed. The accused further told the officer that he wants to show him the place where he met the victim who confronted him, till he managed to leave the scene and ran away.

[4.1] D/Insp. likuyu explained the following to the accused:

“--- “(a) He is not compelled to point out any scene and or point at a scene of crime or to say anything regarding such thing or points,

(b) Whatever he may point out or say would be noted down and photographed and may later be used as evidence in subsequent trial, (c) He is entitled to legal representation of his own choice and expense prior to do the pointing out, (d) If he cannot afford legal representation at own expense, he is entitled to apply for a Legal Aid funded lawyer who upon approval shall be provided by the Government. The application forms are available at the Clerk of Court who will assist with their completion. Question, do you understand your rights with regard to legal representation? Answer: Yes, he had applied already for Legal Aid.” He said he will need the representation in Court.

[4.2] According to the officer the accused still appeared prepared to continue with the pointing out. The accused told likuyu that he has not yet done the pointing out to any other person. The accused further said he was not assaulted, threatened or influenced by any person to do the pointing out.

[4.3] D/Insp. likuyu asked the accused whether he understood the cautioning that he explained to him, and he said yes. On his election regarding the pointing out the accused told likuyu that he will point out all the places from where the fight started up to where it ended.

[4.4] They then drove in a sedan vehicle from the Police Station to the scene of crime. The driver was D/Sgt Shikongo, the Chief sat with him in front. The accused sat in the rear seat between Consts. Ngarare and Ishmael. It was at 12h30 on 05 February 2013 when they left for the scene and they returned back to the Police Station at 14h10. D/Insp. likuyu did not take part in the investigation of the case, and he has never met the accused before.

[5] Annack Davids testified that she is the official permanent interpreter for the Damara>Nama, Afrikaans, English, Oshierero and Oshiwambo languages at Omaruru Magistrate’s Court. She can write, read and speak these languages very well. On 11 October 2012 she interpreted for the accused from Damara>Nama into English and vice versa.

[5.1] Throughout his appearances the accused did not tell the Court or complain about any assault on him by the police. Neither did he talk about not understanding what she was interpreting for him. During the proceeding the witness only noticed that the accused was aggressive. She interpreted everything that the Magistrate told the accused as well as the latter's answers.

[6] Magistrate Kwizi testified that he was the Magistrate of Omaruru on 11 October 2012 for four years. He recognized the handwritten record of the proceedings which he conducted in respect of the accused's first appearance. In attendance at Court was the official permanent interpreter, Mrs Davids. Kwizi also recognized the accused as the person who was brought before him. His rights were explained. According to Kwizi from the accused's first appearance before him up to the time he was referred to the High Court, he did not report to him of any assault on him by the police.

[7] Trougoth Nanub is the accused. According to him he only understands Nama, his mother language. He does not understand English. He only understands a little bit of Afrikaans and so is his knowledge of writing it. His first appearance at Omaruru Magistrate Court was on 11 September 2012. He was taken from the Police Station to the Court – there he was taken into the office of the Magistrate, where it was only himself, the police officer and the Magistrate. He was struggling to speak Afrikaans to the police officer while the Magistrate spoke in English. There was no interpreter in attendance to help him during the proceedings. He told the police officer in Afrikaans to tell the Magistrate that he was assaulted. The officer told him he has done so, and further said from there he will take him to the hospital. W/O Narib told him he will be taken to Okombahe to meet D/Insp. likuyu.

[7.1] According to the accused he was not told why the Inspector wanted to see him. He denied that he told W/O Narib that he was willing to do a pointing out of the scene in Okombahe. He said he did not know the reason why arrangements

were made for him to get to Okombahe. He was only told that D/Insp. likuyu wanted to meet him there and that he will be informed accordingly. He was handcuffed from behind and taken to Okombahe Police Station, and was made to sit in the Charge Office. D/Insp. likuyu whom he was seeing for the first time spoke to him in English which he did not understand. The accused told likuyu in Afrikaans he did not understand what he was talking to him in English, but he just continued talking in English. Cst. Munduva came and re-handcuffed him in front and asked the accused to follow him outside the Charge Office which he did.

[7.2] The accused says D/Insp. likuyu did not tell him the reason to come and see him, no photos were taken in the Charge Office, and he was not told who the photographer is. D/Insp. likuyu again entered the Charge Office, spoke to him in a funny language and left. A constable came to fetch him. They went outside and some police officers were standing next to the sedan in which D/Insp. likuyu rode to Okombahe. The accused asked Sgt. Munduna why he was brought to Okombahe, he said he didn't know. The photographer came and took photos of the police station. Sgt. Mundunu told the accused to climb in the rear seat of the car, sitting between Constables Ngurare and Ishmael, the photographer was the driver and next to him was D/Insp. likuyu. While the vehicle was moving Ngurare and D/Insp. likuyu were talking in English. They came to stop at the river bed. The conversation between Ngurare and D/Insp. likuyu continued. From here they drove across the river. Lee Ngurare was directing the driver where to go from the police station.

[7.3] The accused said he did not know where they were going as nobody had told him what the trip was all about. He does not know what D/Insp. likuyu and Ngurare were talking because he does not understand English. The accused denied that it was him who freely and voluntarily requested to point out the scene of crime to D/Insp. likuyu. After crossing the river bed, they stopped Ngurare and D/Insp. likuyu continued talking in English. They crossed the riverbed, entered another road that he did not know. They drove up to where some orange

beacons were already placed on the ground. According to the accused D/Insp. likuyu appears to have been the one who earlier drove and placed the beacons there. When they came there Sgt. Munduva removed the beacons and loaded them on the vehicle.

[7.4] The accused was still handcuffed in front when D/Insp. likuyu approached him, lifted his handcuffed hands straight up to the level of pointing. The D/Inspector straightened the accused's pointing finger, folded the rest backwards and then moved apart to enable the photo taking process. Because of the language barrier the accused could not ask D/Insp. likuyu what was the purpose of the whole exercise. It was the accused's first time to walk in that area. From here they drove to his stepfather's house where photos were again taken, but no pointing out was done. Of these photos he only witnessed the taking of one photo. At his stepfather's house D/Insp. likuyu directed him where to point and photos were then taken. From here he was re-handcuffed from behind and they drove back to the police station.

[7.5] At no stage did D/Insp. likuyu explain to him that he was not obliged to do the pointing out. According to the accused no legal rights in general such as legal representation and in particular rights related to the pointing out were explained to him at all. D/Insp. likuyu did not ask him to sign on any paper. From the Okombahe Police Station to where they found orange beacons already put on the ground he did not point out anything nor tell any person about anything related to the pointing out of the scene of crime.

[7.6] During cross-examination the accused tried for the first time to place on record that he was beaten up by Csts. Lee Ngurare; Tjombe; Bede as well as the ambulance driver. If the accused had testified in detail about his assault he would have been cross-examined thereon to test his credibility.

[8] When the accused took the witness's stand to testify about the reasons for his objection to exhibit 'D' being admitted as part of evidence before this court, he did not mention even a word related to how members of the police at Okombahe Police Station or D/Insp. likuyu or any member of his team assaulted or influenced him to pointing out the scene of crime.

[9] All that the accused testified about is that no rights were ever explained to him by D/Insp. likuyu, nor was the purpose of his visit or him being brought from Omaruru Police Cells to Okombahe Police Station. The accused further stated that D/Insp. likuyu held and raised up his two front handcuffed arms; straightened his pointing finger, folded the rest and then released his hold, and moved backwards to enable the photographer to take the various photos of the pointing out of the scene of crime. I reject this evidence as false beyond reasonable doubt.

[10] It is practically not possible for D/Insp. likuyu to have used the accused's finger to point out the scene of crime because he was not there at the time of the incident. The worst destructive contradiction in the accused's evidence is that in his reply to the State's pre-trial memorandum he stated that he cannot dispute or admit the contents of the photo plan because he was not present and did not point out the scene to the photographer.

[11] The accused's counsel forcefully put it to the police witness Oswald Narib as per instructions, that the officer received a phone call from a certain Dankie Nanus saying the accused was assaulted during arrest. According to counsel it was on that basis the officer asked the accused whether he was well at the time he took a warning statement from him. Counsel further said that the officer promised to attend to the matter after the accused's court appearance. Narib denied knowledge of the assault reported to him. The accused did not testify about it in his evidence in chief and he denied knowledge of it during cross-examination.

[12] The accused did not testify that he refused to sign the pointing of the scene of crime at all. It is on that basis that I accept Chief likuyu's explanation that he only realized what he termed as a human error in court.

[13] In the light of the above I rule that the accused's objection to the handing in of exhibit 'D' to form part of evidence before this court is without merit. It is only an afterthought.

[14] In the result I make the following order:

The objection to the admissibility of exhibit 'D' is found to be without merit and therefore dismissed.

Exhibit 'D' is formally accepted as evidence before this court.

A M SIBOLEKA
Judge

APPEARANCES:

STATE : Mr. J. T.Kuutondokwa
Office of the Prosecutor-General, Windhoek

ACCUSED : Mr. M. Engelbrecht
Directorate of Legal Aid