



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

Case No: CC 16/2015

**THE STATE**

versus

**ERWIN TEBELE**

**Neutral citation:** *S v Tebele* (CC 16/2015) [2017] NAHCMD 112 (12 April 2017)

**Coram:** USIKU, J

**Heard:** 14, 15, 16 March & 10 April 2017

**Delivered:** 12 April 2017

**Fly note:** Evidence – Pointing out – Accused not informed of his rights prior to the pointing outs – Duty of police and Court to inform accused persons of fundamental rights – Accused duly informed of his rights since his arrest by the police on different occasions – No need to be informed repeatedly once accused confirm to have understood the rights – Accused in a position to make an informed decision once he has understood the rights as explained.

**Summary:** The state sought the admissibility of the pointing out made to the police by the accused after his arrest on the 3 September 2013 on a charge of murder. Accused asserted that his rights were not explained to him

prior to him making the pointing out of the alleged crime scene. Contrary to accused's denial of having been informed of his rights prior to the pointing out. There is clear evidence to show that accused's rights were duly explained and he confirm to have understood his rights when explained. Accused was therefore able to make an informed decision when he pointed out the crime scene. The pointing outs are ruled admissible in evidence.

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### **ORDER**

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The pointing outs were recorded from the accused after his rights were duly explained to him and both parties signed them as such they are ruled admissible in evidence.

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### **RULING: TRIAL-WITHIN-A-TRIAL**

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USIKU J:

[1] The sole issue before me for determination at this stage is the admissibility or otherwise of the pointing out allegedly made to Inspector Gariseb in this matter.

[2] The law on the point is clear that in order for the pointing out to be admissible in evidence an accused must be duly informed of his rights after his arrest and prior to the pointing out been made. An accused must therefore understand the rights being explained in order for him to make an informed decision whether to proceed with such pointing out or to abandon the pointing out. The State was represented by Ms Shikerete while Mr Siyomunji appeared for the defence. This court is indebted for their valuable submissions.

[3] It is trite that the state carries the burden of proving that the pointing outs are made by the accused: (a) freely and voluntarily, that it is not induced by threats or promise by any person or authority, while the accused was in his sound and sober senses and; (b) without having been unduly influenced thereto, that is without any external factor, extinguishing the accused's freedom of will, not necessarily by a person in authority.

[4] In the trial-within-a-trial Inspector Jantjies said he met the accused on the 5 September 2013 after his arrest on a charge of murder on 3 September 2013. Accused was brought to his office by sergeant Namwandi. As the head of the Criminal Investigation Unit, it was his responsibility to peruse through all dockets involving serious crimes.

[5] He identified himself as a police officer and explained the purpose of the interrogation. At the time the accused had not yet been charged. It was him that instructed Sergeant Namwandi to formally charge the accused. In the presence of Namwandi he warned the accused and explained him his legal rights. That accused had a right to remain silent, that anything he says will be taken down in writing and may be used as evidence in a court of law. Also that the accused has a right to legal representation and if he cannot afford a lawyer, he may apply to the Directorate of Legal Aid to be provided with a lawyer. Accused informed him that he will give a statement in Court, but offered to point out the crime scene.

[6] Having opted to point out the crime scene, Inspector Jantjies again warned the accused that he was not under any obligation to point out any scene. Accused insisted to point out the alleged scene of crime asserting that the occurrences at the scene were in his conscious and he was of the opinion that once he point out the crime scene, it would ease his conscious.

[7] Inspector Jantjies further testified that he informed the accused about his right to be accompanied by a lawyer during the pointing out. Accused therefore opted to do the pointing out on his own without a lawyer. He spoke to the accused in

Afrikaans language and they communicated well. He then approached Inspector Gariseb, a commissioned officer to take charge of the pointing out.

[8] Inspector Jantjies further testified that he observed some scratches on the accused's left arm which the latter claimed to have been as a result of a fight that occurred on the 30 August 2013 in the location. That fight had nothing to do with the incident of the 3 September 2013.

[9] On allegations that accused was under the influence of alcohol when he was brought to his office by Sergeant Namwandi, Inspector Jantjies stressed that it could not be possible for the accused to have been under the influence of alcohol or drugs because he had been incarcerated since the 3 September 2013.

[10] Detective Sergeant Namwandi testified that he was employed by Nampol and based at Gobabis Crime Investigation Unit. On the 5 September 2013 he was instructed by Chief Inspector Jantjies to collect the accused from the charge office and take him to his office. In his presence, Chief Inspector started to warn the accused about his legal rights. Accused was warned about his right to remain silent as well as to engage the services of a lawyer of his own choice. These rights were explained to the accused in Afrikaans, the language they all understood well. Detective Sergeant Namwandi testified that after the rights were explained to the accused by Chief Inspector Jantjies, accused informed him that he will engage the services of a lawyer at a later stage. He also indicated that he will give a statement in Court. Accused however went on to explain that there was something bothering him and would like to go and point out the crime scene. It was at that stage that Chief Inspector Jantjies again warned the accused about his right to remain silent, also advising him that he was not obliged to do the pointing out. Further that should he still want to do so, he could do it in the presence of a lawyer. The accused was also advised that an officer could be arranged to accompany him to the scene for the purposes of the pointing out. Accused persisted that he wanted to do the pointing out in order to free his mind.

[11] Detective Sergeant Haoseb's testimony is that whilst on duty at the Gobabis police station, on the 5 September 2013 he was instructed by Chief Inspector Jantjies to make arrangements with Inspector Gariseb in order for accused to do the pointing out. He took the accused to Inspector Gariseb. Accused had informed him that he wanted to do the pointing out of the scene. He then left accused with Inspector Gariseb. According to his observation accused looked normal and did not look like someone who had been forced into making the pointing out. Accused had no problem with the pointing out at all. He had known accused during their school days and they had no grudge between them.

[12] Inspector Gariseb testified that he was the second in command at the Gobabis police station. He was requested by Chief Inspector Jantjies to be in charge of the pointing out. Being a Commissioned Officer, he could participate in the pointing out. On the 5 September 2013 accused was brought to him by Sergeant Haoseb whereafter he introduced himself to the accused as a commissioned officer. He also exhibited his appointment certificate to the accused who appeared to be in his sober senses at the time. He was calm. They spoke in Damara/Nama language which they both understood well.

[13] Inspector Gariseb explained to the accused that he was under no obligation to point out the crime scene and further that accused had a right to be legally represented by a lawyer prior to the pointing out being done. Accused was also informed of his rights to apply for a legal aid lawyer should he not be able to afford a private lawyer. His right to remain silent was also explained to him.

[14] According to Inspector Gariseb, accused responded by informing him that he understood his rights and when asked what he wished to do, he opted to do the pointing out adding that he will need the services of a lawyer only at a later stage. Inspector Gariseb further explained to the accused that he was not at the alleged scene of crime and it will be his first time to be there upon his directive from where they were to the alleged crime scene.

[15] Accused was informed of the photos to be taken on the scene for the purposes of investigations.

[16] On the question whether accused had already pointed out the scene to someone else, he responded in the negative. Accused then informed Inspector Gariseb that he was involved and that was the reason that made him willing to point out the crime scene in order to free his mind.

[17] Inspector Gariseb's observation on the accused was that he had two stab marks on the left arm which he claimed to have been occasioned during a fight on the 30 September 2013. Accused did not implicate the deceased in the stabbing. On further questioning whether he was compelled to do the pointing out or forced to do so, accused responded that he was doing it out of his own free will. His rights were again explained before he embarked on the actual pointing out of the crime scene.

[18] After the accused had pointed out the crime scene, he affixed his signature on the pointing out notes and confirmed to have been satisfied with the manner in which points were made.

[19] On the other hand accused denied to have been informed of his rights prior to the pointing out being made by him. He does not deny to have met the four witnesses that testified during the trial-within-a-trial. Both Sergeant Namwandi and Chief Inspector Jantjies testified that accused's rights were explained to him. He satisfied himself that accused understood his rights as explained, he then made arrangements for the pointing out of the scene. Accused's denial of not having his rights explained is thus not true when one considers the evidence of the state witnesses who corroborated each other in that regard.

[20] Inspector Gariseb informed the accused of his rights at the police station when the latter was handed over to him as well as at the alleged scene of crime before accused went ahead to do the actual pointing outs. In his own testimony accused confirmed to have understood his rights as Inspector Gariseb explained them to him where after he directed the police to the crime scene where he proceeded to do the pointing out.

[21] The pointing outs were recorded from the accused after his rights were duly explained to him and both parties signed them as such they are ruled admissible in evidence.

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D N USIKU  
Judge

## APPEARANCES

STATE : Ms Shikerete  
Office of the Prosecutor-General

ACCUSED: Mr Siyomunji  
Instructed by Directorate of Legal Aid