

**REPUBLIC OF NAMIBIA**



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

**RULING**

**CASE NO.: CC 12/2013**

In the matter between:

**THE STATE**

and

**JAN BENEDICTUS FREDERICKS**

**ACCUSED**

**Neutral citation:** *S v Fredericks* (CC 12/2013) [2017] NAHCMD 229 (16 August 2017)

**CORAM:** NDAUENDAPO, J

**Heard on:** 6 July 2017

**Delivered on:** 16 August 2017

**Flynote:** Criminal Procedure – Trial within a trial – Admissibility of a warning statement – Confession – Pointing Out – s 119 Proceedings.

**Summary:** The accused is arraigned before this court on charges of murder, assault with intent to cause grievous bodily harm and assault by threat. During trial, the State wished to introduce into evidence a warning statement, confession, pointing out and s 119 proceedings. The defence objected to the production of the same on the basis that the accused was: (a) assaulted and threatened, (b) not fully warned of his rights and (c) told by Sergeants Kooper and Dierstaan, what to narrate to Magistrate Anderson when making the confession.

Held; the accused was not assaulted or threatened nor was he told what to narrate to Magistrate Anderson.

Held; that the retired Magistrate Bekker's failure to warn the accused of his rights on 16 November 2012, simply because he was already warned on 14 November 2012, by Magistrate Anderson, was a misdirection.

Held; the confession, warning statement and pointing out are admissible as evidence.

Held; the s 119 proceedings are inadmissible as evidence.

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### ORDER

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In the result, it was ordered that:

1. The confession, warning statement and the pointing out are ruled admissible.
2. The s 119 proceedings are ruled inadmissible.
3. The matter is postponed to **27-29 June 2018** at **10:00** for continuation of trial.
4. The accused remains in custody.

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### RULING

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**NDAUENDAPO, J:**

[1] The accused is arraigned in this court on charges of murder, assault with intent to cause grievous bodily harm and assault by threat. During trial, the State wished to introduce into evidence a warning statement, confession, pointing out by the accused and s 119 proceedings in the Magistrate's court. The defence objected to this wish on the basis that the accused was a) assaulted and threatened, b) was not fully warned of his rights and (c) that the accused was told by Sergeant's Kooper and Dierstaan, what to say when he made the confession, the pointing out and warning statement. The same objections leveled against the confession were leveled against the s 119 proceedings.

[2] Mr. Anderson, the Magistrate who recorded the confession testified that the accused was brought to him by police officers. He took down a confession which was reduced to writing. There was an interpreter who interpreted from English to Nama and vice versa. He testified that he explained the rights of the accused as per the pro forma form. These rights included the right to legal representation which includes the accused right to obtain the services of a private lawyer at his own costs or legal aid if he is unable to afford private legal representation. The pro forma form was read into the record and marked as exhibit 'F'.

[3] He further testified, that he did not observe any injuries on the body of the accused person, nor did the accused inform him that he was assaulted by Dierstaan and Kooper. The accused also did not inform him that he feared that he would be assaulted if he made a confession. According to him, the accused made the confession freely and voluntarily and he was in his sound and sober senses and there was no misunderstanding between himself and the accused as he is also fluent in Damara/Nama, which the accused spoke.

[4] During cross-examination, the Magistrate testified that the right to legal representation was fully explained, including the right to legal representation during the process of making a confession. He was adamant that he did not observe any injuries on the body of the accused and that the accused was calm, settled and composed in the manner he answered questions.

[5] Ms. Swartz testified that she was the interpreter in the proceedings before Magistrate Anderson, when he took down the confession of the accused person. She was interpreting from Nama to English and vice versa. Damara-Nama is her mother tongue and the accused was fluent in it. There was no misunderstanding between the accused person and herself. She testified that when the accused was informed of his right to a lawyer, he said that he did not want a lawyer now. She further testified, that the accused did not have any injuries on his body and that he pulled up his t-shirt to show that he did not have any injuries. Dr. Verkhusho, a medical doctor, testified that on 14 November 2012 he examined the accused person and found no injuries on his body.

[6] Warrant Officer Dierstaan is attached to the Serious Crime Unit, Keetmanshoop and has over 20 years' experience at Nampol. On 9 November 2012, he took over the investigation. He found the accused in custody at Aus. He informed the accused about the charges against him. He informed the accused of his rights, that is- that he is not obliged to answer or explain, if he wants to explain, he can do that in the presence of his lawyer, he then effected the arrest.

[7] On 12 November 2012, he collected him from Aus and took him to the Magistrate, because the accused wanted to make a confession. The accused told him that this thing was on him and wanted to talk to someone. He testified that he took the accused to hospital where he was examined. He denied that he assaulted the accused with the butt of his gun at the back of his head. He also denied that the accused was assaulted by Kooper in his presence. He did not observe any injuries on the accused.

[8] Detective Sergeant Kooper testified, that he obtained the warning statement from the accused. They spoke Afrikaans and Damara-Nama. He testified, that the accused was cooperative and wanted to make a confession. He explained the rights of the accused as per the pro forma form and although the pro forma form does not indicate the right to apply for legal aid, he explained same to the accused as it is normal procedure. According to him, the accused was very cooperative with the police officers.

[9] During cross-examination Detective Sergeant Kooper testified that he explained to the accused the right to remain silent and that if he said something it may be written down and could be used against him in the court of law. He further testified that after the warning statement was recorded, he read it back to the accused and the accused was satisfied therewith and signed same. He also denied the instruction by counsel for the defence, that he was the one who told the accused what to narrate to the Magistrate.

[10] Retired Magistrate Bekker also testified. He testified that he conducted the s 119 proceedings. The accused appeared before him on 16 November 2012. He asked the accused whether he still wished to abide by his decision not to apply for a lawyer, which decision the accused made before a Magistrate on 14 November 2012. The accused told Mr. Bekker, he only wanted a lawyer during mitigation. During cross-examination, Mr. Bekker testified, that the accused's rights were explained on 14 November 2012 and on 16 November 2012, the accused told him that he will abide by his decision of 14 November 2012. He asked the accused whether he was forced, and he said no.

[11] Chief Inspector Hartzenberg testified that on 17 January 2013, he was contacted by Warrant Officer Appollus to assist him with a pointing out. On 18 January 2013, the accused was brought to him at the Police Charge Office. The accused was in his sound and sober senses. Chief Inspector Hartzenberg introduced himself and showed his appointment certificate to the accused. He then explained the rights to remain silent and legal representation to the accused, where after the accused indicated that he will not require a lawyer for the pointing out. He further testified, that he explained the purpose of the pointing out and that photographs will be taken during the pointing out. The accused directed them to the scene and as the accused pointed out, he made notes. He also testified, that the accused never informed him that he was assaulted nor that he was threatened with further assault. He also did not see any injuries on the body of the accused. During cross-examination, he persistently maintained, that he explained the rights of the accused as contained in the pro-forma form. The accused understood the explanation and

signed the pro-forma form. The notes made by Chief Inspector Hartzenberg during the pointing out, were provisionally admitted into evidence and marked as exhibit "J".

#### Defence Case- trial within a trial

[12] The accused testified that on 13 November 2012, he was taken at the police cells by Sergeant Kooper to the latter's office. In his office, he was given a paper to sign and thereafter he was taken upstairs, where he was threatened and assaulted. He was never informed of his rights. He denied giving a statement out of his own free will. He denied having given the answers as contained in exhibit "H". In fact, he informed the court that he did not have a conversation with Sergeant Kooper.

[13] The accused further testified, that he was taken to the old hospital in Keetmanshoop, where he was handcuffed with the right hand on his back and the left hand behind his back. He was chained and tied to the tree and the chair on which he was standing was kicked away from beneath him. As a result of this, he sustained injuries on his wrist as well as internally. Further, that Kooper, Dierstaan and other reserve force officers assaulted him.

[14] The accused confirmed that he was taken to Magistrate Anderson for a confession by Sergeant Kooper. He testified that he informed Anderson that he wanted a lawyer. He also informed the court that Anderson did not explain to him the document marked as exhibit 'F'. He testified, that he was injured behind his head with a firearm and that the scar was still visible. He testified that the injury on his head was inflicted on him, through assaults and threats by Kooper and Dierstaan in transit to Magistrate Anderson. He further testified, that he did not inform the Magistrate of the assault as he was in pain.

[15] As far as the s 119 proceedings are concerned, he confirmed that he appeared in court on 14 November 2012 and informed the Magistrate that he was going to conduct his own defence. According to him, he was under pressure and wanted to plead guilty in order to finalize the case. He confirmed that the magistrate asked him questions and he answered those questions and they were written down.

On the question by his counsel, he testified that what he informed the Magistrate is what Kooper and Dierstaan told him to narrate.

[16] He further testified, that he did not know what pointing out was. He denied that Hartzenberg explained anything to him. He denied having any conversation with Hartzenberg about a lawyer. He further denied that Hartzenberg informed him that photographs will be taken as he was pointing out. He further denied, that he initialed and signed the pointing out notes.

#### Submissions by counsel for the State

[17] Counsel submitted that the requirements for the warning statement, pointing out and confession were met. Further, that confession was freely and voluntarily made and that the accused was in his sound and sober senses. He submitted that there were material contradictions in the version of the accused and that the accused failed to give instructions to his counsel on material issues. In light of the above, counsel submitted that the pointing out, confession and the warning statement be ruled admissible.

#### Submissions by Counsel for the Defence

[18] Counsel persisted that the confession given by his client was not given freely and voluntarily. That the rights, including the right to legal representation of the accused, were not explained fully before the pointing out. Further, that the person who took down the confession of the accused did not inspect to determine whether the accused had injuries on his body. In light of the above, he submitted that the warning statement, confession and the pointing out should be ruled inadmissible.

#### Evaluation of evidence

[19] The prosecution sought to introduce into evidence the confession, pointing out, s. 119 proceedings and warning statement of the accused. The defence objected to that on the basis that the accused was a) assaulted and threatened, b) was not fully warned of his rights and c) that the accused was told by Sergeant's Kooper and Dierstaan, what to say when he made the confession, the pointing out and warning statement.

### *Confession*

[20] Magistrate Anderson testified, that the accused was brought to his office for purposes of recording a confession. Ms. Swarts, the interpreter interpreted from English to Afrikaans/Damara-Nama and vice versa. He testified, that he used a pro forma form, marked as exhibit "F" to explain the rights of the accused. These rights include the right to employ a private lawyer or a legal aid appointed lawyer and for that lawyer to be present at the stage of giving a confession and the accused understood these rights. The accused informed Magistrate Anderson, that he did not need a lawyer at that stage. Magistrate Anderson further testified, that the accused did not inform him that he was assaulted or threatened nor did he observe any injuries on the body of the accused. According to him, the confession was made freely and voluntarily and the accused was in his sound and sober senses. The evidence of Magistrate Anderson was corroborated in material respects by the interpreter Ms. Swartz. She confirmed that the rights were explained and that there was no misunderstanding in the interpretation as the accused was fluent in Damara/Nama, which was also the mother tongue of the interpreter.

[21] The evidence of Magistrate Anderson was honest and truthful. The version of the accused person was littered with contradictions. He testified that when he was brought to Magistrate Anderson, he had an injury behind his head, which he sustained as a result of being hit with a firearm. He was also assaulted by Kooper, Dierstaan and other officers, before he was brought to Magistrate Anderson, yet he never told Anderson that he was assaulted or threatened when he was brought to him. His explanation for the failure was, that he was fearful that if he had informed magistrate Anderson of the assaults and the threats, he would have been subjected to further assaults. Kooper and Dierstaan were not present when the accused gave the confession and they would thus not have known what he told Magistrate Anderson. Furthermore, the accused was examined by Dr. Verkhusho, on 14 November 2012 and he did not observe any injuries on the body of the accused person. There is therefore no medical evidence to corroborate the accused version that he was assaulted.



[22] It was also not put to the witnesses Kooper and Dierstaan, that they took the accused behind the old hospital where they severely assaulted him. In my respectful view, the version of the accused that he was assaulted before he went to make the confession is a mere fabrication. I am satisfied that the confession was made freely and voluntarily and that his rights, including the right to legal representation were explained to him.

#### *Warning statement*

[23] Dierstaan testified, that the accused was brought from Aus police station to Keetmanshoop. The next day he was interviewed by Kooper, who obtained a warning statement from him. Kooper testified, that he explained the rights of the accused to the accused as per the pro forma, marked as exhibit 'F' and that these rights include the right to legal representation. Although the right to legal aid is not on the pro forma, he explained the right to apply for legal aid to the accused, as this is normal procedure. He warned the accused, that he could have a lawyer at the stage of taking a warning statement. According to him, the accused understood and opted to give the statement without a lawyer. He denied that the accused was assaulted or threatened in any way. He denied the allegation that he told the accused what to narrate to the Magistrate.

[24] The accused denied that he signed the warning statement. He testified that he was assaulted by Dierstaan and Kooper and as a result sustained injuries, however there was no corroboration from the doctor who had examined him. The version of the accused is highly improbable and had he been assaulted, as he testified, the doctor would have observed the injuries. I am satisfied that, his rights were explained and that he was not assaulted.

#### *Pointing Out*

[25] Hartzenberg testified that he made use of the pro forma and explained the rights to the accused as contained therein. The accused testified that he was assaulted and that he did not communicate with Hartzenberg. He also testified that

no rights were explained to him, whereas the instructions were that the rights were not adequately explained to him. He also testified that they did not have a conversation about a lawyer.

[26] Hartzenberg testified that the accused was in his sound and sober senses. After he explained his rights, the accused indicated that he did not want a lawyer during the pointing out. The accused understood his explanation and voluntarily agreed to go and point out. He made notes and on each page the accused signed. The accused never told him that he was assaulted nor threatened. The accused version that his right to a lawyer was not explained is highly improbable. Notes of the pointing out were made and the accused signed on each page and at the end of the notes.

#### *Section 119 Proceedings*

[27] Retired Magistrate Bekker testified that on 16 November 2012, he did not explain the rights of the accused as he was satisfied that those rights were explained to the accused on 14 November 2012. He however, asked the accused whether he would abide by his decision to apply for a lawyer for mitigation. Mr. Bekker testified that he was satisfied that the accused rights were explained on 14 November 2012 and therefore he did not deem it necessary to explain same to the accused again on 16 November 2012, when the accused appeared before him. This failure by Mr. Bekker was a misdirection in my view. The possibility cannot be excluded that had the rights been explained again on 16 November 2012, the accused may have opted to apply for legal representation and he was thus denied that opportunity. It is for these reasons, that the s 119 proceedings of 16 November 2012 are ruled inadmissible.

[28] In the result, I make the following order:

- 28.1 The confession, warning statement and the pointing out are ruled admissible.
- 28.2 The s 119 proceedings are ruled inadmissible.

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GN NDAUENDAPO

Judge

APPEARANCE

THE STATE: D Lisulo  
Of Office of the Prosecutor General, Windhoek

ACCUSED: M Siyomunji  
Of Siyomunji & Co, Windhoek