

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 18/2016

THE STATE

versus

WILLEM FREDDY EKSTEEN

Neutral citation: *S v Eksteen* (CC18/2016) [2017] NAHCMD 284 (9 October 2017)

Coram: USIKU, J

Heard: 12 & 13 September 2017

Delivered: 9 October 2017

Fly note: Criminal Procedure – Admissibility of the warning statement – Admissions made by accused in terms of section 119 of the Criminal Procedure Act in open court – Confession made to the magistrate by accused in the presence of a police officer – Whether rights were fully explained and understood by accused prior to the making of such statements and admissions.

Summary: The accused who is facing charges of murder read with the provisions of the Combating of Domestic Violence pleaded not guilty where after the state proceeded with the trial.

ORDER

1. The warning statement recorded by the police and signed by the accused is inadmissible as well as the confession made to the magistrate in the presence of a police inspector.
2. The proceedings in terms of section 119 of the Criminal Procedure Act made in open Court are ruled admissible.

RULING: TRIAL-WITHIN-A-TRIAL

USIKU J:

[1] At the commencement of the trial, the State led evidence from witnesses which may be summarised as follows:

[2] On the 21 September 2014 the accused arrived on farm Warmfontein in the Aroab area where he had sought employment. The farm owners Mr and Mrs Lensing confirmed that the accused had arrived with them from Aroab town, during the afternoon of the 21 September 2014. They also confirmed that at the time, the deceased Janetta Babiep resided on their farm and had been assisting them to look after small live stock. Though not formally employed she was residing on the farm for about two months prior to her death.

Piet Babiep

[3] He was the deceased's brother who was employed on the farm. On the morning of the 22 September 2014, he was awakened by the accused who informed him about the deceased having committed suicide by hanging herself in the roof of the room in which the two had spend the night.

[4] The deceased and accused had been involved in a domestic relationship and had a child born from their union. After the report was made, he went to the room and found the deceased's body laying upwards on a single bed with a piece of a rope around the deceased's neck. Part of the rope was attached to foot of the bed on which the deceased lay. He decided to approach the foreman about what he had observed whereafter they went to the room and saw the body of the deceased. Having observed the body of the deceased, the foreman in turn made the report to the farm owner. Police were alerted and later on arrived on the farm.

[5] Police officer Frederik from the scene of crime unit was the first to arrive on the scene. He photographed the scene. Upon entering the room where the body of the deceased lay, he noticed a rope around the deceased's neck. He suspected foul play and made inquiries from the deceased's brother about who had been in the latter's company after they had left to sleep. The deceased's brother pointed out the accused as the deceased's boyfriend, with whom she had spend the previous night.

[6] Police officer Frederik then confronted the accused about the deceased's death whereafter the latter allegedly responded that he was responsible for the deceased's death. Frederick claimed to have informed the accused of his legal rights, a claim accused had denied. It was then at this point that the defence challenged the admissibility of the statements claimed to have been made by the accused to officer Frederik; or to the other police officials; as well as the confession made to the magistrate at Keetmanshoop on the 23 September 2014, also the admissions made during the section 119 plea, the day after the first court appearance by the accused.

[7] The defence contended that the statements allegedly made to the police upon the accused's arrest were not made freely and voluntarily, further that the accused's legal rights were not fully explain to him in order for him to make an informed decision prior to the making of the alleged statements and or admissions, or confession. It was further alleged by the defence that accused was subjected to assaults, and had been threatened, forced and or influenced to make such statements and or admissions. Further that during the confession accused had been

couched on what answers to give to the magistrate during the taking of the confession on the 23 September 2014 at the Keetmanshoop Magistrate Court.

[8] Accordingly the court had to go through a trial-within-a-trial on these issues.

[9] Officer Frederik testified during the trial-within-a-trial that he met the accused for the first time on farm Warmfontein on the 22 September 2014 after he arrived there to attend to an alleged suicide. Having been taken into the room where the deceased's body lay on a single bed, he suspected foul play. The deceased had a rope around her neck and another piece of rope was attached to the bed on the side of the foot. He then spoke to the accused after he had introduced himself to him as an officer.

[10] Accused made certain admissions. He had not yet explain the accused's right not to incriminate himself at the time. Photos of the scene were taken, whereafter the deceased's body was loaded on the police van and transported to the mortuary at Keetmanshoop. Accused was loaded on the vehicle and they drove back to Keetmanshoop. Whilst on their way towards Keetmanshoop, they met another police vehicle driven by Chief Inspector Kawanda accompanied by warrant Talliaard enroute to Aroab. Both vehicles stopped and accused was handed over to warrant Talliaard.

[11] Warrant Talliaard testified that whilst in the company of Chief Inspector Kawanda on their way to Warmfontein, they met with sergeant Frederik who handed over the accused to him. He introduced himself as a police officer to the accused who was at the back of Frederik's vehicle. According to him, accused made certain admissions and allegedly offered to go and give his story to the magistrate. The accused was then driven to Keetmanshoop Magistrate Court.

[12] Warrant Talliaard specifically admitted that he had not explained the accused rights, prior to the latter making alleged admissions to him. More specifically he did not inform the accused about his right not to incriminate himself and the consequences thereof, should accused opt to give a confession.

[13] Upon arrival at the Keetmanshoop magistrate office, Warrant Talliaard went to the police station whilst Inspector Kawanda went to search for a magistrate. He was later on contacted by Chief Inspector Kawanda who informed him that there was no magistrate available to take a confession. He was then instructed to take the accused to the State hospital for an examination. An examination was done by the doctor and thereafter they returned to Aroab in the evening and again drove back the next morning to Keetmanshoop in order for the accused to give his confession.

[14] Mr Shapumba a magistrate at the time for the district of Keetmanshoop testified that he was approached by Inspector Kawanda on the 23 September 2014. The Chief Inspector had brought in a suspect for a confession. He explained the warning as per the pro-forma which is used for the purposes of confessions after he had introduced himself to the suspect. The suspect remained in his office, with the interpreter who interpreted from English to Afrikaans and vice versa. The Chief Inspector who had brought in the suspect also remained in the office throughout the recording of the confession. No reasons were advanced why the Chief Inspector had been present during the recording of the confession by the magistrate. That position was confirmed by Ms Shiindi, the official interpreter at the time, during the taking of the confession.

[15] According to Ms Shiindi, when she was called to attend to a confession in the magistrate's chambers, accused was asked specifically whether he had been threatened or influenced to give a confession to which he answered in the negative. She however indicated that it was not a normal practice for a police officer to sit in whilst a confession was being recorded by a magistrate. Neither could she explain the reason why Chief Inspector had sat in the magistrate's chambers throughout as the confession was being recorded from the accused.

[16] Another interpreter Ms Sabrina Rodges Alberto testified that she too was an interpreter at the Keetmanshoop magistrate office during September 2014. She came to know the accused when he appeared before court on the 24 September 2014 on a charge of murder. Mr Shapumba was the presiding magistrate at the time whilst she acted as an official interpreter in English to Afrikaans and vice versa. She

testified that Mr Shapumba explained to the accused his right to legal representation and she interpreted to him in Afrikaans language, which accused understood well.

[17] Accused was specifically asked how he intended to proceed and his response was that he will conduct his own defence. He was also asked whether he would engage the services of a private lawyer or alternatively that he could apply for a legal aid lawyer. Having translated the accused's rights to him the presiding officer went on to explain to the accused, the seriousness of the offence he was facing and also added that it would be better for him to get a legal representative instead of him representing himself. All explanations were translated to the accused, but he still opted to conduct his own defence.

[18] The charges were then put to the accused by the public prosecutor after which Ms Alberto translated them to the accused in the Afrikaans language from English whereafter accused indicated that he had understood the charge and offered a plea of guilty.

[19] Mrs Alberto further testified that the proceedings were postponed to the next day being the 25 September 2014 for questioning, because there was no sufficient time as there were other several matters that were to be attended to. The matter proceeded on the 25 September 2014 and the accused was questioned in terms of section 112 (1) b of Act 51 of 1977 by the presiding magistrate. Having completed the questioning, the presiding magistrate advised the accused that the proceedings were to be forwarded to the Prosecutor-general for her decision on the further conduct of the case. Accused was also informed that after the decision had been made he will be informed about what charge he will be facing and in which court he would be tried. These were all translated by the interpreter into Afrikaans language from English. Accused confirmed to have understood and appeared normal.

[20] For reasons which will become evident in due course, I consider it unnecessary to go over the defence's evidence in chief and the cross-examination. Suffice to state that accused gave evidence of having been assaulted, threatened and that he had been coached on what to answer to questions posed by the presiding magistrate during the recording of the alleged confession. His rights were

never explained to him either by Sergeant Frederik or warrant Talliaard, and not even by the presiding magistrate.

[21] The addresses by counsel also took their lead from the evidence of the parties they each represented, that is to say the state on one side and the defence on the other side.

[22] My duty at this juncture is therefore not to decide the truth or otherwise of the allegations of the police brutality following the accused's arrest or the denial thereof by the police. In my view, the conflicting versions will not take this court anywhere and will ipso fact be disregarded. As alluded to by the presiding officer at the confession, the interpreter as well as Chief Inspector Kawandi, the latter sat in the office of the presiding magistrate whilst the alleged confession was being recorded. That alone creates an impression that the alleged confession by the accused was not made freely and voluntarily.

[23] It is a requirement that in order for a confession to be admitted in evidence it must have been made, freely and voluntarily and without any undue influence. It is common cause that from the time of the accused's arrest on the alleged murder charge, Chief Inspector Kawanda had been conducted and informed about the possible involvement of the accused already. Infact the Chief Inspector's presence during the alleged confession would in itself intill fear in the mind of the accused and that would impact on the voluntariness or otherwise of the alleged confession.

[24] It has never been explained why it was necessary for the Chief Inspector to sit in and thereby follow the recording of the alleged confession. I am of the view that the alleged confession by the accused cannot be said to have been freely and voluntarily under the circumstances and it cannot therefor be rule admissible in evidence.

[25] Coming to the warning statement recorded by warrant officer Talliaard, he conceded that he did not fully explained the accused's rights prior to him taking the said warning statement. It therefore follows that accused would not have been able to make an informed decision before the statement was taken after his arrest. The

warning statement recorded from the accused by the police and signed by the parties is ruled inadmissible.

[26] With regard to the section 119 of the Criminal Procedure Act recorded by the presiding magistrate on the 24 September 2014 after the accused had pleaded to the charge of murder in open court, these however are ruled to be admissible in evidence as they were recorded after the presiding officer had dully explained the accused's legal rights as confirmed by Ms Alberto who acted as official interpreter during the proceeding.

D N USIKU
Judge

APPEARANCES

STATE : Ms Sikerete
Office of the Prosecutor-General, Windhoek

ACCUSED : Mr Engelbrecht
Instructed by Directorate of Legal Aid, Windhoek