

**REPUBLIC OF NAMIBIA**

**NOT REPORTABLE**



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

**RULING ON TRIAL WITHIN A TRIAL**

**CASE NO.: CC 02/2015**

In the matter between:

**THE STATE**

and

**RIAAN KHAXAB**

**ACCUSED ONE**

**HANS GERARD KAMBERIPA**

**ACCUSED TWO**

**Neutral citation:** *S v Khaxab* (CC 02/2015)[2017] NAHCMD 7 (17 January 2016)

**Coram:** USIKU J

**Heard on:** 2 June 2016, 15-18 August 2016 and 14-15 September 2016

**Delivered on:** 17 January 2017

**Flynote:** Criminal law: Trial within a trial – Evidence – Confessions and admissions – Admissibility – Police officers taking confession and admissions, must be satisfied that the statement is made freely and voluntarily.

**Summary: Admissibility – Confessions and Admissions State must prove that admissions and confessions were made freely and voluntarily – Without undue influence – That admissions and confessions were made when accused was in his sound and sober senses – That accused was informed of his rights to legal representation including the right to apply for legal aid.**

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### **ORDER**

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Admissions and confessions made by accused are admitted into evidence in this court.

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

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USIKU, J.

[1] The defense objected to a confession and admissions allegedly made by the first accused person being produced as part of the evidence on the following grounds:

- i. The accused person objects to the admissibility of an admission made to Mr. Husselman in respect of the warning statement, which was allegedly not made freely and voluntarily;
- ii. The accused person further objects to the admissibility of the confession on the basis that firstly, it was allegedly not made freely and voluntary and secondly that it was made in violation of Accused person's right to a fair trial in terms of Article 12 of the Namibian constitution, more particularly that the accused person was allegedly assaulted, he was threatened, promises were made to him and was denied the opportunity or right to the services of an interpreter at the time.

[2] The State called six witnesses during the trial within a trial. The first witness was Deputy Commissioner Bartholomeus Alfeus De Klerk, who was based at Regional Crime Investigations Coordination, Windhoek, Khomas region. He testified that on 3<sup>rd</sup> December 2011 he received a call from Inspector Eimann from the Rehoboth CIU informing him that they needed his services as the accused person needed to make a confession. He drove to Rehoboth, police station whilst in an office, accused person was brought to him by Inspector Eimann who left them alone. He informed the accused person of his rights. He observed that the accused was sober, at his full senses and his demeanor was relaxed. Questions regarding any threat were posed to the accused to which he replied in the negative. The accused informed him that he was beaten with a baton on his back, upon observation by himself, he did not see any open wound, but he observed a slightly swollen part on the accused person's back. He then proceeded by taking the accused's statement as he was convinced that the assault that the accused was talking about had no influence in him making the statement.

[3] Deputy Commissioner De Klerk further testified that the accused did not request for a Damara/nama interpreter and that he had taken down the confession in the Afrikaans language that the accused well understood. In cross examination Counsel for the defense Mr. Uirab questioned the deputy commissioner as to why he did not utilized a recording instrument while taking down the statement of the accused, to which he responded that the recording instrument was not available, and more so the use of the recording instrument would have acted as a mere auxiliary. Mr. Uirab further questioned him as to why the process to apply for Legal aid was not written down on the form? To which he answered that he did explain the process and it was simply not written down.

[4] The second witness was Warrant Nel a police officer at the Rehoboth police station, stationed in the charge office, he asked the accused person whether he sustained any injuries and the latter stated that he did not sustain any injuries, he than recorded same in the occurrence book as "free from injuries no complains".

[5] The Third witness was Mr. Frans Amakali, who was a shift commander in the charge office, on the 4<sup>th</sup> of December 2011. At 20minutes past 12, he completed the

entry for the accused by making an entry in the occurrence book, in making the entry he indicated that the accused was “free from injury no complain”, because the accused did not inform him of any injuries and he also did not observe any injuries on the accused person at the time.

[6] Both Mr. Beukes and Mr. Luis van Wyk denied that they had assaulted the accused at the time of his arrest nor did they witness any other member assaulting the accused person.

[7] Mr. Riaan Khaxab the accused person testified that he was arrested on the 2 December 2011, by the police officers who found them walking. When the vehicles approached them, one officer Beukes and Rasta man disembarked from the vehicles and wanted to handcuff him, but he released himself from their grip and decided to run away. As he tried to run past a group of police officers he was tripped and fell to the ground. He was not sure of the number of police officers at the second vehicle. After he fell, he folded himself as the police officers allegedly started to beat him with police batons and kicked him. He could not see who was beating or kicking him as he was covering his face.

[8] Mr. Khaxab further testified that after the assault he was loaded onto the police vehicle and driven to the police station. He was searched and placed in a waiting room. He testified further that his rights were not explained to him. Mr. Eiman came to get him from the waiting room and told him that serious crime officers will come and beat the truth out of him. He was thereafter loaded onto a vehicle and they drove to his house where he was asked to point at a firearm. When he asked why he must point at the fireman Mr. Eiman allegedly slapped him at the back of his head and instructed that he points to the firearm as photos were then taken of him. The police then opened a bag in which ammunition and a silencer was found. The police also asked him where the rest of the things were whereby he informed them that, that is all he was given to keep and that the wallet was with his girlfriend. He was taken back to the police station. Whilst in the office of the investigating officer the police officers, who were present all started to question him randomly including Deputy Commissioner De Klerk.

[9] Mr. Khaxab was then left in the office with Deputy Commissioner De Klerk, who showed him his police card and identified himself. The accused allegedly requested a Damara>Nama interpreter and none was provided to him. He informed the deputy commissioner that he was allegedly assaulted as the Deputy Commissioner inspected his back. He allegedly requested for legal representation which was met with silence, he further claimed that he was not informed of his rights by the deputy commissioner.

[10] I now move on to adjudicate the grounds raised by the accused;

### **ALLEGED PROMISES MADE**

[11] Alleged promises made to the accused person as correctly argued by the state hold no water as the accused person testified himself in examination in chief that no promises were made to him, this was further confirmed by the testimony of Deputy Commissioner De Klerk.<sup>1</sup>

### **CONFESSION GIVEN FREELY, VOLUNTARY AND WITHOUT UNDUE INFLUENCE IN RESPECT OF ALLEGED THREATS OF ASSAULT AND ASSAULT AND THE RIGHTS OF THE ACCUSED**

[12] For the admissions to be admitted in evidence, they should satisfy the requirements of section 219A of the Criminal Procedure Act 51 of 1977. The Court must be satisfied that the statement had been made freely and voluntarily and without undue influence. Furthermore, the Court must be satisfied that accused had been properly advised of his rights to legal representation which includes the right to apply for legal aid. The Court must be further satisfied that the accused made the admissions whilst he was in his sound and sober senses.

[13] The *onus* of proof is on the State to prove beyond a reasonable doubt that the above mentioned requirements are met.

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<sup>1</sup> Also read *S v Johannes Mushishi* case no cc 07/2010 delivered on 21 June 2010 and

[14] In the case of *S v Windstaan and Another*<sup>2</sup>, the following was stated

'I have no doubt that accused 2 was informed of his rights to legal representation including the right to apply for legal aid. Although the proforma does not reflect that he is informed of his rights to apply for legal aid, when accused 2 was asked questions contained in the proforma the following transpired:

Question : Do you now want a legal representative?  
 Answer : I will apply for legal aid.  
 Question : What is your choice, do you wish to make a statement or do you only wish to answer questions, (after consultation with your legal practitioner or do you remain silent?  
 Answer : I will make a statement to the police now and want to tell the magistrate/court the truth.

What the accused said above was undoubtedly clear that he was aware of his right to legal representation including the right to apply for legal aid.'

[15] All State witnesses who interacted with the accused person on the date of arrest and on the date when the warning statement was taken testified that the accused person was not assaulted in their presence or that they did not assault him. They also did not observe any injuries on the accused, apart from old injuries that the accused testified to. The accused was taken to Deputy Commissioners De Klerk, the confession was taken, he informed the Deputy Commissioner that he was assaulted, the deputy commissioner observed a slightly swollen part on the accused person's back and continued as he was convinced that the assault did not induce a sense of fear in the accused at the time.

[16] Counsel for the State correctly argued that the contradictions between accused instructions and evidence in chief regarding who of the police officers allegedly assaulted him, the manner and on which particular part of the body he was assaulted is a clear indication that he was not assaulted. It is my opinion that if accused was indeed assaulted he was not going to contradict himself as to what role each police officer played when they allegedly assaulted him. Furthermore, the accused was allegedly not assaulted at the time the statement was recorded, but at

<sup>2</sup> *S v Windstaan and another* (CC 19/2010) [2016] NAHCMD 48 (3 March 2016).

the time of arrest. I am therefore satisfied beyond a reasonable doubt and inclined to side with Deputy Commissioner that the swollen area on the back of the accused person had no influence in him making the confession.

[17] It is important to note that the accused was arrested on the 2 December 2011. Deputy Commissioner De Klerk had asked the accused if any person has threatened him with assault to persuade him to make a statement to which the accused had responded in the negative. Further questions were put to the accused whether any actions would be taken against him should he decline to make a statement or if he was threatened with assault or any other prejudice should he inform him of the assault or threats to which he answered in the negative.

[18] The accused then appended his signature to confirm the correctness of the contents of the confession. That clearly goes to show that accused was giving his statement freely, voluntarily and without undue influence.

[19] Looking at the evidence presented before this Court, there is no doubt in my mind that when the accused narrated what had transpired to Deputy Commissioner De Klerk, he did so freely and voluntarily without any undue influence. His rights were fully explained to him and he understood them well. It became apparent that the accused is not a credible witness and as such his version of not being fully informed of his rights cannot be reasonably possibly true.

[20] In my view the state did prove that the admissions and confessions made by the accused were made freely and voluntarily without any undue influence and must therefore be admitted into evidence in this court.

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D N USIKU  
Judge

## **APPEARANCES**

STATE : Mr Lutibezi  
Of Office of the Prosecutor-General

ACCUSED1: Mr Uirab  
Directorate of Legal Aid

ACCUSED 2: Mr Tjituri  
Tjituri Law Chambers  
Instructed by Directorate of Legal Aid