

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

TRIAL –WITHIN – TRIAL

JUDGMENT

CASE NO.: CC 6/2022

In the matter between:

THE STATE

and

JOHAN WICKUS MAREE

ACCUSED

Neutral citation: *S v Maree* (CC 6/2022) [2024] NAHCMD 627 (24 October 2024)

CORAM: CHRISTIAAN, J

Heard on: 6 November 2023, 25 -28 March 2024, 27 -31 May 2024, 22- 26 July
2024, 2-6 September 2024, 21 October 2024

Delivered: 24 October 2024

Flynote: Criminal Law – Trial within a trial – Admission of a confession – Objection thereto – Rights not explained – Assaulted – Forced – No basis for objection – Admissible.

Summary: Criminal Law: The state sought to have a confession by the accused ruled admissible. The defence objected to that on the basis that the accused was not properly warned of his right to legal representation, was forced to say what he said and was assaulted. A trial within a trial was held and the court found that there was no basis for the objection.

Held further, that the accused's rights were fully explained to him.

Held further, that the accused was not assaulted. The confession ruled admissible

ORDER

The confession made by the accused on 3 June 2020 is ruled admissible.

JUDGMENT

CHRISTIAAN, J:

[1] The accused was arraigned in this Court on 74 counts comprising of charges of contravention of s 234(1) (d) of the Child Care and Protection Act 3 of 2015(Induce, allow or cause a child to be used for the purposes of creating child pornography), Contravention of section 15 read with section 1 of the Prevention of Organised Crime Act 3 of 2015(child pornography),contravention of section 15 of the Liquor Act 6 of 1998(supply a person under the age of 18 years with alcohol), contravention of section 14 of the Combating of Immoral Practices Act 21 of 1980 as amended by Act 7 of 2000(committing or attempting to commit a sexual act with a child below the age of 16 years), contravention of s 3(1) as read with s 3(2) and 3(4)(a) of the Combating of Trafficking in Persons Act 1 of 2018(Child trafficking), contravention of s18(1) (a) as

read with section 18(4) of the Tobacco Products Control Act 1 of 2010 (supply tobacco products to a person under the age of 18 years), contravention of s 4(b)(i) read with section 1, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004 (money laundering), rape in contravention of section 2(1) (a) of the Combating of Rape Act, Act No. 8 of 2000 (Rape) .

[2] The short facts of this case are that during the period extending and on diverse occasions from 2014 to 2020, the state alleges that it was the accused, a 51-year-old male self-employed photographer and videographer, attended swimming events in Windhoek, Namibia, and took photos and recorded videos. He installed hidden cameras in changing rooms and toilets of the Olympia swimming facility, recording children in various states of undress and nudity. The children were unaware of being filmed. The accused befriended families and their children at these events, and from 2014 to April 2020, he took them to his residence for sexual acts and filming. The accused provided alcohol and cigarettes to children under 18, despite their age, and showed them pornographic videos.

[3] It was further alleged that the accused then engaged in sexual acts with the children, touching, stimulating, and masturbating their penis, despite their being under 18 at all times. He would suck their penises, insert his penis into their anuses, and instruct them to stimulate and masturbate each other. The accused would take photographs or record the children in various states, post them online, and sell some to buyers in other countries. The payment was made via Western Union Money Transfer services. The children were mostly under 18 years old.

[4] The accused pleaded not guilty to all the charges preferred against him and did not disclose the basis of his defence.

[5] Mr. Khumalo represents the state, and the accused is conducting his own defense.

[6] The State applied for the confession regarding the accused to be admitted into evidence. The Defence objected to that on the basis that: (a) the accused was not properly warned of his legal rights; (b) He was forced or coerced to say what he said and (c) he was assaulted to make a confession (d) he was not on his sound and sober senses owed to medication he was using at the time (e) The accused was vulnerable due to his emotional state as he was separated from friends and family.

[7] The State called the below mentioned witnesses in support of the application. The summary of their evidence is as follows:

State's case

Hendrika Jacoba Horn

[8] On 3 June 2020, the accused was taken to make a statement before Ms Horn, a magistrate stationed at Mungunda Magistrate Court, Windhoek. On the *pro forma* (exhibit T), the magistrate notes that she cautioned and explained the rights of the accused. She informed the accused that he has a right to legal representation, including legal aid. He was asked whether he understood the warning and he said 'yes', he further stated: 'I do not want to have a lawyer present while making my statement'. He was asked: 'Do you nevertheless still wish to make a statement?' and he answered, 'I want to make a statement' (my emphasis). He was asked 'were you assaulted, threatened, bribed or were you promised any benefits or privileges by any person in order to influence you to make a statement?' He then replied and the answer was 'No, not at all. It is my own choice and I do not expect any benefits and or privileges'.

[9] Magistrate Horn made the following observations 'Deponent appears to be in his sober and sound sense. In other words, he is normal'. She maintained that the accused's rights were explained and that she was never informed that the accused was forced to make a statement by the police officer. She further told the court that, had the accused told her he was forced to make a statement, she would have stopped the whole

confession process. The accused spoke English and he is conversant in English. She testified that after the confession was taken, it was read back and the accused was satisfied with it and he signed it. The accused admitted that Ms Horn informed him of his rights to legal representation and that he had applied to legal aid, but failed to mention that a payment of N\$350 is to be made. The accused further admitted that Ms Horn made a good impression on him and she explained the rights to him. She further testified that the accused appeared normal and had no injuries. The accused never complained to her that he was assaulted. He could also not observe any problem with the interpretation and she and the accused understood each other. Ms Horn recorded that the accused made the confession freely and voluntarily, in his sound and sober senses and without undue influence.

Sergeant Memory Chindo

[10] Sergeant Ncindo and Sergeant Naobeb, were instructed by Chief Inspector Olivier to take the accused to the Katutura Magistrates Court, for him to make a confession in front of a Magistrate. The circumstances surrounding the transportation of the accused were that she was accompanied by her colleague Sergeant Naobeb, and the accused was seated at the back seat of a double cab motor vehicle. They have proceeded to the office of Magistrae Horn, who was seated at the upper floor at Katutura Magistrate court, upon arrival with the accused. She testified that they waited for the accused to finish making the confession outside the office. The accused was not handcuffed at any stage during the time that he was with her. The accused also did not inform her of any complaints he had. The accused went into the office of the magistrate by himself and they did not disturb the proceedings at any stage. When the accused completed the process, they again accompanied him to the Gender Based Violence Unit and handed him over to Chief Inspector Olivier.

Alex Naobeb

[11] Sergeant Naobeb and Sergeant Chindo was tasked by Chief Inspector Olivier to escort the accused to the Katutura Magistrates Court for him to make a confession. He

confirmed the testimony of Sergeant Chindo in so far as it relates to the fact that they took him to court without having any conversation with the accused. He was taken to the office of Magistrate Horn. They left the office after the accused was handed over, and was outside the office of the magistrate, waiting for the accused to finish taking the confession. Once the accused was done with the process, they escorted him back to the Gender Based Violence Unit. He further testified that he did not interrupt the proceedings at any stage, and that the accused did not voice any complaints to him.

Lodewyk Van Graan

[12] Testified that he had an interaction with the accused on 12 May 2020 and he was with Warrant officer Khun at that stage. He confirmed that he collected the accused from Seeis Police Station and dropped him off and did not have any interaction with the accused until such time that he saw him in court, when he testified in the main trial. He further confirmed that he did not know the accused made a confession and further denied to have threatened the accused or tied the accused in a figure eight position and he was further not tied up in a figure eight position by anyone in his presence. He further denied that the accused was assaulted at any stage. He clarified that the police procedures are very strict whenever a suspect or an accused is booked in and out for investigations. He informed the court that whenever an accused is received by the charge office, an occurrence book entry must be made that the accused is free from injury and free from complaints. He confirmed that when he had contact with the accused, he was very co-operative and that there was no strife or altercation between the accused and the police at any stage.

[13] He further denied that the accused dogs were used against him, as a means of threatening or inducing him to make a confession. He confirmed that the dogs of the accused were taken by family members, the date of his arrest, and the search and seizure of his residence. He denied that Sergeant Olivier had anything to do with the dogs of the accused.

[14] On the aspect of legal representation, he testified that the accused was given an opportunity at every stage from the time of arrest, investigation up until he appeared in court. There was according to him no point where the accused did not have an opportunity to consult a lawyer. It was his further testimony that the accused was given an opportunity to call his family regarding the dogs. He denied discussing the accused with his sister or family members, and that the accused was separated from them, because of the arrest in this matter. He further denied that any of them attacked, or displayed aggressive behaviour towards the accused. He further informed the court, that the confession taking process of the accused was done by the Gender Based Violence Unit and that he was not involved.

[15] The witness further denied that any evidence bag was on the head of the accused in an attempt to suffocate him. The accused was always confirming that he was free from injuries or complaints, and should he had complaints, there was so much opportunity for him to report that to any of the police officers. He further denied having seen Khun and Olivier assaulting or coercing the accused in any way in his presence.

Ricardo Khun

[16] On his part, Ricardo Khun denied that he knew about the accuseds' confession. He denied that he assaulted the accused before he made the confession. He further denied that he knew what a figure eight position is and he can further not confirm that the accused was assaulted. He confirmed that he explained the accused rights to him and that the accused called a friend to come and remove the dogs from his residence. He further denied, having done anything to the dogs of the accused, in an attempt to threaten him or induce him to make a confession.

Karl Olivier

[17] Inspector Olivier, testified that he was involved in the process of the accused arrest, and had nothing to do with the accused confession except for arranging that the accused be taken to make a confession in front of a magistrate. He informed Sergeant

Chindo and Naobeb to escort the accused to Katutura Magistrate for him to make the confession. He denied that any threats were made to the accused or that he was unduly influenced or coerced before making the confession. Regarding the explanation of the rights, he denied that the accused rights were not explained and further said that he could not comment on the rights explanation when the confession was taken. He further denied and confirmed the testimonies of Khun and Van Graan, that the accused was not assaulted by them at any stage of the proceedings.

[18] Inspector Olivier, denied that he has knowledge of what a figure eight position is, and the accused was not tied in a figure eight position by anyone of them. He further denied that any plastic bag was put over the head of the accused, in an attempt to suffocate him. Inspector Olivier confirmed that there were dogs at the residence of the accused, on the date he was arrested and the search and seizure of his residence took place. He denied that they had anything to do with the dogs, as a way to induce the accused to make a confession. He confirmed that the accused was constantly reminded of his rights. He further denied informing the accused what he should say in the confession before the magistrate.

[19] The accused testified in his defence, as the only witness.

Defence case

Johan Wickus Maree

[20] He testified that he was arrested on 30 April 2020, just after eight, whilst doing charge office duty as a reservist police officer between 06h00 and 14h00. He testified that he did not book off duty as he was not instructed. He was informed by Inspector Van Graan to accompany him to the Regional Office. At this office, he was shown a screen shot of the video made and a statement by Sergeant Oliveir. The accused testified that he asked whether no one is going to read his rights to him and none of the police officers introduced themselves to him. The accused confirms that he was shown a search warrant but never provided with a copy.

[21] The accused further testified regarding the taking of the confession that he was denied his medication during this time, as he suffered from Post-Traumatic Stress Disorder, anxiety and depression. He confirmed that he was detained and Seeis Police station and was called by District Sergeant Aktoffel for further investigations. He requested to see a legal representative, but was denied the same. He confirmed that he was taken in a motor vehicle and taken to the office of Inspector Olivier. He confirmed that Warrant officer Khun came into Inspector Oliviers office and that he stood up from his chair, where he was sitting. The accused asked whether he can apply for a legal aid lawyer and he was denied to do that.

[22] The accused denied that he asked to be taken to make a confession on 3 June 2020. He further testified that there is no paper trail that he asked to make a confession or any Occurrence Book entry. He testified that whilst in the office of Chief Inspector Olivier, Warrant officer Khun took a piece of paper and a red pen showed him a picture of his two dogs, as they are looking up to the camera, and he informed him that the picture was taken just now. I was informed that if I want to see the two dogs alive, then I must confess. Warrant Officer Van Graan according to the accused was on the phone and said to me that he is going to tell me what to say in the confession.

[23] The accused testified that Warrant Officer Van Graan informed him that he will guarantee him bail, and not allow the media to record the proceedings or allow the children to testify, should he make a confession. He further testified that Warrant Officer Van Graan threatened him that he will arrest his brother and sister for rape and molestation charges and also tell his family not to talk to him ever again. He further testified that he was threatened to confess to the video he made with Esbach, then he will be taken to see his dogs. He accompanied Alex Naobeb, Khun and another lady he could not remember her name to the chamber of Magistrate Horn.

[24] The accused further testified that he has a history with the dogs, as he got the dogs to assist him to deal with the stress and anxiety he was suffering from. He said that the dogs helped him to cope with the trauma of the death of the mother of his son and his mother.

[25] The accused testified that when he entered the office of Magistrate Horn, he hid the envelope and the notes he made on instructions of Van Grann and Khun. After he greeted the magistrate, he dropped the envelope on his knees. He made the confession from the notes and they were interrupted during the proceedings three (3) times. The interruptions were that of Naobeb and the lady, who came to enquire, when we will finish. When they were done, he was again escorted to the offices of the Gender Based Violence offices.

[26] The accused testified that he was not himself during the process of making the confession, because of the side effects of the medication. The accused confirmed that his rights were not explained and that the police officers lied to the court, if they say they did not assaulted him.

Submissions by the state and the accused

[27] Counsel for the state submitted that the police officers denied having assaulted the accused. He submitted that the accused's rights were explained to him. He made the confession freely and voluntarily. He was given ample time by the magistrate to reflect on his decision to make a confession, but still insisted that he wanted to make a confession. Counsel also submitted that the confession was done in accordance with the law, his rights were explained and he opted to confess in the absence of his lawyer.

[28] The accused submitted that the accused's rights were not fully explained to him. He further submitted that the information in the confession was fed to him by Khun and Van Graan and that he had to repeat that in order for him to be admitted to bail and to see his dogs and further to avoid the arrest of his sister and brother. He further

submitted that he was assaulted before he made the confession. He further submitted that he was emotionally not stable. He urged the court not to accept the confession into evidence.

Legal principles

[29] S 217 of the Criminal Procedure Act 51 of 1977 provides:

‘Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without been duly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.’

[30] In *S v Malumo & others*¹, the court held that:

‘In deciding whether such statements are admissible, the court must be satisfied, *inter alia*, and that the statements had been made freely and voluntarily and without undue influence. In addition, the court must be satisfied that the rights of the accused had been adequately explained by the magistrate who recorded the statement.’

[31] It is trite that in establishing whether a statement amounting to a confession complies with the provisions of section 217 of the CPA the onus rests upon the State. Proof of the admissibility of the confession must be established beyond a reasonable doubt.

[32] In the circumstances, a trial within a trial was heard. I shall now turn to analyse the evidence presented.

Analysis of the evidence

¹ *S v Malumo & others* 2010 (1) NR 25.

[33] The basis for the objection of the confession is that the accused was assaulted and he was forced to say what he said, his rights were not fully explained and that he was not emotionally well to have made the statement. Not unexpectedly all the police personnel who were called to give evidence on behalf of the State denied having assaulted the accused in any way or having seen any assaults perpetrated upon the accused or having denied the accused to see and consult a legal practitioner of his own or that appointed by legal aid. The claim was made that the constitutional rights were explained to the accused whenever it was necessary to do so. In short all proper protocol had been observed. It is not necessary to set out in detail all the evidence put forward by the police officers' testimony. Certain aspects of the evidence placed before court in the trial within a trial established a number of objective factors which play a prominent role in the evaluation of the evidence led in the trial within a trial.

[34] The police officers who arrested the accused testified that he was not assaulted when he was arrested or at any stage thereafter. Khun, Van Graan and Olivier also testified that they did not assault nor did they see the accused being assaulted. Chindo and Noabeb informed the court that they were instructed to escort the accused to the chamber of the magistrate, where he had to make a confession, which they have done, without assaulting the accused, nor did they disrupted the proceedings as alleged by the accused.

[35] Khun, Van Graan and Olivier vehemently denied having assaulted the accused and having told him what to say to the magistrate and that he will be admitted to bail if he told the magistrate what (Warrant Khun and Van Graan) wanted him to say. It was not put to them that the promised bail to the accused. Van Graan and Khun informed the court that when the accused was taken to make a confession on 3 June 2020, they were not aware of such process and could therefore deny the allegations made by the accused against them.

[36] Inspector Olivier informed the court that when he was informed that the accused wanted to make a confession, he made the necessary arrangements for the accused to

be brought before a magistrate. He was taken to the Magistrate where he made a confession. He denied having assaulted the accused. He also never saw any injuries on the accused and he also denied having making promises to the accused.

[37] The magistrate testified that she has taken many confessions and he always told accused persons that they were innocent until proven guilty and that they did not have to make a confession. She also explained the accused's rights to him including the right to legal representation and that he (accused) was entitled to be represented during the process of making a confession. She did not observe any injuries on the accused nor did the accused tell her of any injuries or assault or that promises were made to him or that he was informed what to say in the confession. The accused gave the confession freely and voluntarily. He was in his sober and sound senses when he made the confession.

[38] The accused is not being truthful when he testified that he was assaulted. He had the opportunity to inform the magistrate about the assaults, but did not do that. Being suffocated and tied in a figure eight position as he claimed, must have been painful and, if true, he would have told the magistrate about it. The accused also admitted that the magistrate explained his rights to him, but omitted to explain the payment of N\$350. Magistrate Horn also explained that the confession was done in accordance with the law. Accused's rights were explained and the accused made the confession without being forced. From the evidence, it is clear that the the magistrate was competent, the accused never raised any misunderstanding between him and the magistrate as a basis of the objection for admissibility.

[39] For the above reasons, I am satisfied that the state made out a case for the admission of the confession.

Order

The confession made by the accused on 3 June 2020 is ruled admissible.

P CHRISTIAAN

JUDGE

APPEARANCES:

THE ACCUSED

Johan Wickus Maree
Windhoek Correctional Facility
Windhoek

THE STATE:

Mr Khumalo
Office of the Prosecutor-General
Windhoek