

HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: CC 19/2010

**THE STATE**

And

**RAYNOLDT WINDSTAAN  
JOHANNES EIXAB**

**Neutral citation:** *S v Windstaan and Another* (CC 19/2010) [2016] NAHCMD 48  
(3 March 2016)

**Coram:** SHIVUTE, J

**Heard:** 6 – 8 October 2014; 21 – 28 July 2015; 12 – 19 August 2015; 16  
– 18 November 2015 and 27 January 2016

**Delivered:** 3 March 2016

**Fly note:** Criminal Procedure – Evidence – Admissions – Admissibility –  
State must prove that admissions were made freely and  
voluntarily – Without undue influence – That admissions 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.

---

## ORDER

---

The warning statement dated 21 August 2010 by accused 2 is ruled to be admissible.

---

### RULING ON A TRIAL-WITHIN- A-TRIAL

#### SHIVUTE J:

[1] Accused 1 and 2 are jointly charged with two counts of murder and one count of defeating or obstructing or attempting to defeat or obstruct the course of justice.

[2] Mr Moyo appears on behalf of the State, Mr Mbaeva appears on behalf of accused 1 and Mr Christiaans appeared on behalf of accused 2 but withdrew before the completion of the trial-within-a-trial after he allegedly received conflicting instructions from accused 2 and Mr Kaumbi took over from him. Both defence counsel are instructed by the Director of Legal Aid.

[3] Mr Moyo sought to introduce evidence of alleged confessions made by each accused person as well as a pointing out in respect of accused 2 and a warning statement. Counsel for accused 1 opposed the application on the grounds that accused 1 was assaulted. The content of the confession was allegedly dictated to him by police officers namely Groenewaldt and Van der Westhuizen. Promises were made to him and that he was not informed of his rights. While counsel for accused 2 objected on the grounds that the accused did not make the statement freely and voluntarily as he was assaulted. His rights

were not properly explained to him. In respect of the warning statement he warned the police that he wanted to apply for legal aid but they just proceeded to take his warning statement and proceeded to take him to the magistrate to give a confession.

[4] Although counsel initially opposed the admission of the alleged confessions and pointings out in evidence, they later on abandoned their objections. The contents of the alleged confessions and pointings out were read into record and admitted as part of the evidence except the content of the warning statement in respect of accused 2.

[5] I will now deal with accused 2's alleged warning statement. The state called Warrant Officer Kotungondo who allegedly slapped accused 2 and Warrant Officer Kruger who allegedly hit him with a fist in the stomach.

[6] Warrant Officer Jacobus Johannes Kruger testified that whilst he and Warrant Officer Kotungondo were investigating this matter, they approached accused 2 at Mariental Police Station. Accused 2 allegedly told them that he was waiting and expecting them. Before accused 2 spoke further, he was warned of his rights to remain silent, to legal representation by a lawyer of his choice and the right to apply for legal aid whereby accused 2 elected to tell his story about the murders without a legal representative present. Accused 2 appeared to be normal and sober and spoke freely and voluntarily. He did not complain of any assault and no promise was made to him. He was not assaulted in his presence and he was not told by anybody in his presence what he should do and tell the magistrate. He further disputed that he was sitting in front of the magistrate's office when accused 2 was giving a confession. The witness again testified that accused 2's warning statement was recorded by Warrant Officer Kotungondo.

[7] Warrant Officer Kotungondo corroborated Warrant Officer Kruger that when accused 2 saw them he said he was expecting them. However, Warrant officer

Kotungondo added that accused 2 allegedly said he knew that the two officers were aware of his involvement in the murder case as he knew accused 1 would have mentioned his involvement, as a result he wanted to tell the truth.

[8] Warrant Officer Kotungondo confirmed that he took a warning statement from accused 2. When he realised that accused 2 was incriminating himself he warned him of his rights to remain silent, rights to legal representation and that whatever he said would be written down and used against him at a later stage. He again repeated the accused's rights immediately before he took the warning statement which included the right to apply for legal aid. However, the right to apply for legal aid is not reflected on the proforma that he was so warned.

[9] Warrant Officer Kotungondo further testified that he did not observe any injury on accused 2, he was in a sober and sound senses. No promise was made to him to induce him to speak. He did not assault the accused or dictate to him what to say either in the warning statement or confession or to do a pointing out. The atmosphere was relaxed. The witness spoke to accused 2 in the accused's mother tongue which is Damara Nama. The witness reduced the warning statement to writing in English, the official language. After he translated to accused 2 what he wrote, they both signed the statement.

[10] Accused 2 testified that he was assaulted by police officers Kruger and Kotungondo, they threatened him and forced him to give a statement. They informed him of what he should say in the statement and that he signed the document under duress. They even told him what to say to the magistrate when giving a confession. When he was taken to the magistrate he informed the magistrate what he was told by the two police officers. He did not tell the magistrate that he was assaulted, influenced or threatened because he was scared to be assaulted further by the police. Accused 2 conceded that he was in his sound and sober senses when Kontungondo took a warning statement and when he gave a statement to the magistrate. Accused 2's instructions were that

Kotungondo slapped him and Kruger punched him with a fist in the stomach but his evidence in chief is that Kotungondo punched him with a fist and Kruger slapped him.

[11] Furthermore, another instruction to Kruger was that he suggested to use accused 2 as a State witness on condition that he must tell the story to the magistrate the way Kruger wanted him to but accused 2 refused to do so. Again it was put to magistrate Savage that Kotungondo informed accused 2's rights to legal representation including that of legal aid. Counsel for accused 2's instructions to Kotungondo were that after accused 2 gave his statement the atmosphere was relaxed to the extent that he gave N\$10 to accused 2. Kotungondo confirmed that the atmosphere was relaxed. However, he could not deny or confirm that he gave accused 2 N\$10 as it had become a habit for suspects to ask money from police officers to go and buy cigarettes or tobacco.

[12] Sergeant Gideon Karumendu corroborated Warrant Officers Kruger and Kotungondo that he did not observe injuries on the accused when he met him after he gave his warning statement. He was instructed to book accused 2 out and take him to the magistrate to give a confession. Accused 2 never reported to the witness that he was assaulted or had any injuries.

[13] Counsel for accused 2 argued that the warning statement taken by Warrant Officer Kotungondo should not be admitted in evidence because the accused was assaulted by Warrant Officers Kruger and Kotungondo. He further submitted that Warrant officer Kotungondo did not explain the accused's rights properly and that the accused was bribed with N\$10 to keep quiet. Counsel further argued that what was contained in the statement was dictated to accused 2 by the police.

[14] For the admissions to be admitted in evidence, they should satisfy the requirements of s 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.

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

[16] All State witnesses who interacted with accused 2 on the date the warning statement was taken testified that accused 2 was not assaulted in their presence or that they did not assault him. They also did not observe any injuries on the accused. The accused was taken to the magistrate after a warning statement was taken but he never told the magistrate that he was assaulted. Counsel for the State correctly argued that the contradictions between accused 2's instructions and evidence in chief regarding who of the two 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 2 was indeed assaulted he was not going to contradict himself as to what role each police officer played when they allegedly assaulted him. Furthermore, if the accused was assaulted at the time the statement was recorded, the atmosphere was not going to be relaxed after accused 2 gave his statement. I am therefore satisfied beyond a reasonable doubt that accused 2 was not assaulted.

[17] Concerning the issue whether accused 2 was informed of his rights to legal representation including the right to apply for legal aid, it has been conceded that accused 2 was informed of his rights by the police officer who took the warning statement. This instruction was put to the magistrate who took his confession. Again counsel who initially represented accused 2's instructions were that he believed Warrant Officer Kotungondo informed accused 2 of his rights and that he understood.

[18] 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.

[19] I will now deal with the allegation that the accused was given N\$10 in order to keep quiet. It has been submitted that the N\$10 was allegedly given in order to silence accused 2. However, this allegation was not put to the witness through cross-examination.

[20] If it was part of counsel's instructions that accused was given N\$10 in order to silence him this was supposed to be put to the witness whilst he was in the witness stand. This is in line with the decision in *President of the Republic of South Africa v South Africa Rugby Football Union and Others* 2000(1) SA 1 at 5 where it was held:

'...The precise nature of the imputation should be made clear to the witness so that it could be met and destroyed, particularly where the imputation relied upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence was to be challenged but also how it was supposed to be challenged. This was so because the witness had to be given the opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance was to be placed...'

[21] This Court is not satisfied that the alleged N\$10 was given in order to silence him. In any event it is highly unlikely that a person who was allegedly assaulted would be silenced by N\$10 or would sacrifice his bodily integrity for a measly N\$10.

[22] Concerning the issue that the accused was told to give a statement as the police officers wanted him to say, accused 2 said he refused to comply with what police officer Kruger told him. If accused 2 had refused to comply with the police officer's alleged instructions he could not have been influenced by the alleged promise of becoming a State witness.

[23] For the foregoing reasons, I am satisfied that the State has proved that accused 2 gave a warning statement to a police officer freely and voluntarily whilst he was in his sober and sound senses. Accused 2 himself conceded that he was in his sound and sober senses whilst he was giving a warning statement. I am further satisfied that he was not unduly influenced and that he was properly informed of his rights. Therefore, the warning statement is admissible in evidence. As to whether the content of the warning statement was dictated to him that is a question of credibility that needs to be decided at a later stage.

[24] With regard to the two confessions made by the two accused persons and the note on pointings out by accused 2 these documents have been admitted in evidence and they are part and parcel of the record. The issue concerning



whether the contents of the statements were dictated to the accused persons by the police officers is an issue of credibility which I intent to deal with in the judgment in the main trial. This also goes to the weight to be attached to the statements and note on pointings out.

[25] In the result the following order is made:

The warning statement dated 21 August 2010 by accused 2 is ruled to be admissible.

-----  
N N Shivute  
Judge

#### APPEARANCES

STATE : Mr Moyo  
Office of the Prosecutor-General

ACCUSED 1: Mr Mbaeva  
Instructed by the Directorate of Legal Aid

10  
10  
10  
10  
10

ACCUSED 2:

Mr Kaumbi

Instructed by the Directorate of Legal Aid