



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING: TRIAL WITHIN A TRIAL**

CASE NO.: CC 08/2014

In the matter between:

EDMUND JAGGER

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Jagger v S* (CC 08/2014) NAHCMD 152 (01 June 2017)

Coram: SIBOLEKA J

Heard on: 27, 28, 29, 30 31 March 2017; 5, 6, 7 April 2017

Delivered on: 01 June 2017

Flynote: Criminal Procedure: In adequate account, none completion of pro-forma forms constituting the record of proceedings for the applicant's right to legal representation, section 119 plea proceedings, and other rights at various stages of the criminal trial did not take place. There is no part of the handwritten/typed record showing that the rights were in fact explained. D/Sgt. Neleo was not

competent to record an incriminating statement on the warning statement that should have been made to a commissioned officer or a Magistrate. Exhibits handed in as evidence in that regard is declined. The objection to the acceptance of the contents thereof is upheld.

Summary: After the applicant's arrest on the charge of murder the investigation officer took a warning statement whose contents were implicating him to the crime and thus should have been given to a Commissioned Officer or a Magistrate. He thereafter appeared before the Magistrate and pleaded guilty in terms of section 119 of the Criminal Procedure Act 51 of 1977. The forms related to the explanation of his legal rights as well as section 119 plea proceedings were not completed, and there is no handwritten or typed record to that effect.

Held: This procedural failure goes to the core of the pre-trial procedural fairness.

ORDER

In the result I make the following order:

1. The applicant's objection to the contents of the warning statement is upheld.
2. The applicant's version that the explanation of the rights to legal representation and s 119 plea proceedings were not adequately related to him is upheld.
3. The exhibits related to these three documents are set aside and cannot form part of the evidence before this court.

RULING: TRIAL WITHIN A TRIAL

SIBOLEKA, J:

[1] The dispute on this matter has been brought about by the following

proceedings: Section 119 of the Criminal Procedure Act 51 of 1977 plea proceedings before Magistrate Shilemba. The police warning statement the applicant allegedly gave to the investigation officer D/Sgt. Linus Neliwa.

[2] The applicant is facing the allegations of murder to which he pleaded not guilty.

[3] The facts of the matter are briefly that the applicant had allegedly stabbed his girlfriend during the evening of the day of the incident. He went to his flat where the police later found him hanging from the ceiling tied to a piece of wire. They removed him from there and rushed him to hospital for urgent medical attention which he received and was released after some few days. The applicant disputes the whole contents of the police warning statement. There was no interpreter at the time the investigation officer interviewed him. He did not understand what was going on. The statement was only brought to him for a signature.

[4] On the other hand D/Sgt. Neleo testified that the applicant chose to engage him in Afrikaans. That was the reason why the interview was held in that language. He further stated that they understood each other well from the beginning to the end. I accept the version of the police officer thus far. However the officer should have stopped his interview when he realized that the applicant was about to implicate himself to the serious crime he was facing. He nonetheless continued to record the story while he was not competent to do so. It is for that reason that the applicant's objection to the contents of the warning statement is upheld.

[5] The applicant contends that the presiding Magistrate Shilemba did not explain his rights to legal representation. The first pro-forma form the accused's rights to legal representation used by the Magistrate during Criminal Court proceedings is comprehensively drawn up. On top it provides the space for the

Case No, the date of the proceedings and the officers of the Court in attendance. This is followed by a substantially detailed explanation of legal rights. Immediately thereafter is the various options open to the accused to choose from and to indicate on the provided spaces what he elects to do. The presiding officer is by law procedurally required to indicate the accused's choice in regard to these initial crucial explanations. The importance of these explanations is that they indicate how the accused wants to conduct the trial of his case. At the bottom it requires the presiding officer to indicate the date of the proceedings on which the accused appeared before him.

[6] On this matter, Magistrate Shilemba only entered the case number, his name, the Prosecutor and interpreter's names as well as the fact that the accused was appearing in person that is all. The whole crucial information indicated on this form, which each presiding officer is obliged to fill in appropriately in is totally blank. The applicant objects to the content of section 119 plea proceedings on the premise that no explanation was made to him as to what it was all about. He did not know the reason Magistrate Shilemba was questioning him. He denies that the charge was ever put to him.

[7] Section 119 of the Criminal Procedure Act 51 of 1977 explanation pro-forma form has also not been appropriately accounted for. The name of the accused, and the case number have been entered. However, the important information on the bottom of the form requiring the presiding officer to indicate whether the accused understood the explanation of what the proceedings are all about, and whether there was anything he required the court to explain to him further are blank. On the bottom of this form appears two signatures of different presiding officers which should not be the case. The first signature persuasively appears on top of the name of Magistrate L. T. Mayumbelo. Magistrate Shilemba's name is written in pen next to it, without signature. The date on this form is written as 05/04/2013 while the date Magistrate Shilemba indicated on top when she started questioning the accused in terms of section 112 (1)(b) of

Act 51 of 1977 is not very clear. The date is 05/04/2013 but the “3” “4” at the end of the questioning appears the date: “05.03.2013” and a signature.

[7.1] The failure of Magistrate Shilemba to complete the above pro-forma forms which forms part of the record of proceedings leaves this court in complete darkness as to whether the explanation of the accused’s rights and the section 119 of Criminal Procedure Act 51 of 1977 were done or not and whether this all took place at the same proceedings or not.

[7.2] The above questioning proceedings were not mechanically recorded, they were only manually handwritten and typed thereafter. In the circumstances it is only the words of Magistrate Shilemba supported by the interpreter Daniel Meituere pertinently unsupported by the court’s own handwritten/typed documents of the record of proceedings.

[8] In view of all the above procedural failures of Magistrate Shilemba the prosecution has failed to convince this court that the applicant’s legal rights as well as the section 119 plea explanation of proceedings were in fact appropriately explained to him. For the reasons aforestated I decline to accept the contents of the police warning statement the applicant allegedly gave to D/Sgt. Neleo. I also decline to accept that his legal rights and section 119 plea proceedings were adequately explained to him.

[9] In the result I make the following order:

1. The applicant’s objection to the contents of the police warning statement is upheld.
2. The applicant’s version that, the explanation of the rights to legal representation and section 119 plea proceedings were not adequately related to him is upheld.
3. The exhibits related to these three documents are set aside and cannot

form part of the evidence before this court.

A M SIBOLEKA

Judge

APPEARANCES:

APPLICANT

Mr. J. R. Kaumbi

Instructed by:

Directorate of Legal Aid, Windhoek

RESPONDENT

Ms. K. Esterhuizen

Of

Office of the Prosecutor-General, Windhoek