

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING TRIAL-WITHIN-A-TRIAL

Case no: CC 13/2019

In the matter between:

THE STATE

and

PETRUS DU PLESSIS

ACCUSED

Neutral citation: *State v Du Plessis* (CC 13/2019) [2021] NAHCMD 102 (09 March 2021)

Coram: USIKU J

Heard: 03 March 2021

Delivered: 09 March 2021

Flynote: Criminal Procedure – Evidence – Warning statement – Duty on police and Court to inform an accused of his fundamental rights – Accused not duly informed of his rights before pre-trial procedures – Explanation of rights never or

mere formality – Accused must understand and appreciate the explanation and his rights – Verbatim explanation of rights to be stated by officer explaining rights.

Summary: The state sought the admissibility of a statement made to a police officer after the accused was arrested and charged with an offence of Housebreaking with intent to murder, and murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 on the first count. On the second count the accused faces charges of assault by threat.

The evidence presented before Court was that the accused's rights were explained to him upon his arrest firstly and again before he was charged by the investigating officer Warrant Officer Johan Henry Gaeseb before he took a warning statement from him on the 27 August 2018.

It is now the accused's contention that his rights were not explained to him. Neither was the Warning Statement read back to him.

ORDER

As a result, the warning statement allegedly taken from the accused is ruled inadmissible in evidence.

RULING

USIKU J

[1] The sole issue before me to determine at this stage is the admissibility or otherwise of the Warning Statement made to police officer Johan Henry Gaeseb, the investigating officer in this case.

[2] The law relating to the point is clear and the cases cited by counsel, to which reference should be made are directly in point. Those cases are relevant.

[3] It is trite that the State carries the burden of proving that the statements made by the accused are made:

- (a) freely and voluntarily, that is not induced by threats or promise by any person or authority; while the accused was in his sound and sober senses and
- (b) without having been unduly influenced thereto, that is without any external factor, extinguishing the accused's freedom of will, not necessarily by a person in authority.

[4] The accused is facing charges of housebreaking with intent to murder and murder on the first count read with the provisions of Act 4 of 2003 on the second count, the charges preferred against the accused are that of assault by threat. The charges on both counts are denied.

[5] At the commencement of the trial the State led evidence from 13 witnesses. It is not my intention to go through each and every State witness's testimony however I intent to briefly state how Warrant Officer Johan Henry Gaeseb came to be involved upon request from the Karibib police when he was requested to assist in the investigation of the deceased's murder.

[6] It is at this point when the defence challenged the admissibility of the statement which Warrant Officer Gaeseb said the accused made to him on the ground that the statement was not made freely and voluntarily and the defence further contended that the accused's right to legal representation were not fully explained to him. As a result, the Court proceeds to go through a trial-within-a-trial on this issue.

[7] In the trial-within-a-trial Mr Gaeseb testified that he met the accused for the first time on the 26 August 2018 upon his arrival in Karibib after he had taken a group of police officers to follow footprints from the alleged scene of crime. It was decided that some of the officers should visit the accused's family members.

[8] Upon their visit to one of the accused's family members, he learned that the accused had a brother who is a teacher in Usakos. Mr Gaeseb accompanied by Constable Biljoen proceeded to visit the house in Usakos but did not meet the accused. Through communication it was indicated that footprints were followed towards Usakos which suggested that the accused may have walked to Usakos hence they needed to be on the lookout in Usakos.

[9] As Mr Gaeseb and his colleague were busy monitoring the accused's brother's house. They observed a male person who was limping entering the house at about five to six in the afternoon of the 26 August 2018.

[10] They decided to approach the house and knocked at the door to the house. A female person unknown to them opened the house whereafter Mr Gaeseb introduced himself as an officer of the police and further explained his reason for the visit, at the house.

[11] Whilst speaking to the lady, the officer observed a male person seated on a sofa set who attempted to hid his identity by pulling his cap in order not to be recognised. Because Mr Gaeseb had previously been given the suspect's name as 'Oukort', he called out the name and the accused responded. He went towards the accused and identified him as the wanted person.

[12] He again explained his reason for the visit by informing the lady that someone was killed and that he had been seen a male person entering the house, whereafter the lady authorised him to go ahead because he was a police officer.

[13] Mr Gaeseb identified himself to the accused by presenting him with his appointment certificate, whereafter he informed the suspect that he was a detective

from Walvisbay Police Station, and that he was under arrest. He further informed him that he was investigating a murder case which occurred on the 25th of August 2018 between 21 – 22 hours at the Old Location in Karibib.

[14] The accused (the suspect then) immediately responded by asking him which murder. He immediately warned the suspect that he was not obliged to answer any questions put to him or make any statement regarding the incident as it was a serious matter. He further warned the suspect that anything he was going to say will be written down and may be used against him in a Court of law.

[15] According to Mr Gaeseb he also informed the accused about his right to legal representation of his own choice at his own expense prior to deciding to answer any questions or making any statements.

[16] The accused responded that he will only speak the truth. The officer asked him whether he had understood the warning to which the accused responded in the affirmative. They conversed in Afrikaans language so as to enable Constable Biljoen to also understand.

[17] Mr Gaeseb requested the accused to accompany him to Karibib Police Station whereafter the accused pleaded with him to allow him to eat first, because he was very hungry after he had walked from Karibib to Usakos. Accused also informed him that he was very tired. He did not ask the accused why he had walked.

[18] The accused was given something to eat whereafter they walked to the police vehicle. As the accused walked limping, he asked him what had happened. He responded that he was stabbed by the deceased, his ex-girlfriend though he did not say when the stabbing occurred but claimed to have been stabbed with a spear. Whilst they were driving to Karibib, accused started to relate to the officer in the Damara Nama language that his ex-girlfriend had eaten up his money.

[19] Mr Gaeseb extended his warning to the accused and requested him to relate in the Afrikaans language so that they could both understand, whereafter accused

repeated that his ex-girlfriend ate up his money estimated to be approximately N\$250 000-00. He further informed them that his girlfriend had started cheating on him whereafter she dumped him at a later stage. According to Mr Gaeseb the accused continued to relate to him about the happenings as he insisted that he will tell the truth and was in his normal and sober senses.

[20] They later on arrived at the Karibib Police Station where he instructed a police officer to take the accused to the clinic for treatment of the wound he had observed which was bleeding on the left side of his thigh. He had observed that the accused also had bruises on his face.

[21] Pertaining to the events of 27 August 2018, Mr Gaeseb testified that he returned to Karibib Police Station and that the accused was brought to him at about 12 midday at the charge office whereafter he informed him about his rights in the Damara Nama language. He informed the accused that he was not obliged to answer any questions or make any statement, further that whatever he would say could be written down and be used against him in Court of law. He also explained to him that he had a right to legal representation of his own choice at his own expenses, prior to him making any statement.

[22] The accused was further informed that he can apply for legal aid, which upon approval will be given a lawyer whereupon the accused responded that he will tell the truth. He was further advised about his right to apply for bail. Warrant Officer Gaeseb testified specifically that after he had informed the accused about his rights he questioned him if he had understood, to which he answered in the affirmative. On a question whether he (the accused) wanted a legal representative, the latter responded that he wanted one.

[23] When he questioned him further as to what his choice was, the accused responded with a yes, adding that he will get the lawyer at a later stage and offered to give a short explanation in the warning statement. Warrant Officer Gaeseb went on to record a warning statement from the accused where after both appended their signatures on the statement.

[24] On the other hand the accused also testify that his rights to legal representation were not explained neither his right to remain silent. He further testified that after the statement was recorded it was not read back to him, but he was merely requested to sign it. It is an undisputed fact that the Court is faced with two versions, one from the state and the other one is that of the accused person with regard to the issue of admissibility or otherwise.

[25] It is now common cause that when the accused was questioned by Warrant Officer Gaeseb whether he wanted a lawyer, he answered in the affirmative. It is also now settled law that once an accused was asked whether he wanted legal representation before making a statement and he answers in the affirmative, no further questions should be put to him which may lead him to make any statement. That such interview should be brought to an end immediately, except perhaps to determine who the accused's legal representative is in order to make further arrangements. Mr Gaeseb therefore was under an obligation to immediately stop the interview instead of proceeding to record a warning statement from the accused.

[26] It must be reinstated that the right to legal representation which includes an entitlement to legal aid must be explained to a suspect in cases of pre-trial proceedings, especially to the uneducated and unsophisticated accused persons in such a manner that an accused person is placed in a position to make an informed decision. Whilst the duty of the police officer at the pre-trial proceedings is to inform an accused how to exercise such right or entitlement. The explanation of such rights should not be merely a formality, especially where an accused is facing serious charges as is in this case. It is also desirable to make use of competent interpreters to assist in the taking of warning statements by police officials which could strengthen their credibility.

[27] In my view since the right to have access to a lawyer is inextricably linked with the right not to be compelled to incriminate oneself, which is one of the requirements of admissibility, the failure on the part of the police not to allow the accused to

exercise his right to legal representation at the time the warning statement was recorded constitute an irregularity.

[28] Similarly the contention by the investigating officer not to have recorded fully the explanation to the accused should not be condoned just because of the claim that the pro-forma in which the warning statements are being recorded do not provide sufficient space.

[29] The burden to prove that the rights were fully explained lies with the state and it is its duty to prove to the Court that all the requirements have been complied with.

[30] As a result, the warning statement allegedly taken from the accused is ruled inadmissible in evidence.

D N USIKU

Judge

APPEARANCES:

STATE :

Mrs Jacobs

Office of the Prosecutor-General

ACCUSED :

Mr Engelbrecht

Instructed by Directorate of Legal Aid