



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO CC15/23

In the matter between:

The State

and

Ntokozo Khulekani Zikhali

JUDGMENT

TRIAL WITHIN A TRIAL

COX, AJ

[1] Mr Zikhali, the accused, was arraigned before this court on various counts which included kidnapping and murder of a four year old girl.

[2] During the trial counsel for the State informed that he wished to present evidence relating to a pointing out.

It was established from the defence counsel that the alleged pointing out is not in dispute but that the requirements for the admissibility of the evidence was not met as firstly the pointing out was made pursuant to threats made against the accused assaults on him and to avoid further assaults and threats and secondly that the accused's rights were not explained to him.

[3] The State presented the court with the evidence of the investigating officer, sgt Mbhele and the officer who took the accused for the pointing out, Col Scheepers.

[4] Following his arrest on 14 October 2022 the accused was collected from Boksburg North police station and transported to Actonville police station by Mbhele and Cst Roulls.

[5] The accused confirmed that his constitutional rights as per exhibit L was explained to him by the arresting officer. He could however not recall the details of the explanation.

Mbhele accepted that the arresting officer would have done that and did not explain any rights to the accused.

[6] The accused having given Mbhele and his colleagues a proverbial run around Mbhele called in Lt Col Scheepers, now Colonel to assist.

Scheepers testified that the accused intimated that he wished to make a pointing out in the matter; that he would point out where he had left the child the previous evening.

[7] Scheepers proceeded in explaining the accused's rights with regards to remaining silent, warned him against self-incrimination and legal representation. Whilst he was busy with the explanation, so he testified, the accused interrupted him and said that he knew his rights. He however continued with his explanation regardless of that.

[8] After the explanation he asked the accused whether he still wished to proceed with the pointing out which question the accused answered in the affirmative.

[9] Due to the nature of the matter Scheepers elected to follow the informal as opposed to formal processes in conducting the pointing out. It means that no official driver was appointed, no notes were made regarding the route or distances followed or any utterances by the accused en route or during the pointing out and obviously the accused could not sign any document to confirm the correctness of notes made.

[10] Both Mbhele and Scheepers testified that the accused was not assaulted by them or by anyone else in their presence.

It was common cause that the accused had injuries behind his left ear, right chest and right arm which he had sustained prior to his arrest.

[11] The accused person was a poor witness as far as it relates to the alleged assault on him.

He failed to confirm the statement of his legal representative concerning an alleged swollen neck, wrist and internal pain that he would have experienced.

Despite the small number of police that he was involved with on the 14th he was unable to identify any of his assailants.

It was the undisputed evidence of Scheepers that prior to his involvement the accused pointed out a number of addresses to Mbhele and Roulls. It agrees with Mbhele's evidence. In the circumstances it would be impossible for the accused not to know who assaulted him as there were only two police officials in the vehicle with him.

It was put to Mbhele that the accused was assaulted continuously and that he was threatened to do the pointing out. This statement was also not borne out by his evidence. It can hardly be said that he was assaulted continuously. As per his version he was not assaulted by Scheepers or by anyone in his presence.

Initially no mention was made of being suffocated with a plastic bag during the initial pointing out or at the Actonville police station. It appears to have been an afterthought

Based on the foregoing I cannot find that the accused person was assaulted as alleged.

[12] A pointing out amounts to an admission and are therefore governed by the principles applicable thereto. It follows that a pointing out by an accused need to be made freely and voluntary whilst in his sober senses.

[13] The fair trial rights of an accused person are contained in section 35 of the Constitution, Act 108 of 1996.

Pointings out which were contradictory to the Constitutional rights of the accused were said to be inadmissible in **Nomwebu** 1996(2) SACR 396 (E) and **Mathebula** 1997 (1) SACR 10 (W).

[14] I am satisfied that the accused's rights as per the Notice of Rights were explained to him and that he understood what was explained.

The relevant portion of the Notice of Rights reads:

(3) As a person arrested for the alleged commission of an offence, you have the following rights:

(a) you have the right to remain silent and anything you say may be recorded and may be used as evidence against you;

(b) you are not compelled to make a confession or admission which could be used in evidence against you;...

[15] Notably the document does not refer or mention anything about pointings out. It is a *lacuna* in the form and an omission that can prove to be fatal to the admissibility of pointings out as police officers, as in this case, subsequently fail to explain the accused person's rights in such event to him or/ her.

[16] In **S v Melani and Others** 1996 (1) SACR 335 (E) the court considered the admissibility of pointings out made by the three accused. Accused No 1 had not been warned that the evidence obtained as a result of the pointing out could be used against him.

The court considered the defence argument that the pointings out should be excluded as they had been obtained in breach of s 25(1)(c) of the Interim Constitution. It was held that the provisions of s 25 required the court to look beyond

the reliability and voluntariness of the evidence and to consider the impact of admitting the evidence on the “fairness of the criminal justice system as a whole and not only the fairness of the actual trial itself. Froneman J concluded that the pointings out were inadmissible as their admission would bring the administration of justice into disrepute.

The Constitutional Court subsequently ruled that before a pointing out is made the police must warn a suspect that he is not compelled to do so and that he must be made aware of the evidentiary consequences of the pointing out. Failure to do so would render the pointing out as inadmissible (**S v Melani en Andere** 1995 (4) SA 421 (CC))

[17] Scheepers admitted that he did not explain to the accused that he was not obliged to do a pointing out. Neither did he explain to the accused the evidentiary consequences should he proceed with the pointing out. It follows that the accused was not afforded the opportunity to make an informed decision whether he wished to proceed with the pointing out or not. That constitutes an infringement on the constitutional and fair trial rights of the accused hence the pointing out made by the accused is ruled inadmissible.

Cox AJ

Acting Judge of the High Court of South

Africa

North Gauteng Division, Pretoria

Appearances:

For the Accused: Adv Van Wyk Legal Aid South Africa.

For the State: Adv Sihlangu DPP Pretoria.

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