



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- | | |
|-----|--|
| (1) | REPORTABLE: [Y/N] ☒ |
| (2) | OF INTEREST TO OTHER JUDGES: [Y/N] |
| (3) | REVISED: ☒ [Y/N] |
| (4) | Signature: [REDACTED] Date: <u>4/8/2023.</u> |

CASE NO CC15/23

In the matter between:

The State

and

Ntokozo Khulekani Zikhali

JUDGMENT

SECOND TRIAL WITHIN A TRIAL

COX, AJ

[1] This judgment concerns the admissibility or not of a confession made by the accused to Lt Col Bronkhorst at the Brakpan Police station.

[2] Section 217 of the Criminal Procedure Act determines the admissibility of a confession by an accused. Subsection (1) reads:

“ 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 having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence”

[3] It was said that the confession of the accused was not made freely and voluntary as he was assaulted and coerced to do so hence a trial within a trial was entered into.

[4] The burden of proof rests upon the state to prove the admissibility of the confession. There is no burden on the accused to prove its inadmissibility. In this case it was therefore the duty of the state to prove that the accused was not assaulted or unduly influenced to make the confession. It was not the duty of the defence to prove that he was in fact assaulted.

[5] The State presented the court with the evidence of two witnesses and the accused was the only witness in the defence case.

[6] Warrant Officer Nienaber was the Client Service Centre Commander of Brakpan police station on 15 October 2022 and was instructed to collect the accused from its police cells to an office where he would find Bronkhorst whom Col Veldsman requested to take down a confession from the accused. After Bronkhorst was done Nienaber accompanied the accused back to the cells. His evidence does not add value to the point in dispute.

[7] It is common cause that the accused was neither threatened, assaulted nor unduly influenced by Bronkhorst to make a statement.

Bronkhorst completed a pro forma document used by the police when taking down a confession. He read the preamble into the court record. Of relevance is points 7 and 13.

[8] Point 7 reads:

"Have you been assaulted or threatened by any person in order to influence you to come and make this statement?"

No"

and 13"

"Do you have any injuries? If so, how and when were they sustained?"

Yes, police officers put a plastic bag over my head when I was questioned and I was kicked.

13.1 Observation to the Justice of the Peace:

Two wounds on hands (handcuffs), throat swollen, left side ribs also sore inside his body."

These two points arguably appear to be contradictory. Unfortunately, Bronkhorst elected to just follow the pro forma form and not to clarify the apparent contradiction. He defended his decision to proceed with the process of taking down the accused's statement by saying that when asked the accused he elected to proceed with making a statement.

It would have been apposite for Bronkhorst to clarify the apparent contradiction with the accused, to note it down and then decide whether to proceed with it, or not.

[9] No evidence was presented to the court indicating how it came about that the accused was taken for a confession.

According to the accused he was told to accompany Nienaber to Bronkhorst for an interview. He was oblivious as to why or how it came about. From his evidence it appears that he did not inform anyone that he wished to make a confession.

The failure of the state to present evidence on the subject is suspect and deserving of the court making a negative inference.

[10] It was the evidence of the accused that he was transported from Actonville police station to Brakpan police station on 14 October by four police officers. He stated that they were the ones that assaulted him whilst en route to Brakpan by suffocating him with a plastic bag.

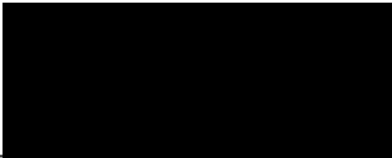
His further evidence was that he was assaulted by a female police officer in the holding cell at Brakpan in that she kicked him on his ankles with booted feet. Another policeman slapped him behind his left ear where he was injured in an unrelated incident.

[11] Notably, the state did not call any of the alleged assailants to confirm or deny the alleged assaults. Considering the nature of the evidence it could not be difficult for the state to establish the identity of the police officers who transported the accused from Actonville to Brakpan.

It would also not be impossible for the state to ascertain the identity of the female police officer that would have kicked the accused on his ankles.

[12] The accused denied that he made the statement freely and voluntary and testified that he continued because of the previous assault and being scared and nervous because of it.

[13] The state failed to provide the court with sufficient evidence to prove that the confession made by the accused was made freely and voluntary. The state did not relieve the onus which rests upon them and the confession is ruled to be 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.

Date of delivery: 04 August 2023