

A256/09

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DATE: ~~20/03/2009~~

31/3/2009

NOT REPORTABLE

Magistrate's Serial No: 86/08

Case No: A990/08

Supreme Court Ref No: 114

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

20/3/09

DATE

SIGNATURE

THE STATE v MTHOKOZISI DONALD NYALUNGA

REVIEW JUDGMENT

DU PLESSIS, J:

The two accused in this automatic review case were convicted of housebreaking with the intent to steal and theft. They were both sentenced to a fine of R3000 or 12 months imprisonment. In addition they were both declared unfit to possess a firearm.

The state's case against the two accused is, apart from inadmissible hearsay, exclusively reliant upon confessions that the accused respectively made to Captain Mbuyani of the SAPS. When they respectively cross-examined him, each of the accused put it to Mbuyani that they had been assaulted in order to make the confession. When the accused did so, the question whether the confessions were freely and voluntarily made, was put in issue.

Where an accused contends that a confession was not made freely and voluntarily, he is placing in issue the admissibility of the confession as evidence. It is settled law that the issue of admissibility of a confession is an issue distinct from the merit of the case against the accused. Justice therefore requires that the issue of admissibility be tried and resolved separately from the other issues. In our law that is done by way of a trial within a trial. (See **S v De Vries 1989 (1) SA 228 (A)** at 233H to 234B) A court that fails in such circumstances to conduct a trial within a trial commits an irregularity. (**S v Mdyogolo 2006 (1) SACR 257 (E)** at 261g to h and at 263c to g). It is an irregularity that ordinarily constitutes an injustice and renders the trial unfair.

I have pointed out that the state's case against the accused is completely reliant on the admissibility of the confessions. Without the confessions, there is no evidence that proves the case against the accused. Had a trial within a trial been conducted, the accused might have been able to show that the confessions were inadmissible without at the same time exposing themselves to cross examination on the merits of the case against them. The irregularity cannot be condoned.

In the result the following order is made:

1. The convictions and sentences of both the accused are set aside.

2. The orders declaring both the accused unfit to possess a firearm are set aside.



B.R. du Plessis
Judge of the High Court

I agree,



E. Jordaan
Judge of the High Court