

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 86/2003

In the matter between:

THE STATE

and

VUYANE JAMES

Accused No.1

TSEPO MONYAKO

Accused No.2

LYNWETH LOUW

Accused No.3

DAWID MOTAUNG

Accused No.4

CORAM:

MUSI, J

HEARD ON:

24 NOVEMBER 2003

DELIVERED ON:

31 MARCH 2004

- [1] On 9 January 2003 accused number 3, Lynweth Louw, (the accused) was arrested by Captain Laux of the Serious Violent Crimes Unit, otherwise known as the Murder & Robbery Unit, of Bloemfontein, on the charges forming the subject of this trial. The charges relate to an attempted robbery at the Hyperama Supermarket in Bloemfontein on 26 October 2002. After being questioned by Captain Laux (Laux) the accused was handed over

to Captain Roets with whom arrangements had been made to conduct a pointing out operation. Captain Roets (Roets) testified in the trial within a trial and handed in as Exhibit “L” a document completed by him which sets out the steps that he took in the pointing out exercise, which document is entitled “Aantekeninge van uitwysing van toneel”. It is a *pro forma* document that is normally completed by an officer conducting a pointing out.

- [2] The crucial portions of this document are, firstly, paragraph 7 in terms of which the accused’s right to legal representation was explained, including the right to legal representation at the expense of the State and he was advised that he could contact a lawyer before it was proceeded further. The accused indicated that he did have a lawyer but that he would contact him later. In terms of paragraph 8 it was explained to him that he was not obliged to point out anything on the scene or explain anything in connection therewith, but that if he did what he pointed out would be recorded and photo’s taken of same and that any accompanying explanations would likewise be recorded. He indicated that he understood the explanation and would proceed nonetheless. In paragraph 10 he confirmed that he was not influenced by anybody to do the

pointing out, that what he would point out are things that he himself experienced and were within his knowledge, that he was doing it voluntarily without any pressure or undue influence or promises. Detailed questions were asked of him around this aspect and the importance thereof was pointed to him. He insisted that there was no undue influence and that he was doing it voluntarily. He was asked specifically how he got to know about what he was about to show and he said “ek het gesien wat daar gebeur het”. It was then proceeded to the scene and he led Roets thereto. After the pointing out was done, he confirmed that he was happy with what he had shown Roets and the explanations made.

- [3] All this was confirmed by Roets under oath and his testimony was not challenged under cross-examination save in one respect only. It was put to Roets that the statement quoted above that the accused had seen what happened was incorrect. It was suggested that the accused only knew about these things. Roets denied this and said that what he wrote in Exhibit “L” is precisely what was said by the accused. It will be noted that they both speak Afrikaans and it was not suggested that there could have been any language misunderstanding. It can thus be accepted that the evidence of

Roets is the truth and should be accepted *in toto*. The averment that Roets incorrectly interpreted the accused when he wrote that the accused had seen what had happened was half-heartedly made and cannot stand in view of Roets' categorical response thereto. Roets also pointed out that he read back to the accused what he had written and invited the accused to himself read it, but the accused declined to do so and preferred simply to sign the document. As can be seen the accused signed each and every page of Exhibit "L".

- [4] The crux of the accused's case is that he had been unduly influenced by Laux to make the pointing out. It was put to Roets in general terms that it is possible that the accused could have been influenced, but then told to conceal the fact so that Roets would not have known about it. Roets conceded that that is possible, but his full response is instructive:

"Dit is seker moontlik dat hy dit nie wou openbaar het nie, so dan sou ek dit nie geweet het nie. Ek moet net sê dat die persoon baie beslis was dat hy 'n aanwysing wil doen en indien daar enige, enige, in my oortuiging, ek nie seker was dat dit wel die geval is dat hy dit wou doen nie, sou ek beslis nie

voortgegaan het met so 'n aanwysing nie en sou ek dan ook die
ondersoekbeampte so ingelig het.”

(Record p.12, line 17-23)

[5] Captain Laux who is also the investigating officer in the matter and who was next to testify on behalf of the State was extensively cross-examined by Mr Pretorius for the accused. This allegation of the accused that he had influenced the accused to make the pointing out was fully canvassed with him. He refuted it at every turn that it was made in all its different guises. The gist of his evidence on the point is that he questioned the accused about his involvement in the crimes on the basis of certain information that he had and the accused admitted what was put to him. The accused then co-operated and he then gave him a number of options and the accused opted to do the pointing out. Laux then arranged with Roets to attend to the accused for this purpose. He says that the accused also signed a warning statement in which he also makes certain admissions in line with the decision to co-operate.

[6] Now I observed Laux in the witness-box and have scrutinised his evidence on the events after the accused was taken into custody on

9 January 2003, and I am focusing on what happened immediately before the accused was handed over to Captain Roets. There are other events which have got nothing to do with what happened in the relevant period leading to the accused making the pointing out and about which the defence has made much issue. I shall deal with these later. For now I am dealing with the evidence relating to the questioning of the accused by Laux on the morning of 9 January 2003. I can find no contradictions or any material discrepancies in the evidence of Laux. He was cool and collected throughout and betrayed no discomfort with questions put to him. His stuck to his version in spite of extensive cross-examination where some questions were repeated in different guises. Nor are there any improbabilities in his evidence.

- [7] The version put to Laux was that he told the accused that his target was accused number 4 and needed the accused's co-operation to nail down accused number 4. If the accused co-operated and agreed to place accused number 4 onto the crime scene, the present charges against him would be dropped and he would be made a State witness. In addition, his other pending charges of robbery of a bottlestore and car theft would also be dropped. Laux's response

to this was that he was an experienced senior police officer and knows that if he did what the accused alleges, he would jeopardise his own case. He had no need, moreover, to use the accused as a witness and at any rate if he had wanted to, the accused would not have been in court today as he knows what procedure to follow. He did not deny the possibility of such improper conduct being perpetrated, but his point was that he never did it and he was emphatic in this respect. I found Captain Laux to be a credible witness on this crucial aspect of the case. Nor is there any reason why he should be disbelieved.

- [8] I turn now to the evidence of the accused. The first difficulty I have with his version as stated above is that he also says that he has had previous experiences with members of the Murder & Robbery Unit of which Laux is second in command as a result of which he does not trust them. He never had any previous dealings with Laux personally, but he does not trust him either. To confirm that Laux and his colleagues are tricksters he cites as an example how he was arrested that morning. Laux phoned to say that he would be picking him up allegedly in order for the accused to sign forms in connection with the changed conditions of his bail in the cases then

pending in the Magistrate's Court, and had promised that he would not be detained; whereas in fact Laux had intended to arrest and detain him. He was cross-examined by Miss Giorgi for the State on how he could then trust that Laux would keep his word on the deal allegedly struck leading to the pointing out. He became evasive and merely insisted that that is what Laux said.

- [9] The cogency of the accused's version is seriously tainted by his assertion that he did not have personal knowledge of what he pointed out to Roets and the accompanying explanations. He alleges that Laux not only influenced him to do the pointing out, but also told him what to point out and what to explain to Roets. He says that Laux drew a sketch plan of the crime scene that he does not know and told him where to place the suspects. He thereby implies that he crammed all that and then repeated it to Roets. This led to counsel for the State cross-examining him on aspects of the contents of the document recording the actual pointing out (which was however not handed in and was not seen by me). The cross-examination revealed a great deal of contradictions, inconsistencies and improbabilities. A few examples will illustrate the point.

[10] Some of things reported to Roets could not have emanated from Laux. For example the accused told Roets that he had arrived on the crime scene in a car together with one Mase. This character is not a known suspect in this case and Laux apparently knows nothing about him as he nowhere mentions such a name. It is a name disclosed for the first time by the accused. Then he gave some details which he could not have memorised. For example he told Roets that one suspect had stood some two metres from a dustbin. When confronted about this, the accused denied having told Roets that. He had all along said that Laux told him that accused number 4 was the target and the person that the accused had to plant onto the scene. When he realised that other people had been placed on the scene as well, he changed and added accused number 2 and himself. He initially gave the impression that Laux had even given him directions as to the route to the scene when in fact he knows that. When asked how he had directed Roets to the scene, he became evasive and would not give a direct answer.

[11] It is unnecessary to go on. Suffice it to say that the accused's version is improbable and devoid of any semblance of truth. When

considered against the background of the largely uncontested evidence of Roets, Laux's version on the point is probable, and I found him to be a credible witness. The same cannot be said of the accused. His version that he was unduly influenced by Laux is rejected as being false beyond a reasonable doubt. I hold that he engaged in the pointing out exercise freely and voluntarily and without being unduly influenced thereto. That would conclude the matter but there are other issues raised in this trial within a trial that need to be dealt with and I shall try to do so briefly.

- [12] Much was made by the accused and his attorney about the events of 31 October 2002. The version of the accused is that on that day Laux had booked him out from the court cells at the Magistrate's offices where he had been appearing on other cases, and took him to the offices of the Murder & Robbery Unit where Laux interrogated him about the instant charges (incidentally he had been arrested on the night of the very same day that the attempted robbery herein was committed. It appears that the arrest took place in the early hours of 27 October 2002, but the accused curiously prefers to say that he was arrested on 26 October 2002). He says that he denied any involvement or knowledge of the crimes; that

Laux told him he was charging him and took his warning statement. However, Laux never followed up and he was not charged then. Now Laux denies this and says that he only interviewed the accused at the court cells and never took him to his offices. He denies taking any warning statement from the accused and denies telling the accused that he was charging him. In his initial evidence Laux pertinently denied having booked out the accused. Later Mr Pretorius applied for the recalling of Laux after the close of the case for the State. He then confronted him with a record of an entry made in the occurrence book kept at the court cells which shows that Laux had indeed booked out the accused on that day. Laux admitted this, but insisted that he had only taken the accused to another place in the complex where he questioned him. Thereafter a colleague of his, Inspector Tshabalala, took over and went away with the accused as he had been looking for the accused in connection with another case that Tshabalala was investigating. Tshabalala was called pursuant to an application for reopening of the State case to counter the new piece of evidence. Tshabalala confirmed that it is Laux who had booked the accused out, but that after Laux had questioned the accused at the court cells he took over and took the accused to their offices where he interrogated

him. Tshabalala also revealed for the first time that Laux had in fact driven alongside in a separate car to and from the offices of the Murder & Robbery Unit, but said that Laux had had nothing to do with the accused at their offices. Back at the court cells it is apparently Laux again who booked in the accused. The explanation for this is that Laux would have done that purely as a formality seeing that he was present and had initially booked out the accused.

- [13] The evidence of the accused and that of the two police officers clearly clashed on this aspect. Mr Pretorius argued that the version of the accused is convincing and should be preferred to that of the police officers. Now there are indeed discrepancies in the version of the police officers but I do not think that they were lying as Mr Pretorius suggested. It has to be borne in mind that the focus of Laux's earlier testimony was the purpose of the booking out and not booking out in the narrow sense of making an entry in the occurrence book. The booking out was in the context of Laux taking him out for questioning in his offices. This Laux consistently denied and he is corroborated by Tshabalala.

[14] It is, however, unnecessary to engage in a full evaluation of the evidence and make any definite findings in this regard. Even if I should find in favour of the accused and reject the version of the police officers that would make no difference to my ruling on the admissibility of the pointing out evidence. The events of 31 October 2002 have got nothing to do with what happened on 9 January 2003. Strictly speaking, all this evidence around the issue is irrelevant. I allowed it to be canvassed purely on the insistence of Mr Pretorius that it would impact on the credibility of the State witnesses. He also said that it would show a particular *modus operandi* on the part of Laux. In the event, I do not think that Laux was in any way thereby discredited. Moreover, even if a witness is shown to have lied on one occasion, that is no basis for holding that he lied on another different occasion. As for the *modus operandi*, the argument is that Laux would have been shown to conduct his investigations in an improper fashion. In my view nothing of the sort has been shown. In this regard the accused was clutching at straws as is shown by the calling of his co-accused number 4. The latter had been listening when Laux testified and yet none of his allegations were put to Laux. At any rate, these are vague and generalised complaints about Laux and no more. Mr

Pretorius also tried to lend credence to this allegation of a sinister *modus operandi* by going outside the evidence led in the trial within a trial and bringing in evidence led in the main trial. This is the evidence by some State witnesses that they had viewed photo's of the suspects in the presence of Laux whereas Laux denied that it would have been in his presence. That evidence still has to be evaluated and it would be inappropriate for me to do that now. Moreover, it is evidence as to identity and is irrelevant to the instant inquiry. In this regard Mr Pretorius cited **S v MAYEKISO EN ANDERE 1996 (2) SACR 298 (CPD) at 304-305**. That case is distinguishable from the present case. In **MAYEKISO** a State witness had, during the course of a trial within a trial, given evidence that contradicted his evidence in the main case on the same aspect.

- [15] The last issue to be considered is the evidence of how the accused was arrested. His version is that Laux phoned him and told him that he will be picking him up under the pretext that it was for the purpose of the accused signing forms in connection with the changed conditions of his bail relating to cases then pending in the

Magistrate's Court. He had assured the accused that he would not be detained. However, on their way to the offices of the Murder & Robbery Unit Laux revealed that he was about to charge and detain the accused. The accused says that had he known that he would be arrested he would have left his place in order to avoid being arrested. This latter statement raises the question of why run away if you are innocent. At the same time it lends credence to his assertion that he was tricked into waiting for the police. And he is to some extent supported by his uncle, David Choantseng. In my view, Laux's version on this aspect is less likely. How could a police detective simply tell a suspect facing such serious charges that he is coming to pick him up and expect the suspect to wait? It is more likely that the bail conditions story was given as a ploy to get the accused and that is why as soon as the accused was picked up it was never repeated. But I do not think there was anything sinister in it (and I am not saying that it is in order). Nor do I think that the accused was prejudiced thereby. The evidence shows nothing untoward happening after the arrest of the accused. At any rate, nothing that could be construed as undue influence leading to the accused agreeing to co-operate.

[16] The evidence of Laux is that he had new information with which he had confronted the accused and the accused admitted what was put to him. He then decided to co-operate. It may well be that the accused thought that his game was up and hence the decision to co-operate. The fact that he had three months ago denied any knowledge of the crimes does not mean that he would subsequently refuse to co-operate, especially when confronted with new information. Besides, by his own account, the accused is not a novice in dealing with the police and he is certainly not a stupid person who could be misled in the manner that he alleges.

[17] For those reasons I have ruled the evidence to be admissible.

H.M. MUSI, J

/scd