

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: SS018/2025

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

18 September 2025

DATE

A handwritten signature in black ink, appearing to be "L. M. M.", written over a black rectangular redaction mark.

SIGNATURE

STATE

And

PHILLIP MAPHOSA

Accused 1

JOAO MOYAMBO

Accused 2

MOSES SITHOLE

Accused 3

JUDGMENT

Noko J

Introduction

[1] Simon Sithole (accused 3) challenged the admissibility of the confession he allegedly made in this matter primarily on the basis that the procedure decreed for the purpose of taking a confession was not complied with.

Background

[2] The accused are arraigned on two counts of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act (“CLAA”), a charge of robbery of aggravating circumstances read with the provisions of section 51(2) of the CLAA, and lastly, contravention of the Immigration Act. Accused 1 and 3 are represented by Mr Khunou and accused 2 is represented by Mr Buthelezi.

[3] All the accused are Mozambican nationals, and the charges were accordingly read and interpreted for them. The three accused pleaded not guilty to the first three charges and pleaded guilty in respect of the charge of contravention of the Immigration Act.

Evidence of the witnesses.

[4] At the outset, the counsel for the accused 3 (“*accused*”) addressed the court and explained that the basis upon which the accused disputes the admissibility of the confession is that the confession was signed by the accused without being privy to the contents of the proforma confession statement, which was also completed not in the presence of the accused.

[5] The States called Sgt Grace Mathabatha, who testified in Sepedi and stated that she is attached to Primrose Police Station. She has been a member of SAPS for a period of 14 years. On 10 April 2024, she was on a night shift when she received a call from someone who indicated that he was the uncle of the accused and further that the accused is back. She drove together with Sgt Shingange and Takalani Nemakhulu to Tembisa. They met the accused’s uncle, then proceeded to where the accused was at that time. The said uncle then

pointed at accused 3, who was then handcuffed by Sgt Shingase. They then drove together to the Primrose Police Station. His rights were also right in the process.

[6] The State Counsel then handed up a copy of the notice of rights for the witness to confirm, and she certainly confirmed that it was. She was requested to read up the contents thereof, and she stated that the accused was informed that he is being arrested on a charge of murder, he had the right to legal representation, that he is entitled to the visitation by his family and further that he will appear within a period of 48 hours in court. He then stated that he wanted to make a statement, and she informed him that he is not involved in the taking of the confession, and she would refer him to her captain. The rights were read to him only in isiZulu. She did not read the whole notice of rights but only mentioned the few that she had highlighted. This process took place after midnight.

[7] The witness was asked as to whether she had attended training, to which she responded in the affirmative and further, that indeed they were taught to read all the rights to the suspect, but in practice, they would ordinarily, and in her words, read here and there and not all of them. She proceeded to make sure that the accused signed the form as he did, and though it is indicated that it was in English, she explained everything in isiZulu, and the accused also confirmed that he understood. She also informed her Commander, Masha, who instructed Captain Sekuba to continue and assist with the facilitation for the taking of the confession.

[8] She stated under cross-examination that indeed she did not read all the rights which were in the notice. Counsel specifically referred to the right to remain silent, to which she confirmed that it was not explained to the accused. The counsel for the accused further conveyed to the witness that the Accused will deny that the rights were read to him, to which the witness responded that that would not be correct. She denied that she, together with her colleagues, assaulted the accused.

[9] The next state witness was Sgt Derrick Shingase, who was testifying in his language isiTsonga. He testified under oath that he is attached to the Primrose Police Station. Further to that, he has been working there for a period of 16 years and is currently doing visible

policing in a full police uniform. He was doing the night duty on 10 August 2024 and was attending to complaints by members of the public and doing patrol at the time when he was called by Sergeant Mathabatha, who requested to be accompanied to Tembisa to arrest a suspect. At that time, he was traveling together with his colleague, Sgt. Takalani Nemukula. They came and picked her up en route to Tembisa.

[10] Sergeant Mathabatha informed him that there was a person who had called her and that person would wait for them and she would take them to where the suspect was. They picked up the contact person and then drove together. They reached a shack where they knocked and accused, then opened the door. He was instructed to put his hands behind his back, and proceeded to handcuff him. In the process, Sergeant Mathabatha then read the suspect his constitutional rights. At the time, the community members were starting to gather around the area, and they had to leave the place as soon as they could.

[11] The witness further indicated that he did speak to the suspect and informed him of the basis of his arrest, and also inquired from the suspect as to whether he knew anything about the allegations. He further stated that at no stage was the suspect assaulted either at the scene in Tembisa or at the police station.

[12] The witness further disputed the version by the accused that he was assaulted, in response to which the witness stated that since the people were already congregating, it would even be riskier for any assault to take place. In retort, the counsel for the accused stated that the assault took place inside the house. The reason for the assault, so the counsel argued, was to force the accused to admit having committed the alleged offence.

[13] The state called its next witness, Takalani Nemakhulu, who testified in Venda through the interpreter. He stated that he is attached to Primrose Police Station as a Sergeant and was on duty on 10 August 2024 and reported for duty at 17:45. He stated further that he saw the accused in Tembisa on the day he was arrested and saw him only then and never more. He further answered in the negative at the time when he was asked whether he assaulted the accused.

[14] He stated under oath that he did not witness the alleged assault of the accused. Further that he entered the yard but waited at the gate whilst his colleagues proceeded to enter the house. The witness further stated that the accused was not assaulted by any of his colleagues, even at the police station. After arresting the accused, he proceeded to the station together with Sgt Shingase and Sgt Mathabathe. The accused was left at the customer service centre with Ms Mathabathe, and they left to do patrolling and attend to complaints outside the police station. He disputed knowledge of the assault, which allegedly took place at the CSC, where he was alleged to have participated, when the accused was lying on the floor with his tummy. He stated during re-examination that indeed the arrest took place on 10 August 2024, and the arrest was at around 11:00 p.m.

[15] The next witness was Colonel Andre Jordan, who testified under oath in English. He stated that he is currently stationed in Katlegong but was previously at Primrose Police Station. On 11 August 2024 at 18:47, he was called by Capt Sekuba, who informed him that there was a suspect detained at the station who wanted to make a confession. He then called Lt Col Rikhotso of Germiston Police Station, who agreed to attend and assist in this respect. When asked if he had asked Lt Col Rikhotso about his proficiency in any specific language and he replied that he knew him to be good at any language in South Africa.

[16] He stated under cross-examination that he knew Lt Col Rikhotso to be eloquent in the South African languages. Though he did not know the accused, the surname of Sithole was a familiar South African surname. Further that he called Lt Col Rikhotso after 18:00. He was informed that the suspect was arrested at 23:00 on that day, and as such, it means that at the time he was called, the suspect was not yet arrested. He could not comment thereon as he did not see the suspect or witness the arrest, but conceded that it would have been irregular to coordinate a confession for someone who had not been arrested as yet.

[17] He spoke with Lt Col Rikhotso a few days later, who stated that the confession process went through without any challenges, but did not ask him as to what language was used. He is also aware that the record of movements of the suspects in detention is recorded in the OB and was confronted with the assertion that the record must be made by Sgt Moriri, who did not make any record, acted irregularly, and he agreed therewith. Further, the

station commander was therefore denied the opportunity to know what was happening, as there were no records. If the said recording was made, it would have been easier for the record to prove the time that was spent by the accused with Lt Col Rikhotso, so argued the defence counsel.

[18] The state called the next witness, Sgt Kgathliso Moriri, who testified under oath that on 13 August 2024, he reported to work at 5:45 and at 7 am one Lt Col Rikhotso came to the reception and informed him that he was there to take down a confession from the accused, who was detained at the station. He then took Lt Col Rikhotso to the crime office, then went to CSC to fetch key cell keys, and proceeded to the cell. He called for Moses Sithole, who came up and noted that there were no injuries on his person. He then took him to Lt Col Rikhotso, who, later at 8:00, called him to take back the suspect as he was finished with him. He went to the crime office and observed that the suspect was not injured and had no complaint. He took him back to the cell and went back to the CSC office.

[19] He stated under cross-examination that, although he is aware that the Occurrence Book is meant to record movements of the inmates, he did not complete the same on this date. He, however, saw the occurrence book with his colleague in the morning of the date. He recalls having kept the goings-on in his pocketbook. He, however, did not have the pocketbook with him, as it was taken by the provincial office after it was completed. The witness was therefore instructed to come with the pocketbook on the next court day.

[20] On the next court day, the state informed the court that the witness had been unable to get the required pocket book, and a discussion was held with the defence, and the parties resolved that the matter would proceed without the said pocket book. With that in mind, the defence submitted that they would waive their right to continue with the cross-examination of Sgt Moriri, which could have continued upon receipt of the pocket book.

[21] The state called Lt Col Rikhotso, who testified under oath that he is attached to Orange Farm Police Station as a branch commander and was appointed on 18 November 2024. Before that appointment, he was a Col for the detective in Germiston. He received a call from Capt Jordaan on 11 August 2024, who asked him about his availability to assist

in taking a confession. He understood that he was called because he is fluent in Shangaan, and the accused was also Shangaan-speaking.

[22] He went to Primrose Police Station on Tuesday, 13 August 2024, at 7 am, met up with the accused, and a confession was taken. He went through the proforma confession and admission form, which contains the questionnaire of what to ask the accused before a proper confession is taken. The rights were also explained to the accused. The accused signed at the bottom of each page and also added his right thumbprints next to the signature. This he got during training, that at times the accused may dispute his signature, and it is therefore safe to also have his thumbprint next to the signature. The witness went through the form and also stated that the accused stated that he would not wish to have a legal representative present during the confession.

[23] He stated under cross-examination that the accused was brought to him by Officer Moriri from the Primrose Police Station, and he was also able to point out the accused, who was in court. He referred to the notice of rights, stating that it appears that the accused was arrested at 00:29 on 11 August 2024, and it was probably an error, as that time should have been for the following day, which is 12 August 2024, and not 11 August 2024. He could not comment thereon as he was not the author of what was written thereon.

[24] The witness stated further during cross-examination that he introduced himself and further showed the accused his certificate, which confirmed his rank. He made a copy of the said certificate in the event that it may be required. He was informed by the defence counsel that the accused will deny that all was explained to him by the witness. He was informed that the accused will dispute that he spoke Shangaan and that his language is Ndwu. On being confronted as to why he did not refer Captain Jordaan to the magistrate, he stated that he was on the Ekurhuleni roster for the week, as someone who understands Shangaan, and assumed that Captain Jordaan may have struggled to get one to assist.

[25] He stated further that he was not privy to the details of the case the accused was facing. The counsel informed the witness that the accused does not understand Shangaan and, to some extent, he could understand isiZulu. In the premises, he was not following the

discussion presented by the witness, but the latter insisted that the communication was fluent without any consternation. The defence stated further, the accused only went to school for two years and would not have followed much of the discussion. In retort, he states that the accused conveyed to him that he understood what was conveyed to him.

[26] The form also contains an address, which is incorrect and was denied by the accused, who stated that his address has a number 5 in the middle, and the one on the record has no number 5. In retort, the witness stated that that was the address which he procured from the accused.

[27] Sgt Mathabatha was recalled, and she confirmed that the suspect wanted to tell the story after his arrest in Tembisa and repeated the same version when at the police station. The suspect was not coerced or assaulted, or threatened when offered to tell the truth. The time was around 23:00, and the suspect was then read his rights at the station and locked in around 00:19. She assumed that both her colleagues may have heard the suspect stating that he wanted to tell the truth as they were within earshot distance. She did not find it critical that she had to inform them as she was going to relay the information to her senior, Mr Sekula. The state then closed its case.

[28] The defence opened its case and called the accused to take the stand. The accused took the oath. He testified that he was at home on Sunday evening and was watching movies on the TV channel with his father when the members of SAPS came. The members of SAPS knocked at the door and arrested him after he opened it, and they claimed that they had been looking for him on the allegation that he was involved in a murder case in the informal settlement. He told them that he did not know anything, and he was then assaulted. He understood that they were looking for him before, but he was not home on Saturday and was at his uncle's house. He was then handcuffed and instructed to embark in the van and taken to Primrose Police Station.

[29] Upon reaching Primrose, he was instructed to lie on the floor in the reception, where he was assaulted by the police whilst Sgt Mathabatha was completing some forms. She thereafter made him sign the SAP 14 and then took him to the cells. He slept for one night,

and in the morning, he was taken to see Lt Col Rikhotso, who made him sign some forms that were already completed at the time of his arrival. He believes that he could have only spent 10 minutes and does not believe that the said Lt Col Rikhotso could have completed the form within that period of 10 minutes. According to him, there was a lot written on the forms.

[30] The said Lt Col Rikhotso was completing the form at the time when he was brought into the office. He was shown Lt Col Rikhotso's name on the form, and he stated that he could see the name but disputed that he had introduced himself to him and showed him his card. The address which was on the form was incorrect as 5 was missing. The signature on each page was his and was done on instructions from Lt Col Rikhotso. He disputed that there were any discussions with Lt Col Rikhotso in the language he understood. The allegation that the communication was in Shangaan is not true, as he does not understand Shangaan, and he speaks Ndaue and a bit of broken isiZulu. He was taken back to the cells after he signed what he was made to sign.

[31] The accused stated under cross-examination that he was at his uncle's house on Saturday and they had a good relationship, but was surprised that the said uncle is the one who reported to the police that he was at home and they could come and arrest him. He further stated that he cannot read or write, as he only attended school for two years. He was, however, able to see that the address written for his father's house was incorrect, as it was no 5, and it was only 1032 instead of 10352. He further disputed that he is the one who gave Lt Col Rikhotso the address. The signature that was appended on the proforma was just him following the instructions of what to do. The signature was copied from a piece of paper prepared by Lt Col Rikhotso, and he had to copy the same. The prosecution asked why this was not raised during his evidence, and in reply, he stated that he forgot to mention it to him.

[32] The state counsel, in an endeavour to interrogate the averments that he could not write or read, enquired from him about certain numbers and letters, and he responded that both of them were numbers and was not aware of the difference. He persisted with the

version that he copied the signature as written down by Lt Col Rikhotso, even though the prosecution stated that Lt Col Rikhotso would have written down Moses and Mossi.

[33] The state, in summation, stated that the state witnesses who were led were consistent and precise. Captain Jordan stated that he called Lt Col Rikhotso for assistance after being requested by Sgt Sekuba. There is no evidence to question his integrity and consistency. This equally applies to Lt Col Rikhotso, who was independent and employed elsewhere and therefore not close to the case or its investigation. Strangely, the accused forgot to inform his attorneys about the signing of the proforma, which was preceded by the instructions just to copy the signature, which was written on a piece of paper for him to copy.

[34] The defence, on the other hand, contended that the evidence presented by the state witnesses is suspect. The accused states that he was arrested on Sunday night and ultimately signed the SAP 14 notice in the morning of Monday at 00:29. Strangely, the telephone call to Lt Col Rikhotso was made after 18:00 on Sunday, which meant that the arrangement for Lt Col Rikhotso to come for the confession was made before the accused was arrested. The state may have made a mistake by reflecting 11 August 2024 and should have reflected 12 August 2024. In addition, the accused stated that he does not speak Shangaan and could not have followed the discussion with Lt Col Rikhotso. Further that the address which appears on the proforma statement was incorrect, and he disputed that he is the one who gave it to Lt Col Rikhotso. The confession was therefore not given freely and voluntarily and should therefore be rejected. The fact that he stayed for a shorter period supports the contention that he was not taken through the forms but only signed as instructed.

Legal principles

[35] This case implicates several provisions of both the Constitution Act and the Criminal Procedure Act. The admissibility of confessions are dealt with in terms of section 35(1)(c) of the constitution which provides that an arrested person has the right not to be compelled to make any confession or admission that could be used in evidence against that person.” This section should be read with section 35(1)(j) of the Constitution which

provides that an accused has the right not to be compelled to give incriminating evidence”. Section 35(4) of the Constitution Act provides that whenever this section requires information to be given to a person, that information must be given in a language that the person understands. Finally, section 35(5) of the Constitution provides that evidence which was obtained in such a manner that the rights are violated must be excluded if the admission of such evidence would render the trial unfair or would be detrimental to the administration of justice.

[36] Section 217 of the Criminal Procedure Act provides that “Evidence of any confession made by any person in relation to the commission of an offense 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 duly unduly influenced, thereto, be admissible in evidence against such person at criminal proceedings relating to such offence...”.

Analysis

[37] The legal position is that failure by a party to cross-examine a witness may preclude him from disputing the truth of that witness’s testimony, see *The South African Law of Evidence*, 4th ed at 461. The evidence that was not challenged is that of Sgt Mathabatha, who recorded that the rights were explained and SAP 14 was concluded at 00:29 on 11 August 2024. In the circumstances, the defence cannot be heard to contend that the said date is incorrect and would have required to be rectified. In the premises, it is concluded that indeed the arrest was effected on Saturday, 10 August 2024 and not 11 August 2024 as the defence intimated. the date of 10 August 2024 was also confirmed by other witnesses.

[38] The foregoing also applies to the accused's failure to confront Lt Col Rikhotso with the version that Lt Col Rikhotso wrote the surname on a piece of paper and then instructed the accused to copy it onto the proforma. Failure to confront Lt Col Rikhotso would ordinarily preclude the defence from disputing the truthfulness of the witness’s testimony. The conclusion would therefore be that the version of Lt Col Rikhotso that the accused signed the proforma remains unchallenged. Whilst this is a general legal position, it was held in the *President of the Republic of South Africa v South Africa Rugby Football Union and Others* 2000 (1) SA 1 (CC) that it has no manifestly incredible application testimony.

This exception finds no application in this matter. Zeffertt DT, The law of Evidence, referred to *Browne v Dunn*, where it is stated that a party who calls a witness is entitled to assume that a witness's testimony has been accepted as correct if it has not been challenged.

[39] He followed instructions and accordingly signed. Then he understood the instructions in the language he was addressed in. He managed to read the street address, but claims that he cannot read or write, or hear Shangaan. The basis of disputing the confession was primarily that he was made to sign the proforma, which was completed at the time it was brought to him. He only stated under cross-examination that, in fact, Lt Col Rikhotso instructed him just to copy the signature, and this was not taken up with the said Lt Col Rikhotso. This supports the submission that the evidence was created as the matter moved on. But he was able to read that there is a number that is missing on the address, as pointed out during cross-examination. Though he claims that he cannot read or write, he admitted signing the SAP 14. The said signature appears, to the naked eye, to be similar to the signature on the confession proforma form.

Conclusion

[40] Having regard to the aforesaid analysis, it can summarily be concluded that the version of the accused is implausible, untenable, and bound to be rejected. The accused identified his name and his signature on SAP 14 without demur or without stating that he was forced to sign it. This, together with the fact that he was able to read the street address and had accepted instructions to sign from Lt Col Rikhotso, belied his version that he is illiterate and or could not understand Shangaan. He was not an impressive witness. At some stage, he was getting cues from the other accused, and the court had to reprimand both accused and the other accused not to communicate whilst he was testifying.

[41] The evidence tendered by the state witnesses remained intact and withstood the cross-examination by the defence counsel. Notwithstanding the apparent defect in the reading of the rights by Sgt Mathabatha, it appears from the proforma as was completed by Lt Col Rikhotso that the rights were read before completing the proforma confession statement. It is therefore concluded that the State has proven its case beyond a reasonable

doubt that the confession was made freely and voluntarily and contemplated in section 217 of the Criminal Procedure Act.

Order

[42] Consequently, it is ordered that the confession was taken in accordance with the requisite legal prescripts.



M V Noko
Judge of the High Court

DISCLAIMER: This judgment is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be **18 September 2025**.

Appearances:

For the DPP:

Deoraj A, instructed by the Office of the
Director of Public Prosecutions.

For the Accused:

Khunou MA, instructed by Legal Aid SA.