

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, BENONI

CASE NO: CC49/2024

DATE: 09.04.2026

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ☒ NO

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

(3) REVISED

In the matter between

10 THE STATE

and

KHETHA MVELASE

Accused 1

BONGANI BUTHELEZI

Accused 2

SIBUSISO SIBIYA

Accused 3

T R I A L - W I T H I N - A - T R I A L
J U D G M E N T

MATLAPENG, AJ:

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[1] The court shall proceed to pass judgment in a trial-within-a-trial. The three accused are standing trial on a number of counts, the evidence of the identification parade which was held on 21 June 2023 at Germiston at which accused 1 and 3 had been pointed out by a

witness is in issue.

[2] It is contended by Adv Tshole on behalf of accused 1 and 3 that the evidence relating to the identification parade should be excluded as it had been obtained unconstitutionally, in that the legal representative had not been present at the time of the parade.

10 [3] The court is required to determine whether the evidence of what happened at the identification parade should be excluded on the ground that it would render the trial unfair, or otherwise be detrimental to the administration of justice.

[4] The burden of proof rests upon the State to prove the admissibility of the identification parade.

20 [5] The State in its attempt to prove the admissibility of the evidence of the identification parade called two witnesses. The first to testify is Moteku Tlolane ,his evidence is briefly to the following effect, he is a sergeant in the South African Police Services with 21 years' service. On 21 June 2023 he was in charge of an identification parade held at Germiston Police Station. It is his evidence that he was not involved in the investigation of this matter. He completed the identification parade form, SAP329 which was handed

in as an exhibit and marked AA3. He testified further that there was a photographer who obtained photos during the parade, the photos were handed in as an exhibit and marked AA5.

[6] It is Sergeant Tlolane's testimony that there were 12 people who formed the line-up, that accused 1 and 3 are the people who chose the people that were part of the line-up.

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[7] It is this witness' evidence that they used a one-way glass or mirror where the people in the line-up were in a room and the witness would be on the other side of the mirror. Sergeant Tlolane testified further that he had conducted more than 20 identification parades, that he apprised accused 1 and 3 of their constitutional rights, including their right to legal representation, but that they elected to proceed without a legal representative.

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[8] It is Sergeant Tlolane's testimony that had the accused informed him that they needed a legal representative at the parade, he would have postponed the identification parade.

[9] Sergeant Tlolane testified further that each of the 12 people who formed the line-up was given a number

written on an A4 paper, they were numbers 1 up to 12, and that the witness who did the pointing out pointed accused 1 and 3 now before court.

[10] The second witness to testify is Mr Sibuye, he is also a sergeant in the SAPS with 24 years' experience and 22 years in the LCRC as a photographer. It is his evidence that he also attended more than, or participated in more than 20 identity parades as a photographer. It is Sergeant Sibuye's evidence further that he was called to attend the identification parade in question, he took photos and compiled the photo album and key thereto, which was handed in as an exhibit and marked EXHIBIT AA5. That concluded the State case in a trial-within-a-trial, but before Adv Malefahlo for the State could close the State case he handed in two statements, one compiled by Constable Mwelase, and the second by Sergeant Ndimma. Adv Tshole consented to the handing in of these statements and they will be dealt with later in the judgment.

[11] Thereafter accused 1 and 3 testified, their evidence is briefly that their constitutional rights were not explained to them, especially the right to legal representation.

[12] Accused 1 and 3 testified further that the investigating officer, to wit Sergeant Rapetsoa, brought into the parade room the persons who formed part of the line-up. It is the defence's evidence that this Rapetsoa was also with the witness who did the pointing out, who pointed out accused 1 and 3.

10 [13] The court then called Sergeant Rapetsoa in terms of section 186 of the *Criminal Procedure Act*, 51 of 1977. His evidence is briefly that he is the investigating officer or one of the investigating officers in this matter, but that he was not present at the identification parade held at Germiston on 21 June 2023. That the identity parade in question was conducted in a case that occurred in Mahamba in Mpumalanga area and that he was not part of the investigation of that case.

20 [14] The State argued that the court should admit the evidence of the identity parade into evidence.

[15] Adv Tshole on the other hand contends that the admission of the evidence will be prejudicial to the accused, he argues in the main that the accused were denied their constitutional right to have a legal representative present at the identification parade.

[16] The evidence of the State as to what happened at the identification parade is diametrically opposed to the evidence testified to by accused 1 and 3.

[17] The evidence of Sergeant Tlolane is that he apprised accused 1 and 3 of their right to legal representation, but that they opted to participate in the parade without their legal representative, and that in the
10 parade room it was only himself, the photographer, Sergeant Sibuye, and the persons in the line-up, including accused 1 and 3.

[18] It is accused 3's testimony that the investigating officer, to wit Sergeant Rapetsoa, in the company of Sergeant Tlolane arrived with the people who formed part of the line-up in the parade room.

[19] This portion of accused 1's evidence is in conflict
20 with the version of accused 3 who testified that whilst they were in the parade room Rapetsoa was on the other side of the mirror with the witness who did the pointing out.

[20] These assertions by accused 1 and 3 cannot be the truth, regard being had to what follows *infra*. Sergeant Ndima, whose statement was handed in as EXHIBIT AA7, states in his statement that he assisted

in the identity parade held at Germiston on 21 June 2023 by Sergeant Tlolane. He states further that he escorted the witness from room G511, that he did not discuss the case with the witnesses, nor allow them to discuss the case, and that no irregularities occurred in his presence. Adv Tshole consented to the handing in of Sergeant Ndimas statement.

[21] Constable SE Mwelase's statement was also handed
10 in as EXHIBIT AA6. Adv Tshole also consented to the handing in of this statement, which was also read into the record by State counsel. Constable Mwelase states in his statement that he assisted in the identification parade in question. He states further that he was not involved in the investigation of this case. He states as follows at paragraph 3:

20 "I did not discuss the case with the witnesses and did not allow them to discuss it with each other, nor were any other persons allowed to see them, nor discuss the case with them."

[22] I am in agreement with Adv Malefahlo for the State that the issue raised by accused 1 and 3 in their evidence that the investigating officer, to wit Sergeant Rapetsoa, was part of the identification parade, is a

crucial issue sufficient enough to nullify the proceedings. It is their version that Rapetsoa was at one stage with the identifying witness when she pointed out accused 1 and 3.

[23] *Wigmore* in his *Book on Evidence* says cross-examination is the greatest legal weapon ever invented to discover the truth.

10 [24] Adv Tshole is one of the able counsels of this division who represents his clients to the best of his ability. He would not have consented to the statements of Sergeant Ndimma and Constable Mwelase to be handed in as exhibits if indeed Sergeant Rapetsoa or any other person contacted or was with a witness before the latter did the pointing out.

20 [25] Adv Tshole would also have taken Sergeant Tlolane to task about the presence of Sergeant Rapetsoa at the identification parade if indeed Sergeant Rapetsoa was present at the parade. Adv Tshole did also not raise this aspect of Sergeant Rapetsoa being present at the parade in his argument.

[26] The issue of the investigating officer, to wit Sergeant Rapetsoa, being in attendance at the parade, which came to the fore only when accused 1 and 3 were in

the witness stand, is one of several problems with the accused versions, and there are also improbabilities which affect both accused 1 and 3's versions as to what actually transpired at the time of the identification parade.

10 [27] I find therefore that the assertion by accused 1 and 3 that Sergeant Rapetsoa was present at the identification parade in question is just an afterthought, and that in fact it is a fabrication of their own imagination and is rejected as false.

20 [28] Adv Tshole raised an argument about the photos, he argued that it was desirable that there should have been a photo of all 12 people who were part of the line-up, so that one can be in a position to see if these people were of the same complexion, height, physique, there is no force in this argument. Mr Sibuye, the photographer, explained that the room where the parade was held is small, it did not allow a photo of all 12 people to be taken at the same time, but that photo 5 is a continuation of photo 4. The photos depicting persons in the line-up, are from photos 4 up to 15, and every Tom, Dick and Harry will be in a position to see all the people who were in the line-up on this day in question.

[29] Adv Tshole pointed out, and rightfully so, that an accused person is entitled to legal representation as from the time of his arrest. This is provided for by section 73 (1) of the *Criminal Procedure Act*, 51 of 1977. Section 35 (3) of the *Constitution* provides:

“Every accused person has a right to a fair trial, which include the right –

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(f) To choose and be represented by a legal practitioner and to be informed of this right promptly;

(g) To have a legal practitioner assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly.”

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It is not in dispute that accused 1 and 3 had a legal representative when they first appeared in court here at Benoni on 12 June 2023 and that they had already appeared in court when the identification parade was conducted.

[30] There was no suggestion that the presence of a legal representative would have made any difference to the outcome of the parade. An identification parade is different from a confession or a pointing out, where an accused is asked to incriminate himself, such an accused has a right to legal representation before deciding whether to do the confession or a pointing out.

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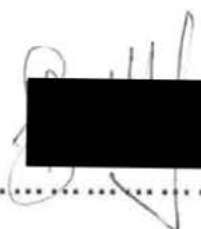
[31] In the case of *S v Mphala and Another* 1998 (1) SACR 654 (W) it was contended on behalf of the accused that the evidence relating to the identification parade should be excluded as it had been obtained by unconstitutional means, in that the attorney had not been present at the time of the parade. The court held that although on their version the accused did not waive their right in respect of the parade which was held, they at no time said that they had attempted to assert such rights at that parade when they discovered that their attorney was not present, it could therefore not be said that the police held the identification parade despite the express wish of the accused that it should not take place without their attorney being present.

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[32] In the present matter accused 1 and 3 at no time said that they attempted to the assert the right to have their legal representative present at the identification parade. It could therefore not be said that the police, in particular Sergeant Tlolane, held the identification parade despite the express wish of accused 1 and 3 that the parade should not take place without their legal representative being present.

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[33] In the result it is my finding that the evidence of what transpired at the identification parade is admissible in evidence.


.....**MATLAPENG, AJ**

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ACTING JUDGE OF THE HIGH COURT**DATE:** 09/04/2026

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that **so far as it is audible to me**, the foregoing is a true and correct transcript of the proceedings recorded by means of a digital recorder in the matter between:

THE STATE // K MVELASE & 2 OTHERS

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