IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
29/11/16 DATE — SIGNATURE

CASE NO: A422/2015

29/11/2016

In the appeal of:

BETHUEL MOLAUDZI Appellant

and

THE STATE Respondent

Full Court Quorum: Mothle J;
Molahlehi J et Davis AJ.
Date of Hearing: 28 October 2016
Date of Judgment:

JUDGMENT

MOTHLE J

Introduction

1. This is an appeal against conviction and sentence imposed by the Honourable Mr Justice Legodi in the High Court of South Africa (Circuit Court for the Northern District) held at Makhado on 13 May 2005. The appeal has been referred to the Full Court of the Gauteng Division with leave of the Supreme Court of Appeal dated 22 September 2014, following the refusal of the application for leave to appeal by the trial Court on 30 November 2006.

2. The appellant was convicted of three counts, being one count of robbery with aggravating circumstances; one of common assault; and one of murder read with Part 1 of Schedule 2 of Act 105 of 1997.

3. On 5 September 2006 he was sentenced to 10 years direct imprisonment for robbery, 12 months imprisonment for assault and 20 years imprisonment for murder. The Court ordered that the 12 months sentence should run concurrent with the 10 years sentence which effectively meant the appellant would serve 30 years imprisonment.

4. This appeal raises the question whether the alleged pointing out of crime scenes by the appellant, was made freely and voluntarily. In particular the appropriateness of the presence of the arresting and investigating police officer at the pointing out, which police officer is also alleged to have shot the appellant during arrest and made threats to shoot him again if he does not co-operate during the pointing out.

5. There was a considerable delay from the time the application for leave to appeal was refused by the High Court up until the matter came before the Supreme Court of Appeal by way of petition.

6. It is clear that the delay in prosecuting this appeal occurred as a result of the non-availability of the trial record of proceedings in the High Court. Due to the absence of the record of trial proceedings, it became necessary for the prosecution and the defence to approach the Honourable Mr Justice Legodi, the presiding trial Judge, for the reconstruction of the trial proceedings from his notes in Court.

7. On 30 June 2016, the Honourable Mr Justice Legodi met with Adv. Steynberg for the appellant and Adv. Vorster for the

State as well as Mr Ndlovu, the interpreter, to reconstruct the trial proceedings. The appellant was personally present during the proceedings of the reconstruction of the record.

8. The presiding Judge was able, from his trial proceedings notes, to reconstruct and electronically record a summary of the evidence relating to the pointing out, a transcribed copy of which was provided to the Full Court.

9. The additional documents before the Full Court are in three volumes. Volume 1 contains the judgment and sentence of the High Court, the application by the appellant for leave to appeal as well as the judgment on the application for leave to appeal. Volume 2 comprises mainly copies of correspondence between the various officials in the Department of Justice as well as the Registrars of the Court, together with the copy of the photo album of the crime scenes and autopsy. Volume 3 comprises the copies of the various exhibits starting with exhibit "E" which is the statement regarding an interview with the suspect; exhibits "F" and "G" being extracts from the police occurrence book; exhibit "H" the warning statement; exhibits "J" and "K" are the standard form or *pro forma* document dealing with guideline questions concerning the

constitutional rights of the suspects as well as the statement concerning the pointing out of the alleged crime scenes.

Background

10. During or about July and September 2003 in the area around Levubu Farms near Makhado, Limpopo, there was a series of robberies committed, one of which resulted in the murder of a farmer. The appellant was arrested for these crimes on 11 November 2003.

11. It appears from the record that at the time of his arrest, the appellant had been shot in the left arm. The police took a warning statement from him on the day of his arrest and the following day conducted a pointing out. The Court refused to admit the warning statement but admitted the evidence relating to the pointing out, which became the only evidence linking Appellant to the commission of these offences and the only reason for his conviction.

12. The following evidence concerning the pointing out by Appellant is reflected in the reconstructed record, the exhibits and the judgment of the trial Court:

12.1 The arresting and investigating officer Inspector Makusela, testified that appellant was arrested at approximately 22H00 on 11 November 2013. This evidence is disputed by appellant who states that he was arrested in the afternoon of that date;

12.2 During the said arrest, the appellant was shot in the arm. He testified that it was the said Makusela who shot him in the arm, while Makusela denies this allegation;

12.3 The pointing out occurred on 12 November 2013 and conducted by Superintendent Carel Smith. Smith was assisted by an interpreter Inspector Magidi. They were also accompanied by another member of the South African Police Service, being a photographer;

12.4 During the interview with appellant and before going out to pointing out of the scene, Smith wrote down in a pro forma document, answers to certain questions stated therein. One of these questions inquired whether appellant was injured. Smith recorded that indeed appellant was injured on the arm.

In his observations, also recorded on the pro forma statement, Smith indicates that he saw appellant's arm being strapped with a white bandage which had spots of blood on it. Smith did not enquire from the appellant, the circumstances relating to the shooting as well as whether appellant knows the person who shot him;

12.5 Later in his evidence in a trial within a trial, appellant testified that he was shot by the investigating officer Makusela who also assaulted and threatened him to make the pointing out failing which he will shoot him again. Appellant says he never told Smith that he was threatened by Makusela.

12.6 At the pointing out he was instructed to stand and point out in a particular direction while photographs were taken of him. He saw Smith writing something which he does not know and was not read back to him;

12.7 The appellant further testified that at the scenes of pointing out, the very same investigating officer Makusela was present. This evidence of the appellant concerning the presence of the investigating officer on the scene is confirmed by the interpreter Magidi. The appellant testified that he was assaulted by Makusela at the scene of the pointing out but

this is denied by Magidi who testified that Makusela was present at the scene but did not participate in the pointing out;

12.8 In the reconstructed record, the presiding Judge wrote down that Makusela, during his evidence, denied that he was even present at the scene of the pointing out; and

12.9 The reconstructed record further shows from the notes of the presiding Judge that there was evidence by the appellant to the effect that the interpreter Inspector Magidi was the one who identified the scenes. Exhibit J records that he was also the driver. Appellant testified that he was instructed to stand and point while pictures were taken of him.

13. After the trial within a trial, the trial Court provisionally admitted the evidence relating to the pointing out. Further evidence was led in regard to the commission of the offences with no additional evidence linking the appellant to any of the crime scenes. At the end of the trial, the Court pronounced that the provisionally admitted evidence relating to the pointing out is finally admitted into the record.

The legal principles.

14. Section 35 of the Constitution of the Republic of South Africa, 1996 provides for the rights of an arrested person in particular one who is in the custody of the police. One of the fundamental rights in Section 35 is the right against self-incrimination. It is this right which is the foundation of the provisions of Sections 217 to 220 of the Criminal Procedure Act, 51 of 1977 *("CPA")*. These sections deal with the admissibility of confessions (s217)[1]; admissibility of facts discovered by means of inadmissible confessions (s218)[2]; confessions not admissible against another (219) and admissibility of admissions by an accused (s220).

15. Section 218 (2) of the CPA provides:

> *"(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings."*

---

[1] ***S v Zuma and Others 1995 (2) SA 642 (CC).***

[2] Appellate Division judgment in the two appeals that were heard together and reported under the citation: ***S v January; Prokureur-General, Natal v Khumalo 1994 (2) SACR 801 (A).***

16. In ***S v Sheehama***[3] the court held that section 218(2) does not apply to an involuntary pointing out. This principle was confirmed in ***S v January; Prokureur-generaal, Natal v Khumalo***[4]. A pointing out has to be conducted freely and voluntarily.

17. In order to give expression to the Constitutional rights of arrested persons, in particular those in police custody, a body of rules have evolved over the years in regard to the approach required of the Court in determining whether the arrested person made these admissions, confessions or pointing out freely and voluntarily. The Supreme Court of Appeal in ***S v Abbott***[5] held thus:

"... *as a result of recommendations made by the Bench over the years, with reference to questions which ought to be asked particularly by magistrates before an accused's confession is recorded, standard departmental forms had come into being which were used by magistrates and police officers for confessions and pointings out (i.e. to establish that an accused was indeed acting freely and voluntarily). An official who used such a form had to be meticulous in making the various preliminary enquiries, and in recording the accused's replies thereto. However, it was the trial Court which ultimately had to decide*

[3] 1991 (2) SA 860 (A).
[4] 1994 (2) SACR 801 (A), at 809 a-b. The two appeals were heard together.
[5] The head note to the judgment, cited as 1999 (1) SACR 489 (SCA).

whether the accused had acted freely and voluntarily, and a failure to comply with the relevant departmental prescripts did not necessarily result in the accused's statement being inadmissible."

18. Consequently, in instances where the State intends to rely on this self-incriminating evidence, it has to prove beyond reasonable doubt that the arrested person making a self-incriminating statement was not assaulted, injured, threatened with assault or injury or in any other way forced or pressurised to make that statement.[6]

Evaluation of evidence

19. In this case there are four significant areas of the evidence which came out in the trial-within-a-trial. These are the following:

19.1 That Appellant told Smith that he was injured during his arrest. Smith records that he saw that the left arm of Appellant was strapped in a bandage which had spots of blood. Smith did not make any further enquiry about this incident as indeed he

[6] See also an article by **Meintjies-Van Der Walt in the 1996 South African Journal of Criminal Justce** on page 83, under the title" *S v Melani and Two Others (CC9/93 29 March 1995) (ECD): public policy and the fruits of the poisoned tree- the admissibility of evidence of a pointing out obtained in breach of the Constitution"*

was under no obligation to do so[7]. The trial Court should have considered whether the version of the appellant in regard to how he sustained his injuries, raised doubt about the alleged freeness and voluntariness of the pointing out. As stated in ***S v Abbott*** above, it is the trial Court that must make the determination;

19.2 At the conclusion of the first trial-within-a-trial to inquire into the admissibility of the warning statement, which the prosecution described as a confession, the court concluded thus, without giving detailed reasons: "*that the state has not proved to (sic) beyond reasonable doubt that the accused had made a voluntary statement.*"[8] This raises the question why the appellant would refuse to voluntarily make an incriminating warning statement but agree to do an incriminating pointing out?

19.3 The trial Court dismissed as being not material, the contradictions between Smith and Magidi in regard to the evidence whether the statements of the pointing out were read back to the appellant at the end of the pointing out. Smith testified that they were not while Magidi states that they were

[7] See *S v Abbott supra*, where the Supreme Court of Appeal held that on the facts, the failure of the officer *in casu* to ask further questions to elucidate the alleged assault was not, *standing alone*, a sufficient ground for excluding the pointing out.
[8] Page eleven (11) of the judgment, lines 2 to 5.

read back to appellant. Further, the trial court dismissed as inconsequential the evidence of Smith where he testified that he inquired from the appellant about any threats made to him, but could not indicate where he wrote down these questions and their answers;

19.4 The appellant testified that prior to and during the pointing out, the investigating officer Makusela was making threats of further assault and threats to shoot him again. The trial Court dismissed the appellant's version of the threats during the pointing out, but failed to pronounce on the threats made by the Investigating officer prior to the pointing out;

19.5 Inspector Makusela when testifying for the State in the trial-within- a-trial, denied that he was present at the scene of the pointing out. This denial is recorded as follows[9]:

> *"Makusela denied that he was ... it is not quite clear, but it is written Makusela denied that he was present. Was he lying? O ja, this is the question. Makusela denied that he was present. Was he lying? Answer, he would be lying."*

20. During cross-examination of Smith, the latter admits the presence of the escort vehicle and the fact that the appellant

[9] See page 9 line 14 of the reconstructed record.

was frightened[10]: The judgment of the trial Court further refers to the evidence of Inspector Magidi[11] thus:

"He indicated that at no stage during the pointing out, was the accused ever threatened in his presence. ***He indicated that he did see Makusela during the pointing out and that Makusela was in the other vehicle, which was escorting them."*** (the Full Court's emphasis)

21. From the judgment it is clear that there was an escort police vehicle which followed Smith, Magidi and the appellant's transport to the various locations for the pointing out. Smith does not testify that he saw Makusela at the scene, while Magidi confirms Makusela's presence.

22. The presence of the investigating officer at the scene where the appellant was taken to point out should raise questions as to whether the allegations concerning threats to the appellant, could not be reasonably possibly true. The threats, if made, would no doubt have a bearing on the question whether the appellant made the pointing out, if he did, freely and voluntarily.

[10] Page 16 lines 7 to 19 of the trial court judgment.
[11] Page 17 lines 12 to 15 of the trial court judgment.

23. It seems to me that ordinarily the mere presence of the investigating and/or arresting officer at the scene of pointing out would *per se* not necessarily vitiate the process. However, in this context, the investigating officer, who is also the arresting officer, is alleged to have shot the appellant during arrest the day before the pointing out and made threats to do so again if appellant does not cooperate. These set of circumstances, should have been considered and accepted by the trial Court. In addition, the investigating officer in his evidence denied being present at the scene of pointing out, contrary to the evidence of his fellow officer, Magidi and both testifying for the State.

24. The trial court should have considered and attached sufficient weight to the conspectus of the evidence. There is in my view, sufficient evidence to cast doubt on the State's case. As stated in the trial Court judgment[12] the evidence allegedly uncovered during the pointing out could still not link appellant to the commission of these crimes.

[12] Page 21 lines 9 to 24 of the trial Court judgment.

25. Having regard to the issues raised above, I am of the view that the trial Court erred in admitting the evidence of the pointing out. Consequently, the appeal should succeed and both the conviction and sentence imposed by the trial Court should be set aside.

26. In the premises I make the following order:

1. The appeal succeeds;
2. The conviction and sentence imposed by the High Court on the appellant is set aside and replaced by the following:

"The accused is found not guilty and is discharged."

S P MOTHLE
Judge of the High Court
Pretoria

I agree:

E M MOLAHLEHI
Acting Judge of the High Court
Pretoria

I agree:

N DAVIS
Acting Judge of the High Court
Pretoria.

For the appellant: **Mr S Moeng**
Appellant's Attorney
Pretoria Justice Centre
Pretoria

For the Respondent: **Adv. S Scheepers**
Directorate of Public Prosecutions,
Gauteng.