

SOUTH AFRICA / JUDGMENT

Honniball v Minister of Police (38136/2015) [2017] ZAGPPHC 781 (24 November 2017)

[2017] ZAGPPHC 781

COURT

North Gauteng High Court, Pretoria

BEFORE

Munzhelele

CASE / FILE NUMBER

38136/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 38136/2015

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

DATE:

24 NOVEMBER 2017

In

the matter between

JOHANNES

JACOBUS GEORGE

HONNIBALL Plaintiff

and

MINISTER

OF

POLICE Defendant

JUDGMENT

MUNZHELELE AJ:

[1]The issue for determination is whether damages should be awarded for alleged unlawful arrest and detention, emotional shock and distress.

[2] The plaintiff is Johannes Jacobus George Honniball, a businessman owning a company called Industrial Metal Merchants (Pty) Ltd. The defendant is the Minister of Police.

[3] The plaintiff instituted a claim for damages against the defendant for an amount of R295 000 for alleged unlawful arrest and detention, which also caused him emotional shock and distress. He further claimed an amount of R40182 as damages for the value of copper which he owned and it went missing when he was arrested. He also claimed legal fees incurred for instructing a legal representative in the amount of R15000.

Background**Facts**

[4] In his particulars of claim the plaintiff alleges that on the 19 August 2014 Constable Mokoena (the Constable)

a member of the South African Police Service acting within the course and scope of his employment with the Defendant

arrested and detained him unlawfully. It is common cause that the plaintiff was detained for 21 hours until his release without appearing in court.

[5] The defendant's defence in the plea is that the plaintiff was lawfully arrested and detained. The Constable alleged

that he arrested the plaintiff on the 19 August 2014 without a warrant in terms of section 40(1)

(b) of the Criminal Procedure Act 51 of 1977 on suspicion that the copper was the stolen property of Eskom. He further alleges that the plaintiff failed to furnish reasonable explanation for his possession of the copper. The plaintiff produced documents which were not acceptable to him as proof that the copper was not a stolen property. The copper valued at 916kg was confiscated.

[6] The plaintiff was first detained at Olifantsfontein Police Station and thereafter transferred to Ivory Park Police Station for a period of 21 hours until his release. The case was never enrolled by the prosecutor. The plaintiff was

thereafter released. The defendant denies that he is liable to the plaintiff as claimed, and submits that the plaintiff's claim should be dismissed.

Evidence

- [7] The defendant only called the Constable to testify. He admits that he arrested the plaintiff upon a suspicion that the copper which he found on the truck driven by Mr Judas Chauke, the plaintiff's employee, was stolen property. He requested documents from the driver of the truck to prove that the copper belonged to the plaintiff. The driver produced a declaration which showed that another entity Industrial Metal Merchants was the owner of the said copper. However the constable was not satisfied with the explanation. The plaintiff was then summoned to bring the documents required by the Constable. He produced three receipts and an affidavit which showed the names of companies which sold the copper to his company. The Constable further informed the plaintiff that the said documents are not what he required.
- [8] In his testimony, the Constable did not deny that the plaintiff bought the said copper from the entities (Sakiel Metals, Molobela la Bathe and other scrap metal dealers) which were mentioned in the documents which were discovered by the defendants. The Constable admitted that the plaintiff did not steal the said copper as there were receipts proving that the copper was purchased by the plaintiff's company.
- [9] The Constable under cross examination contradicted allegations in paragraph 7.2 of the defendant's plea wherein it is asserted that the plaintiff was arrested in terms of s 40(1)
- (b) of the Criminal Procedure Act 51 of 1977 (the Act.) He testified that the plaintiff was arrested in terms of the provisions of s 40(1)(e) of the Act.
- [10] It is common cause that the plaintiff's truck was stopped by the road side along R21 route by the police while driven by his employee. The truck was searched and the police alleged that the two bags were stolen copper. The driver was requested to produce prove that the copper was legally acquired. Documents were given but that was not enough according to the defendant. The driver phoned the plaintiff to come to the scene to attend to the Constable's request. The Constable also talked to the plaintiff and instructed him to bring the documents proving that the copper was legally acquired. The Plaintiff brought the documents but the Constable was not satisfied. The Constable requested the plaintiff to 'make a plan or meet them half way'. He presumed that the police were asking for a bribe. He conceded that they did not say that they wanted bribe but they said he should make a plan and he concluded that they wanted bribe. He then asked them if R4000 was good enough for them to release his truck and the Constable agreed.
- [11] He went and withdrew the money, but did not pay them instead he came with the other police officer who then confronted the Constable about the bribe as alleged by the plaintiff. The Constable denied that he requested a bribe. The plaintiff together with his driver and the police officers drove to a place known as Reclaim where the copper was weighed and it weighed 916kg. The plaintiff, his driver and the police officers went to the Olifantsfontein Police Station and he was arrested by the Constable. The copper was registered in the SAP 13 and taken to the store room. At the time when the Constable was present the plaintiff was

not handcuffed. The Constable handed the plaintiff to the police staff at Olifantsfontein where he was handcuffed with one hand to a book shelf. He was in full public view at that point. The plaintiff felt embarrassed because of this arrest and detention.

- [12] He was later that night taken to the Ivory Park police station where he was placed in the cell with other arrested persons. Some inmates made sexual advances to him. He felt so scared that he could not even stand up and walk to the bathroom or the restroom fearing that the inmates might assault him. He could not sleep. He spent the entire night seated on the concrete floor.
- [13] The following day he was placed in the police van with other inmates to court. His case was never enrolled and he was released. He alleged that he suffered emotional shock because of this arrest and detention. People also ridiculed him because of the fact that he was arrested for copper theft.
- [14] After his case was removed from the roll the plaintiff requested the return of his copper. It was only returned to him much later after several months. When his copper was finally returned it was not the same weight as the copper which was confiscated. He alleged that he received 355kg of copper instead of 916 kg of copper. His missing copper was 516kg. It bears mention on the date of the handing over of the copper there is no endorsement by the plaintiff on the SAP 13 that the copper which was handed to him was no longer having the same weight as the one confiscated.
- [15] The plaintiff when asked why did he not reported the case to the police, he testified that he did not want to experience the same treatment which he received at the time when he was arrested.
- [16] As a result of the trauma which the plaintiff suffered he had to receive psychological counselling by Dr Henk Swanepoel a clinical psychologist. The Dr's opinion was that the plaintiff had been significantly affected by the arrest and detention which compromised him psychologically. He was diagnosed with post traumatic stress disorder which required psychotherapeutic intervention from a clinical psychologist for 20 to 25 consultations.
- [17] He also consulted an industrial psychologist Mr Pierre Brits who made an assessment of the plaintiff's loss of earnings. He concluded that the plaintiff's emotional difficulties seem to compromise his business drive. He suggested that the plaintiff should consider earlier retirement therefore a higher contingency should be awarded.
- [18] The plaintiff called three witnesses to corroborate his version i.e. Mr Judas Chauke, Mr Nico de Wet and Constable Jonker. Mr Judas Chauke was the truck driver who was stopped by the police by the road side. He confirmed the testimony of the plaintiff. Mr Nico de Wet was called to the police station to collect the personal items of the plaintiff. He confirmed the evidence of the plaintiff about the arrest and detention at Olifantsfontein Police Station. He differed on the evidence of the plaintiff about how he was hand cuffed behind the counter

- [19] Mr de Wet was again requested by the plaintiff to collect the copper after the plaintiff's release. He confirmed that the copper was not 1 ton when it was received from the police because he even weighed it and gave the receipt to the plaintiff. He also testified that he told the plaintiff about this while they were at the police station and the plaintiff did nothing about it. The plaintiff never produced this receipt in court. The latter again weighed the copper at his own place and generated a receipt, which was then produced to court as proof of the received copper from the police. It was not explained what happened to the receipt generated by Nico de Wet, and why was the receipt disregarded.
- [20] This witness even mentioned that the copper was recovered from the police within a month, which evidence differed from the evidence of the plaintiff, and that of Judas Chauke who testified that the copper was recovered after several months. The plaintiff has to prove that he received less copper than the copper which was confiscated. As stated earlier there has been no endorsement on the SAP 13 that the plaintiff had complained about the missing copper.
- [21] Constable Jonker was called to corroborate the fact that the plaintiff said he was requested for the bribe and that he was seen at the vicinity where there is an ABSA ATM machine. The police confronted the arresting officer Constable Mokoena about the allegations of bribery but the Constable denied such allegations.

Issues to be decided

[22] The Issues to be decided upon are:

- Whether the suspicion of the police officer that led to the arrest of the plaintiff without a warrant and the subsequent detention was based on reasonable grounds that the plaintiff committed the schedule 1 offence in terms of s 40(1) (b) of the Act
- Whether the plaintiff had committed a schedule 1 offence in terms of s 40(1) (b) of the Act
- Whether the plaintiff was able to prove that there was copper missing.
- Whether the plaintiff can claim costs for consultation with the industrial psychologist without having claimed for loss of earnings.

Reasonable suspicion

- [23] S 40(1) (b) of Act provides that a peace officer may without a warrant arrest any person whom he reasonably suspected of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody.
- [24] The defendant has the onus to prove that the arrest of the plaintiff in these circumstances was based on reasonable grounds. Suspicion should exist that a schedule 1 offence has been committed. From the evidence of Constable Mokoena it appears that he formed the suspicion that the plaintiff had committed Schedule 1 offence from the fact that the copper which was found in possession of the plaintiff had an Eskom code, and according to him

only Eskom's copper has a code. There has not been any evidence from Eskom to indicate that indeed the copper belongs to them and not the plaintiff. The defendant failed to call the witness from Eskom.

[25] The principles underlying the failure to call available material evidence by an onus bearing party have been critically

considered by the Appellate Division in the case *Brand v Minister of Justice* 1959(4) SA (A) 712.

'Appellant sued the minister for damages alleging that he had been unlawfully assaulted in a cafe by the second respondent and that he had thereafter been unlawfully

taken to a police station and imprisoned and detained. The second respondent in his defence denied the assault and

alleged that appellant had committed an offence in his presence and been lawfully arrested. Neither

party at the trial called the owner of the cafe, one Pappas, who had given evidence at the criminal trial where the appellant had been acquitted. Ogillvie Thompson JA in considering the effect of failure by both parties to call Pappas as a witness said

'now, where a witness who is available and able to elucidate the facts is not called by a party, such failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him.'

[26] Considering critically this aspect of the matter, which has a bearing on the question now before court, the plaintiff submitted that an adverse inference should be drawn against the defendant. This is also based on the statement by Van den Heever JA in the case of *G/eneagles Farm Diary v Schoombie* 1949 (1) SA 830 (AD) and adopted in the case of *R v Bezuidenhout* 1954

(3) SA 188 AD where either party could have called the witness, failure to do so operates against the party on whom the onus rest rather than against the other party.

[27] The onus rest on the defendant and they failed to call an Eskom person to testify regarding the said copper so therefore failure to call this witness operates against the defendant. The plaintiff gave the Constable affidavit attested by him to the effect that the copper belongs to him. The plaintiff also gave the Constable the declaration by the dealer to the effect that the copper belonged to his company and that the plaintiff was the sole owner of the company. The plaintiff also gave the constable three receipts proving that he purchased the said copper from two different scrap metal companies. He did not verify with the companies found on the receipts which the plaintiff produce at the scene of incident as to whether the mentioned companies sold the copper to the plaintiff.

[28] The reasonableness of the suspicion should be objectively assessed. See *S v Reabow* 2007

(2) SACR 292 (ECD) at page 297ce, See also Mabona and Another v Minister Of The Law and Order and Others 1988 (2) SA 654 (SE) page 658 eh

[29] The police officer should have kept an open mind and take notice of every relevant circumstance pointing either to innocence or guilt of the plaintiff. It is of importance that the Constable should have ascertained through investigations or verification that a schedule 1 offence has been committed, and that there are no reasonable grounds present that show the plaintiff did not commit the offence. In these circumstances the Constable failed to investigate the essentials relevant to the offence of theft, receiving stolen properties knowing it to be stolen, or failure to give an account of possession of goods suspected of being stolen before arrest could be affected.

[30] The Constable while under cross examination informed the court that he arrested the plaintiff in terms of section 40(1)(e) of the criminal procedure act 51 of 1977 because

- the plaintiff had a copper which was stripped and failed to report same to the police who deal with second hand goods,
- the value of the copper was excessive,
- The defendant wanted to verify the address of the plaintiff.

[31] The above reasons are not contained in the defendant's plea. The plea of the defendant should have set out these reasons justifying

the arrest so that the plaintiff would know on which points he must prepare a reply and that the court could also be able to ascertain precisely which reasons to adjudicate on. The above issues feature nowhere in the plea of the defendant and as such the new reasons suggested outside of the plea will not be considered. See National Media Ltd, and Others v Bogoshi 1998 ZASCA 94 where Hefer JA held that

.. . 'The defendant is required to plead facts which legally justify his denial of unlawfulness

[32] This failure was a clear indication that the defendant failed in its defence to justify the arrest of the plaintiff and also to prove that the plaintiff had committed a Schedule 1 offence.

[33] The Constable failed to establish the jurisdictional facts justifying the arrest and detention. As a result the arrest and the detention became unlawful in these circumstances. I will not deal with the issue of the discretion to arrest or not to arrest which the police are expected to exercise in relation to an individual's constitutional right, freedom of movement personal liberty, and dignity as sanctioned by our Constitution. See Louw v Minister of Safety and Security 2006(2) SACR 178(T). See also Minister of Safety and Security V Sekhotho 2010 (1) SACR 388 Theses cases focused on the critical point regarding the right to arrest and to secure the attendance of the person to court as opposed to the determination which should be exercised by the police whetherto effect arrest or not.

- [34] Having regard to the pleadings, the evidence by the Constable and the plaintiff and his witness's evidence, I am persuaded that the plaintiff has made out a case on merits. I find that the defendant is liable to pay proved or agreed damages suffered by the plaintiff consequent to the unlawful arrest and detention.

Missing copper

- [35] The plaintiff had to prove that the copper was missing. The latter testified that his copper which was confiscated was 916kg but what was received from the police was 355 kg. The police officer constable Mokoena testified that he did not know that there was any copper missing until he saw the claim on the summons. He did not see any case or complaint opened about the missing copper. What he saw was Mr Honniball's signature on the SAP 13 and that he received his copper.
- [36] The witness of the plaintiff Mr de Wet testified that the returned copper did not amount to 1 ton, and Mr Honniball did not do anything about that information. The testimony of de Wet differed from the testimony of the plaintiff in that the plaintiff testified that he informed the police there and then when he realised that the copper seemed less than the copper which was confiscated. The latter did not inform the police about it so that they could recheck if there were other bags in the store room there and then before they went away and to also alert same to the police so that they could weigh the copper in the presence of the police. This would have proved that the defendant would have to bear the responsibility of the missing copper. It was not been clear as to the reason for the plaintiff to keep quiet in these circumstances. The SAP 13 which was produced before me during the trial shows the plaintiff having signed for the copper which he received on the 5 December 2014. Nothing was mentioned on the SAP13 about the missing copper.
- [37] Mr de Wet was requested to weigh the value of such recovered copper, at his place of work and gave the receipt to Mr Honniball but the latter in his testimony, testified that he generated his own slip after he again weighed the copper. This receipt has been referred to by the plaintiff as proof that the copper was no longer 916 kg but 355 kg. It is not clear what happened to the receipt which the plaintiff was given by Mr Nico de Wet, and what the reasons were for disregarding the said receipt and re weighing the copper was. The plaintiff has to prove on a balance of probabilities that he was not given the total weight of the copper which was taken by the defendant.
- [38] All the evidence adduced in court has to be weighed on a balance of probabilities. This was emphasized in the

case of *S v Van Aswegen* 2001(2) SACR 97 SCA where the court said: '

In whichever form the test is applied it must be satisfied upon consideration of all the evidence. See also *S v Trainor* 2003 (1) SACR 35 (SCA) at 41bc, *s v Mbuli* 2003 (1) SACR 97(SCA) at 110

[39] Mr de Wet was called by the plaintiff to corroborate the evidence of the plaintiff that indeed there was copper missing. He weighed the said copper in the presence of the plaintiff and his coworkers but in the absence of the police to whom the allegation of the missing copper is directed to. The plaintiff did not produce the said receipt when requested to discover the documents which he will rely on during trial to prove on a balance of probability that indeed there was a missing copper. He only produced his own receipt which he later weighed at his business premises again in the absence of the police.

[40] The plaintiff failed to produce this receipt which he was given by de Wet and elected to rest his case primarily on his own verbal testimony and the receipt which he himself generated after weighing the

copper in the absence of the police. In doing so he took a calculated risk of nonpersuasion of the trial court

in respect of the onus resting on him. The onus was on the plaintiff to satisfy the court on a balance of probabilities that the copper was indeed missing. If indeed the value found by Mr de Wet was the same as the value found by the plaintiff the question arises as to why the plaintiff would measure again the copper. The court will draw an inference that the measurement found by de Wet was different from the measurement of the copper by the plaintiff. The plaintiff disregarded the receipt of Mr de Wet. See *Brand v Minister Of Justice* 1959(4) SA (A) 712 Van den Heever JA in the case of *Gleneagles Farm Dairy v Schoombie* 1949

(1) SA 830 (AD) and adopted in the case of *R v Bezuidenhout* 1954(3) SA 188 AD

[41] Taking into consideration the inference which was drawn from the missing receipt of de wet, as well as the fact that no complaint was lodged with the police, that the police were not present when the said copper was weighed on the two occasions, that the plaintiff signed the SAP13 and did not inform the police who gave him the copper about the missing copper, because this copper is of value to the plaintiff, I find it improbable that there was any missing copper. Having regard to the pleadings and the evidence by the plaintiff and his witnesses I am not persuaded that he has made out a case on the merits of the copper claim. I find the defendant is not liable for the damages claimed by the plaintiff on claim 3

Quantum

General damages

[42] The plaintiff has lodged three claims. Claim 1 is a claim for general damages arising out of the unlawful arrest and detention where the plaintiff prays for compensation in the amount of R180 000 and an amount of R25 000 for future medical expenses as per the clinical psychologist report, Dr Henk Swanepoel. Claim 2 is for the legal costs incurred by the plaintiff when he instructed the attorney to assist him in the case and for which the plaintiff prays for compensation in the amount of R15000. Claim 3 was for missing copper and the plaintiff was not successful in proving his case and the said prayer for compensation is denied is also a prayer for costs on party and party scale.

[43] The plaintiff presented evidence on the quantification of damages simultaneously with evidence on merits; the defendant did not present evidence to challenge the quantum claim by the plaintiff. The plaintiff in his evidence testified

that he is 48 years old but at the time of the incident he was 45 years old. He is a business man who was arrested for possession of stolen copper and detained for 21 hours. He never appeared in the courtroom but he was transported

in a police van together with other inmates who were to appear in court.

[44] He was incarcerated at Olifantsfontein police station behind the bookshelf.

The evidence of the plaintiff and his witness de Wet about the handcuffing behind the bookshelf differs. The

plaintiff evidence is to the effect that he was only handcuffed one hand and the bookshelf was also

cuffed. De Wet said the plaintiff was hand cuffed both his hands behind the bookshelf. The evidence of de Wet was improbable in that it will be impossible to handcuff two hands together with a bookshelf. It has not been clear through evidence of de Wet why he was exaggerating when testifying as a witness of the plaintiff with regard to this issue.

This has left me not knowing which version I should rely on between the plaintiff and his witness.

[45] The plaintiff further testified that he was taken to Ivory Park Police Station where he was placed in the police cell with 30 inmates. There were not enough beds and he sat on the floor until morning. There were sexual advances to him by other inmates. He was terrified of the other inmates to such an extent that he could not even walk to the rest room. In the morning he was placed in the police van with 40 other inmates. He was then released from the court holding cells without appearing in court. The attorney facilitated everything for him and he was released and the matter was never enrolled in court.

[46] The plaintiff received counselling by the clinical psychologist Dr Henk Swanepoel in whose report he mentioned that the plaintiff still require 2025 consultations with him as he has diagnosed that the plaintiff has suffered a Post Traumatic Stress Disorder which requires psychotherapeutic intervention from clinical psychologist. The report was part of the evidence and it was admitted by the defence. The defence also admitted the damages claimed for future medical expenses as well as the special damages prayed for.

[47] I have already assessed evidence on merits above and would like to proceed and assess evidence on quantum.

I will start with the issues which are admitted on the pretrial minutes.

- The defendant admits that the period that the plaintiff was in police holding jail 21 hours.

- That the plaintiff was detained at Olifansfontein Police Station first and then at Ivory Park Police Station.
- Vicarious liability of the defendant is admitted.
- The defendant admitted the findings of the clinical psychologist Dr Henk Swanepoel. and the damages for future medical expenses

[48] Both counsel submitted the cases upon which they rely on in support of their cases on quantum. I will however not deal with all of them as they were merely serving as guide for the court in assessing damages suffered as a result of the arrest and detention.

In the case of Minister of Safety and Security v Seymour 2007 1 all SA 558(SCA) para17 and 20 Nugent JA held that:

'The assessment of awards of general damages with reference to awards made in the previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are useful guide to what other courts have considered being appropriate

but they are no higher value than that.'

'Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no measure for the loss. The court awarded an amount of R90000

[49] I have also considered the case of Minister of Safety and Security v Tyulu 2009

(5) SA85(SCA) at 93 df Boshielo AJA (as he then was) commented

'in assessing the damages for unlawful arrest and detention It is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him much needed solatiumforhis injured feelings'

In Olgar v Minister of Safety and Security (ECO) 18 December 2008(case 608/07 at para 16. The following was stated

'in modern South Africa an award for damages for the wrongful arrest and detention should express

the importance of the constitutional rights to the individual freedom and it should properly take into account the facts of the case, the personal circumstances of the victim and the nature, and extent and degree of the affront to his dignity and his sense of pesronal worth.'

[50] I also take into account the case of Solomon v Visser and Another 1972 (2) SA 327(C) where a 48 year old business man was detained for seven days, first in a police station cell and then in prison was awarded R4000 (which now amount to R136 000)

In the case of Areff v Minister van Polisie 1977(2)SA 900 (A) a 41 year old businessman was arrested and detained for 2 hours was awarded R1000 (now worth R24000)

[51] In Seria v Minister of Safety and Security and Others 2005 (5) SA 130 CJ a professional man was arrested and detained in a police cell for about 24 hours for the time with a drug addict and was awarded R50 000 (now worth R52 000)

[52] In this case the plaintiff was arrested and detained for 21 hours until his release the following day. The clinical

psychologist's assessment of the plaintiff, revealed that he was traumatised by the arrest and detention which occurred. The counsel for the plaintiff submitted that it was not necessary for the plaintiff to have been arrested and detained as the police had his address and that he was a local businessman who has been cooperative with the police from 10:00am when he went to the scene until he was arrested. Having regard to the pleadings, evidence led, personal circumstances of the plaintiff, the clinical psychology assessment report and

the previous case laws I am persuaded that the plaintiff was able to prove damages caused by the arrest and detention.

[53] The plaintiff requested for cost on party and party cost and this has not been opposed except the cost of one expert Mr Pierre Brits who assessed the plaintiff's loss of earnings. The defendant opposed the said cost as loss of earnings did not form part of the pleadings or claims. I find that the objection to this cost has merit as the court did not adjudicate on the loss of earnings. The claim for costs of the expert Mt Pierre Brits must fail.

[54] In the result I make the following order:

1. That the defendant is liable to pay the plaintiff compensation for damages arising out of the unlawful arrest and detention which occurred on the 19 August 2014, in the amount of R80 000.
2. The defendant is ordered to compensate the plaintiff for special damages for future medical expenses in the

amount of R25 000.

3. The defendant is ordered to compensate the plaintiff for special damages incurred for instructing an attorney to represent him in this case in the amount of R15000.
4. The claim against the defendant for loss of copper is dismissed.
5. The defendant is ordered to pay costs of suit on a party and party scale inclusive of the costs of counsel, expert Dr Henk Swanepoel's expenses as well as interpreter fees.

Counsel for Plaintiff: Adv. C. Spangenberg

Attorney for Plaintiff: JWB Attorneys

Counsel for Defendant: Adv. A. Gxogxa

Attorney for Defendant: State Attorney

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