

SOUTH AFRICA / JUDGMENT

L.D v S (CA209/2015) [2016] ZAE CGHC 42 (2 June 2016)

[2016] ZAE CGHC 42

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, J E Smith, G H Bloem

CASE / FILE NUMBER

CA209/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA209/2015

DATE HEARD: 03/05/2016

DATE DELIVERED: 02/06/2016

In the matter between

L. D.

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] On the evening of 3 October 2009 Mr Mongameli Mtwebana left his home for the purpose of transporting passengers in his “jikileza”

taxi. He never returned. On 4 October 2009 his body was found. He had been shot and robbed of his vehicle and an unknown sum of money. The appellant was one of four accused who were subsequently convicted by the High Court, Port Elizabeth, of murder and robbery with aggravating circumstances. The appellant was sentenced to 20 years' imprisonment for the murder and 15 years' imprisonment for the robbery, the sentences to run concurrently. Leave to appeal against the convictions and sentences was granted to a full court of this division by the Supreme Court of Appeal, leave having been refused by the trial court. In view of the fact that the appellant was 17 years old at the time of the alleged commission of the offences, leave to appeal was unnecessary in view of the provisions of s 84 of the Child Justice Act 75 of 2008.

- [2] The only evidence against the appellant was a pointing out during which he made certain statements. Following a trial within a trial, the pointing out was ruled admissible by the trial court. The grounds of appeal relating to the admissibility of the pointing out are that the appellant was unduly influenced to do the pointing out and that the appellant was not properly informed of his constitutional rights at all relevant times, resulting in an unfair trial.
- [3] The appellant was arrested on 26 October 2009. He was 17 years old at the time and in standard 7 at school. He voluntarily

reported at the KwaNobuhle detective branch offices after messages were left with his family that the police were looking for him.

There is a factual dispute about what happened thereafter.

- [4] The pointing out was conducted on 27 October 2009. Events which took place on 26 October 2009 are relevant to the issue of admissibility but it is convenient first to set out some portions of the printed form which was completed by Captain Gerber of the Motherwell detective branch, who was appointed to take charge of the pointing out. The form appears to be a standard printed one which provides, inter alia, for explanations to be provided to the accused person or suspect who is going to do the pointing out, and questions to be put to such person, prior to the actual pointing out taking place. It was not in dispute that at the time Gerber put questions to the appellant, the appellant's mother was present and the services of an interpreter were used to interpret from English to isiXhosa and vice versa. The form reflects that Gerber explained to the appellant what a pointing out involves and that the appellant understood the explanation. Thereafter the form reflects that questions were put to the appellant which he answered, as follows:

"Do you know why you were brought to me, and if so, why?"

YES I HAVE TO EXPLAIN EVERYTHING THAT HAPPENED .

If it is to do a pointing out, how do you know that you may do a pointing out to me?

YES THE DETECTIVE TOLD ME MR. GROOTBOOM

If you were told by anyone that you may do a pointing out to me, who told you so, when was this exactly and what did the person say to you?

MR GROOTBOOM TOLD ME THAT I A GONNA TELL WHAT HAPPENED.

Why do you want to do a pointing out?

I AM DOING IT OUT OF MY OWN FREE WILL AND BECAUSE THE INVESTIGATOR TOLD ME SO.

- [5] According to the form, Gerber then explained further matters to the appellant, including that he was not obliged to do a pointing out, that he had the right to remain silent, that he was not obliged to make a confession, admission or statement that could be used against him, that he had the right to consult with a legal representative of his choice and that if he could not afford one, a legal representative would be appointed at no cost to the appellant. In relation to the explanation regarding legal representation the following questions and answers were recorded:

“Do you understand these rights? YES I UNDERSTAND.

Do you wish to exercise either of them? NO, LEGAL REPRESENTATIVE AT COURT.

If so, do you wish to do that? YES AT COURT.

- [6] Later in the questioning the appellant was asked if he had been encouraged or influenced in any way to do the pointing out and his answer was “No”. When he was asked if he declared that he had elected to do the pointing out of his own free will, without being forced, influenced or encouraged by any person to do so, he answered “Yes”.
- [7] Gerber testified that on 26 October 2009 he was informed by the Kwa- Nobuhle branch commander that a suspect wanted to do a pointing out. On 27 October 2009 he interviewed the appellant, utilising Constable Mkhonjiswa as the interpreter. The appellant’s mother was present. With regard to the appellant’s answers to the effect that Grootboom had told him to tell what happened and to do the pointing out, Gerber disagreed that it sounded as though the appellant had been compelled and influenced. When it was put to him that he should have asked for more information from the appellant following these answers, he said that the appellant had not hesitated to do a pointing out. He denied that he had not explained the appellant’s right to remain silent, the right to legal representation, and the meaning and consequences of a pointing out. He said that he had explained everything that was on the typed form.
- [8] It was put to Gerber in cross-examination that he had not explained the necessity for the appellant to appoint an attorney then and there. He said that he had done so. Earlier in his evidence in chief when he was being led on the questions and answers in the form relating to the right to legal representation, he said that he had included the following explanation:

“You are entitled to the services of a legal representative now, to assist and advise you on your choices before we continue.”

This explanation was not reflected on the printed form.

[9] Warrant Officer Deon Arnolds was the investigating officer in the case. He testified that on 26 October 2009 the appellant's

parents brought the appellant to Arnolds' office. The father left, leaving the appellant and his mother with Arnolds.

Arnolds informed the appellant and his mother that it was a murder case and warned the appellant that he had the right to remain silent, the right to legal representation, and if he could not afford legal representation that he could apply for legal aid. Arnolds spoke to the appellant and his mother in Afrikaans and according to him they understood what he had explained.

[10] The appellant told Arnolds that he had been involved together with his friends in the incident. His warning statement was then taken. This statement was handed in as an exhibit. It was signed by the appellant, his mother and Arnolds. It reflected that the statement was taken on 26 October 2009 at 11h00. It further reflected that the appellant had been informed of the charges, the reason for his arrest, his right not to say anything, that what he said could be used as evidence against him, and that he had the right to consult a lawyer and if he could not afford a lawyer he could apply to the court for a lawyer to be appointed. He made the following statement:

"I would like to show and tell the place what and where the incident took place. I am also doing this out of my own free will."

[11] Arnolds said that the appellant was not influenced to make the statement, nor did he encourage the appellant to do the pointing

out. He disagreed that the appellant's mother was not present on 26 October 2009 and that the warning statement had been presented to the appellant and his mother for signature after the pointing out on 27 October 2009, when the mother was present.

After the warning statement was taken, the appellant was formally charged and his fingerprints were taken. Arnolds requested

Sergeant Fleurs to take the appellant to the police cells. There is some confusion in Arnolds' evidence here about the sequence of events because a notification of rights document was completed by Fleurs and signed by the appellant at 10h30 on 26 October 2009. Arnolds requested his commanding officer to arrange for a pointing out and Gerber was duly appointed to take charge of the pointing out.

[12] According to Arnolds no other police officer interviewed the appellant at this stage. There was a Warrant Officer Grootboom

who was a detective at Kwa-Nobuhle at the time. Arnolds was not sure if Grootboom was involved in the investigations but as far as he was aware Grootboom did not deal with the appellant.

- [13] Grootboom testified that he was not involved in the investigations in the case and assisted Arnolds when required. He was involved in the arrest of two of the other accused. He denied leaving a message with the appellant's father that the appellant should contact him. The appellant and his father had arrived at Arnolds' office, looking for Arnolds. Grootboom remembered being told by an officer that they were looking for him, that is Grootboom. Grootboom left the appellant and his father with Arnolds and had no further contact with the appellant. He denied telling the appellant that he must do a pointing out and tell what happened. He did not remember if he was ever in a motor vehicle with the appellant. He did not remember if he had booked out the appellant on the day of the pointing out.
- [14] Sergeant Fleurs testified that on 26 October 2009 Arnolds had requested him to detain the appellant in the cells. He took the appellant to the police station in a vehicle. There was no other officer in the vehicle. At the station he completed what he termed a notice of rights in terms of section 35. This document, which was handed in as an exhibit, is a printed form in English with the heading "Notice of rights in terms of the Constitution" with a reference to s 35 of the Constitution. Its contents are a repetition of what is contained in s 35 in relation to arrested and detained persons. Fleurs was alone with the appellant and read the rights contained in the document to the appellant in English. There was no interpreter present. According to Fleurs the appellant said that he understood and signed the certificate portion of the document which reflected that he certified that he had been informed of his rights and that he understood them. Fleurs denied that he had merely placed the document before the appellant and asked him to sign it.[15] The appellant testified that his mother had telephoned him and told him that the police were looking for him and that she had given him the name and cellphone number of Grootboom. At the time he was living in Port Elizabeth with his aunt, and his mother was living in Uitenhage. The appellant, his father, and his father's cousin went to the offices to which they had been directed and asked for Grootboom. Grootboom was called and arrived with a few other detectives. The appellant was questioned and then taken to the police station by Grootboom and Fleurs. There he was told to sign a form. He signed the form but did not know what its contents were. He has a limited knowledge of English. He was detained and was later fetched and taken back to the detectives' offices where he found three of the other accused. Grootboom was among the detectives there. He was asked about the former fifth accused (who was acquitted) and a firearm. He was taken back to the police station and locked up. He did not see his mother that day nor did he and his mother sign a warning statement on that day.
- [16] The next day he was fetched by Grootboom who told him that he was going to do a pointing out because the three other accused had already done so. He felt that he had no choice and did not think that he could refuse. With regard to the interview with Gerber, he said that Gerber had not explained his right to remain silent and he could not remember if other rights had been explained. If he had known that he could have chosen not to do a pointing out, he would not have done the pointing out. If he had known that he was entitled to immediate legal representation he would have exercised that right. When he returned from the pointing out to the detectives' offices he was asked by Arnolds to sign a document.

Arnolds never explained his rights to him.

- [17] The appellant's father, Mr Gladman Mkaya, testified that on 25 October 2009 he learned from his sister that the police were looking for the appellant. He contacted the appellant's mother who also told him that the police were looking for the appellant and that Grootboom had left his number and told her that they should bring the appellant to see him. The next day he and his nephew took the appellant to the detectives' offices and asked for Grootboom. Grootboom was called and arrived with other detectives, including Arnolds. Mkaya then left. He did not see the appellant's mother at the detectives' offices that day
- [18] The appellant's mother, Ms Nomkumbuleko Stokwe, testified that she learned on 24 October 2009 that the police were looking for the appellant, when she was visited by Grootboom and another officer. She was given Grootboom's contact details. The following day she notified the appellant's aunt, and later spoke to his father and told him that the police were looking for the appellant. The next day, 26 October 2009, she was informed by the appellant's father that the appellant had been detained. She said that she was not present on 26 October 2009 when the appellant reported to the police, nor did she sign any document on that day.
- [19] On 27 October 2009 the interview between Gerber, the appellant, and herself, took place. The form which Gerber completed was read back to her and the appellant, and the appellant was satisfied with everything which had been recorded. The appellant then did the pointing out at which she was present. Thereafter in Arnolds' office Arnolds gave her and the appellant a form to sign. She could not remember if the contents were explained to her.
- [20] The chief factual disputes which emerged from the evidence concerned the date on which the appellant's warning statement was taken, the date on which his mother was present at the detectives' offices, and whether or not Grootboom told the appellant to tell what had happened and to do the pointing out.
- [21] In my view there were no grounds for rejecting as not reasonably possibly true the evidence of the appellant and his mother that the mother was not present at the detectives' offices on 26 October
2009. The appellant's father said that he did not see the mother there and even Grootboom said that the appellant arrived with his father and did not mention the mother.
- [22] Further in my view there were no grounds for finding that the appellant's evidence that he had been told by Grootboom to do the pointing out, was not reasonably possibly true. Despite Grootboom's attempts to distance himself from the appellant and the investigation, he was involved in the case, in that he had been involved in the arrest of two other accused. Both the appellant's parents testified to Grootboom's involvement in that his details were left with the appellant's mother and the father's intention when he went to the detectives' offices was to report to Grootboom. Grootboom himself said that he had been told they were looking for him. The parents would not have known about Grootboom unless he had provided his details. Grootboom's evidence concerning whether or not he travelled in a

vehicle with the appellant was unsatisfactory and contradictory, in that he initially said that he had no further contact with the appellant and later said that he did not remember if they travelled in a vehicle together.

- [23] It is further highly improbable that the appellant would use Grootboom's name when interviewed by Gerber if he had not had contact with Grootboom. In his answers to Gerber the appellant did not appear to exaggerate Grootboom's role. He did not say for example that Grootboom had threatened him, and in one of his answers he said that he was going to do the pointing out of his own free will and because the investigator told him so. The appellant's version that Grootboom told him he had to do a pointing out because the other three accused had done pointings out, was supported by the fact that the other accused had in fact done pointings out. The appellant would not have acquired this knowledge unless he had been told by someone.
- [24] I think it must be accepted that Gerber did follow the printed contents of the form when he interviewed the appellant. The appellant's initial challenge in cross-examination of Gerber that certain rights were not explained was not followed through completely when the appellant testified. In addition the appellant's mother said that the contents of the form had been read back and that the appellant was satisfied.
- [25] The admissibility or otherwise of the pointing out must be considered against this evidential background.
- [26] The first explanation of rights by Fleurs was in my view effectively no explanation at all. Even if one accepts that Fleurs read out the contents of the form to the appellant, he did so in English, which was not the appellant's first language, and of which he had limited knowledge, and in the absence of his parent. The form for the most part reproduces the wording of parts of s 35 of the Constitution, with some adaptations. This is legal language which even an adult person untrained in the law would have difficulty understanding. As was said in *Magwaza v S* [2015] All SA 280 (SCA) at para [17]:

"It is important to appreciate that a constitutional right is not regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making a suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"

- [27] It follows that in the present case, even on the State's version, the appellant was not in a position to make an informed

decision on whether or not to exercise his rights. Even if his mother had been present it would have made no difference because

English was not her first language either.

[28] Having found that the appellant's version of his mother's absence on 26 October 2009 was reasonably possibly true, no reliance can be placed on Arnold's evidence concerning the taking of the warning statement. It was in that statement that the appellant purportedly elected to do a pointing out, in other words to forego his right to silence and to legal representation at that stage. Even if the statement was taken on 26 October 2009, the State did not prove that the appellant's mother was present. The election he made, if he did make it, was therefore made without the advice of his parent and with no prior understanding of his constitutional rights.

[29] The importance of parental assistance for a minor from the moment of arrest was stressed in *S v Manuel en Andere* 1997 (2) SACR 505 (C) where Brand J (as he then was) after referring to a number of authorities, said the following at 516 e-f:

“Soos uit die aangehaalde gesag blyk, is die teenwoordigheid van ‘n jeugdige se ouer vanaf die oomblik van sy arrestasie van groot belang. Die redes hiervoor is die aanvaarding van die feit dat jeugdiges oor die algemeen, weens hulle gebrek aan oordeel en lewenservaring, nie oor dieselfde vermoë as volwassenes beskik om besluite te neem nie.”

[30] Grootboom's conduct in telling the appellant to do the pointing out amounted in my view to undue influence. This was a 17 year old boy who apparently without resistance accompanied his father to report to the police. His youth and immaturity and the fact that he was in custody would have rendered him susceptible to what a police officer, a person in authority, told him to do. His answers to Gerber bear this out. He stated unambiguously and as a fact that Grootboom told him what to do. This is consistent with his evidence that he felt that he had no choice. Gerber did not investigate Grootboom's influence further in order to ascertain the extent of such influence on the appellant's election to do a pointing out, and whether or not, in spite of such influence, the appellant would nevertheless still have elected to do the pointing out. As the appellant's answers stood therefore, Grootboom's improper conduct directly caused the appellant to do the pointing out. It did not avail the State that at a later stage in the interview the appellant said that he had not been encouraged or influenced to do the pointing out. Encouragement and influence are general concepts more readily understood by an adult, as opposed to a 17 year old's factual assertion that he had been told to do the pointing out.

[31] On this ground alone the pointing out should have been excluded.

[32] Even leaving aside the undue influence, there is an aspect of Gerber's interview with the appellant that is cause for

concern. That is when the appellant said that he wanted legal representation at court. Gerber said that he had explained to the appellant that he was entitled to the services of an attorney at that stage, but such explanation did not appear on the printed form. Gerber specifically said that he had explained everything which was in the printed form. I therefore cannot accept that he did explain to the appellant that he was entitled to legal representation at that stage. Even if he had done so, he should have enquired why the appellant was prepared to proceed with a pointing out

when he had indicated that he wished legal representation at court. Either way, there was a failure properly to explain the appellant's right to legal representation, in a manner he and his mother could understand. The pointing out was therefore made without the appellant's right to legal representation at all stages having been explained.

[33] A similar situation arose in *S v Thyse* [2013] ZAECGHC 11 (20 February 2013). In that case a pointing out by the accused was ruled inadmissible. The accused, after his right to legal representation and to apply to the Legal Aid Board was explained by the officer who was to conduct the pointing out, indicated that he wished to apply for assistance from the Legal Aid Board. He was then asked what he wished to do with regard to the exercise of his right to legal representation. His response was that he wished the court to assist him with the Legal Aid Board. The pre-printed questionnaire provided for the interviewing officer to record what steps were taken to comply with any requests by the person in respect of legal representation. The officer recorded that the accused said that "As I noted above I will organise a court to assist me with Legal Aid Board". The interviewing officer took no further steps relating to the accused's statement that he wished to have legal representation nor did she

enquire from the accused why he was prepared to proceed with a pointing out when he had indicated that he wished legal representation.

[34] At para [17] Goosen J said the following:

"The right to legal representation by an accused person is a fundamental right which seeks to ensure that the accused person is adequately and properly protected at all stages of the pre-trial and trial procedures. At the pre-trial stage there is a clear duty upon the investigating authorities to ensure that the accused is properly informed of his rights. There is also a duty to facilitate the exercise of the right in order to ensure that an accused person's right to silence is protected and that the fairness of the proceedings is assured. See in this regard S v Pitso 2002

(2) SACR 586 (O), *S v Lottering* 1999

(12) BCLR 1478 (N) and *S v Tsotetsi & Others* 2003

(2) SACR 623 (W)."

It is clear in the present case that Gerber did not ensure that the appellant was properly informed of his rights, nor did he facilitate

the appellant's exercise of his rights. This was of particular importance because of the appellant's age.

[35] As was said in *Magwaza v S* (supra) at para [18]:

"If it is accepted, as I think it must be, that the appellant was not properly warned of his constitutional rights, then it must follow that there was a high degree of prejudice to him because of the close causal connection between the violation and the conscriptive

evidence. For, plainly, the rights infringement resulted in the creation of evidence which otherwise would not have existed. And as it was put in *R v Ross* (1989) 37 CRR 369 at 379 ‘ . . . the use of any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair.’”

[36] In the present matter the pointing out was the only evidence against the appellant. It should have been excluded and its admission rendered the trial unfair.

[37] In the result the appeal must succeed. The convictions and sentences are set aside.

J M ROBERSON

JUDGE OF THE HIGH COURT

SMITH J:-

I agree

J E SMITH

BLOEM J:-

G H BLOEM

Appearances:

For the Appellant: Ms M Henderson, Grahamstown Justice Centre

For the Respondent: Adv M Mnyani, Director of Public Prosecutions, Grahamstown

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2016/42.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ld-v-s-unknown-topic-aecghc-2016--6a3ea51e3b1caa9129814b8f>

Prepared on 9 October 2026 · Esheria