

SOUTH AFRICA / JUDGMENT

S v January, Prokureur-Generaal, Natal v Khumalo (341/92, 728/92) [1994] ZASCA 106; [1994] 4 All SA 354 (A) (8 September 1994)

[1994] ZASCA 106

COURT

Supreme Court of Appeal

BEFORE

Van Heerden, Smalberger, Nienaber, Van den Heever, Harms

CASE / FILE NUMBER

341/92, 728/92

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

Source record

CASE NOS 341/92 & 728/92

/mb

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

M P JANUARY APPELLANT

and

THE STATE RESPONDENT

PROKUREUR-GENERAAL: NATAL APPELLANT

S M KHUMALO RESPONDENT

CORAM : VAN HEERDEN, SMALBERGER, NIENABER,

VAN DEN HEEVER et HARMS JJA HEARD : 22 AUGUST 1994

DELIVERED : 8 SEPTEMBER 1994

JUDGMENT

VAN HEERDEN JA/...

1

VANHEERDEN JA:

These two matters were heard together because the same point of law arose in each.

In January v The State the appellant was one of five accused who stood trial in the Eastern Cape Division on inter alia two charges of murder. These related to the death of two young men who had been abducted from a house in the district of Uitenhage during the evening of 8 November 1989. For some 16 days thereafter their whereabouts remained unknown to the police and their

families. In the early hours of 24 November the appellant and others were arrested. They were taken to a building known as the Ford Centre where the appellant was questioned by Warrant Officers Noyo and Moshara. Eventually the appellant told his interrogators that he wished to point something out. The upshot was that the appellant and Warrant Officers Fourie and

2

Odendaal proceeded in a motor vehicle to a spot in an open area in the district of Uitenhage. They arrived there because the Warrant Officers had followed directions given by the appellant. After the vehicle had stopped the appellant pointed out a manhole with a heavy lid. When the lid was removed the decomposed bodies of the two young men were found inside the manhole. It was later established that they had been murdered before their bodies were dumped into the hole.

On 25 November 1989 the appellant made a statement to a police captain. The admissibility of this statement and the pointing out was contested by the appellant on the ground that they had been induced by assaults on him by Noyo and Moshara at the Ford Centre. Predictably they denied that they had assaulted the appellant. At the end of a trial-within-a-trial the presiding judge (Kannemeyer JP) ruled that the statement was inadmissible because of the State's failure to discharge

3

the onus of proving that it had been freely and voluntarily made. He held, however, that the evidence relating to the pointing out was admissible even if it had taken place as a result of assaults on the appellant.

In the main judgment the court a quo drew certain inferences from the pointing out and, for reasons not material to this appeal, found the appellant guilty as an accessory after the fact on the two capital charges. Subsequently the appellant was sentenced to five years' imprisonment of which a period of two years was conditionally suspended on the two charges treated as one for purposes of sentencing. With the leave of Kannemeyer JP the appellant then appealed to this court against his convictions.

At the hearing of the appeal it was rightly common cause that, if it was necessary to do so, the State failed to prove that the

4

pointing out had not been induced by the assaults testified to by the appellant, and that if the evidence relating to that conduct of the appellant was inadmissible the appeal must succeed. The crisp, but by no means easy, question therefore is whether proof of an involuntary pointing out by an accused is admissible in a criminal matter if something relevant to the charge is discovered as a result thereof. (Since the assaults in question were allegedly committed by policemen, I shall confine myself to a pointing out which is involuntary because of

something said or done by a person in authority:)

Although we have been referred to various authorities, only two require detailed consideration. They are the decisions of this court in *Rv Sheehama* 1991(2) AD 608, and *S v Sheehama* 1991(2) SA 860(A). In *Samhando* the accused had been convicted on a charge of murder. Shortly after the death of the deceased two so-called "policeboys" by the

5

use of considerable violence forced the accused to admit that he had killed the deceased. The accused then showed them *inter alia* where the blood-stained clothing of the deceased was concealed in the branches of an orange tree. The presiding judge refused to allow evidence as to the accused's admission to be put before the jury, but allowed the policemen to testify about the pointing out.

The matter came before this court after the presiding judge had reserved a question of law, i.e. whether the evidence of the pointing out was admissible. Having referred to the general rule of the English law of evidence which excludes a statement made by an accused person unless it is shown by the prosecution to have been freely and voluntarily made, Watermeyer ACJ said that there had arisen in England a modification of that rule, based upon what might be called the theory of confirmation by subsequently discovered facts. He explained it as

6

follows (at p 613):

"The fundamental reason why admissions by an accused person made under an inducement are not admitted as evidence against him is because they are untrustworthy as testimony. If, therefore, such admissions can be proved to be true by other evidence, the reason for their exclusion vanishes and they should be admitted as evidence. Pushed to its logical conclusion that reasoning would lead to the admission of the whole of an otherwise inadmissible confession if it be confirmed in material particulars by subsequently discovered facts, but the English Courts, while admitting a partial application of this reasoning, have stopped short of carrying it to its logical conclusion. At first only the facts discovered by reason of an inadmissible confession were allowed to be proved in evidence, but subsequently the rigidity of the exclusionary rule was somewhat relaxed."

Watermeyer ACJ proceeded to quote a passage from *East*, *Pleas of the Crown*, and to refer to two English cases decided in 1809 and 1840. Without further analysis of the ambit of the exception to the general rule, he then held that the evidence of the policemen had been

rightly admitted. It was no doubt for this reason that in R v Duetsimi

7

1950(3) SA 674(A) 678A Schreiner JA said that the true ratio decidendi of Samhando was not easy to discover.

Watermeyer ACJ based his judgment solely upon the common law. He therefore found it unnecessary to express an opinion

on the ambit of s 274 of the Criminal Law and Procedure Act 31 of 1917

("the 1917 Act"), That section was the predecessor of s 218(1) of the Criminal Procedure Act 51 of 1977 ("the 1977 Act") to which I shall return at a later stage.

In Duetsimi. Schreiner JA said the following (at p 678 F -

G):

"On the whole it seems to me that the true basis of the decision in Samhando's case is that, in relation to statements not amounting to confessions ..., the fact that the statements have not been shown to have been freely and voluntarily made does not prevent proof by the Crown not only of facts discovered in consequence of such statements (including the whereabouts of things connected with the crime), but also of the fact that the accused pointed out such

8

things."

It will be observed that Schreiner JA did not specifically refer to the situation where something connected with a crime is discovered not as a result of a pointing out, but of information given by the accused in a statement. In Samhando. however, Watermeyer ACJ (at p 614) referred to two English cases which "permitted evidence to be received of the words used by the accused in relation to the articles discovered in consequence of an inadmissible confession".

As has often been pointed out, Duetsimi gave rise to the amendment of s 274 of the 1917 Act by s 42 of the Criminal Procedure and Evidence Amendment Act 29 of 1955. (The existing s 274 became s 274(1) and a new subsection (2) was introduced.) In the same year the amended section became s 245 of the Criminal Procedure Act 56 of 1955 ("the 1955 Act"). With minor amendments it was re-enacted as s 218 of

9

the 1977 Act.

whether s 245(2) of the 1955 Act applied to all pointings out or only to those as a result of which something had been discovered. For

convenience I quote s 218(2) of the 1977 Act which, as said, is in substantially the

same terms as s 245(2) of the 1956 Act:

"(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."

In a majority judgment this court held that a pointing out fell within the ambit of s 245(2) of the 1956 Act whether or not it led to the discovery of something material to the charge. However, the question

10

whether the subsection rendered admissible evidence of an involuntary pointing out, did not arise and was therefore not considered.

No purpose would be served by dealing with a number of decisions, handed down since 1965, in which the above question was expressly or implicitly answered in the affirmative. They were all referred to by this court in Sheehama. It is important to mention, however, that a new s 219A was inserted in the 1977 Act by s 14 of the Criminal Procedure Amendment Act 56 of 1979. The introductory provision ("the main provision") of subsection (1), which is subject to a proviso not material to this appeal, is in these terms:

"Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence."

11

In Sheehama it was held that the following two categories of post 1964 decisions were clearly wrong; ,

- (a) decisions that a relevant pointing out did not constitute an extra-curia admission, and (b) decisions that evidence of an involuntary pointing out was admissible under s 218(2) of the 1977 Act.

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/ZASCA/1994/106.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-january-unknown-topic-asca-1994--6a3ea5133b1caa912980ad06>

Prepared on 11 October 2026 · Esheria