THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 248/2018

In the matter between:

FANIE ARCHIBOLD NDIMANDE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndimande v The State* (248/2018) [2019] ZASCA 132 (30 September 2019)

Coram: Ponnan, Saldulker, Swain, Mbatha JJA and Hughes AJA

Heard: 22 August 2019

Delivered: 30 September 2019

Summary: Evidence – admissibility of a pointing out where appellant's rights in terms of s 35 of the Constitution have been infringed – dock identification admissibility thereof – trial within a trial – video footage of identification of appellant not submitted as evidence – identification must be such that certainty is beyond reasonable doubt to place reliance thereupon.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoatlheng J, Bam and Petersen AJJ) sitting as a court of appeal:

1 The appeal is upheld.

2 The order of the full court is set aside and substituted with the following order:

'The appeal is upheld and the conviction and sentence of the appellant are set aside.'

JUDGMENT

Hughes AJA (Mbatha JA concurring):

[1] The appellant was convicted in the Gauteng Division of the High Court, Johannesburg (high court) on one count each of murder, robbery with aggravating circumstances, attempted robbery with aggravating circumstances, unlawful possession of a firearm, unlawful possession of ammunition and three counts of attempted murder. Cumulatively, he was sentenced to an effective term of life imprisonment. The appellant's appeal against conviction was dismissed by the full court. This is a further appeal with special leave having been granted by this court.

[2] On 3 August 2003, at 22h00 and at Amabele Spar, Ivory Park, Johannesburg, a gang of armed men wearing balaclavas attempted to rob the Spar store. The gang accosted two staff members and a security guard whilst they proceeded to close the store. A scuffle ensued. Eventually the security guard was dispossessed of his firearm and was fatally shot. The two staff members managed to flee from the store and sought assistance from other security guards who were outside of the store. The entire incident was recorded on video cameras located inside the store. The State alleged that the appellant was part of the assailants.

[3] The issues in this appeal are whether there was a positive identification of the appellant by the state witness (Mr Hamilton Mbatha); if such identification was reliable; the admissibility of the evidence obtained through the pointing out by the appellant and if the admissibility thereof rendered the trial unfair.

[4] During the trial, the two staff members testified that they could not identify the assailants as they were wearing balaclavas. However, the security manager, Mr Hamilton Mbatha (Mr Mbatha), testified that he identified the appellant as one of the assailants after he had viewed the video footage a day after the incident. He testified that the appellant was the only one who at some stage removed his balaclava. According to him, he also saw the appellant at the store four months later when he was brought to conduct a pointing out with the police. At that stage he did not inform the police about what he had seen on the video footage. Instead, he identified the appellant from the witness box on the day that he testified. The so called dock identification. The video footage was never handed in as an exhibit by the State.

[5] The trial court, though it is not quite clear in the judgment, appears to have relied on the dock identification of Mr Mbatha in respect of the appellant. Mbatha's evidence cannot be said to be reliable as it was not corroborated. Most unfortunate is that the video footage which Mbatha places reliance upon was not produced in court as evidence. The production of this evidence was relevant as Mbatha had the suggestive benefit of having seen the appellant during the pointing out and viewing him in the dock. The failure to adduce such evidence was fatal to the State's case.

[6] Incidentally, the appellant was arrested on 24 December 2003 at 02h00 by Metro police. He testified that he was assaulted by the Metro police officers for about 20 minutes. He was only brought to the police station at 11h00 to be charged and detained. During this process, Inspector Mogoboya (Mogoboya) was one of the officers present. The appellant's evidence was that after his detention he was taken to an office where Mogoboya, who had introduced himself as the investigating office, assaulted him and encouraged him to co-operate with the police officers. The appellant's evidence was disputed by Mogoboya who testified that it was on the very same day, whilst he escorted the appellant to the holding cells that the appellant offered to point

out the crime scene. The recordings of the pointing out proceedings, exhibit F, revealed that at 11h18 on 24 December 2003 a telephone call was made to Captain Van Rooyen, of the Benoni Serious and Violent Crimes Unit, for him to assist in conducting the pointing out on 26 December 2003 at 12h00.

[7] It is significant to note that on 25 December 2003 at 12h00, prior to the pointing out, the appellant had signed a warning statement in the presence of the investigating officer (exhibit J), wherein it was recorded that the appellant wished to make a statement in court. Notwithstanding the request made by the appellant, the pointing out still took place on the very next day. The trial court admitted the evidence of the pointing out on the basis that the appellant had failed to inform Captain Van Rooyen that he wanted to make a statement at court. According to Captain Van Rooyen, during the pointing out, the appellant made the following utterance: 'I want to show out place where we robbed and shot people' (exhibit F). The trial court further concluded that the voluntariness to point out the scene stemmed from the appellant's willingness expressed to Mogoboya on 24 December 2003 and his utterance to Van Rooyen, which it concluded amounted to a confession. This conclusion by the trial court was reached against the backdrop that the appellant had opted to exercise his constitutional right to remain silent and make a statement at court. After the trial court admitted this evidence the appellant was convicted on the strength of the pointing out and the utterance made.

[8] The trial court ruled that the evidence of the pointing out was admissible and rejected the appellant's contention that it should be excluded. The same position was adopted by the full court, that the pointing out was done freely, voluntarily and without any undue influence. The full court found that the dock identification on its own would not have 'passed muster'. Instead, it concluded, that the evidence of the pointing out corroborated the identification made by Mr Mbatha. The full court went further to state that: 'the evidence of identification and the evidence of the pointing out are mutually corroborative, amounting to unassailable proof of the appellant's involvement in the crime'.

[9] Notably the trial court failed to evaluate the evidence of Mr Mbatha's purported identification of the appellant. Neither, did it make a finding on its reliability. The video footage relied upon by Mr Mbatha, which was not handed into court, was yet another issue that was not appraised by the trial court. Consequently, the trial court misdirected itself when it made no findings on both the identification of the appellant by Mr Mbatha and the video footage, which was not handed in at court.

[10] The appellant contends that the evidence of the pointing out was improperly obtained, as it was obtained in violation of his rights to a fair trial. The admissibility of the evidence obtained as a result of the pointing was challenged in the trial within a trial. The appellant was adamant that he was instructed by one of the police officers, Inspector Lele Khumalo, who acted as an interpreter during the pointing out, what he had to point out. In addition, he testified that the assault by the Metro police officers and Mogoboya prior to the pointing out coerced him to co-operate. The trial court rejected the appellant's version that he was assaulted on the strength of Mogoboya's denial thereof. On the other hand, it rejected Mogoboya's denial of the assault on the appellant's co-accused. The result, part of Mogoboya's testimony was accepted, whilst another part was rejected on a crucial issue of whether the assaults on both the appellant and his co-accused in fact occurred. This begs the question whether reliance can be placed on Mogoboya's testimony.

[11] It is trite that a court must exercise caution when dealing with evidence of identification. A useful guide on identification is set out in LAWSA Volume 18 para 263, where the authors state as follows:

'Judicial experience has shown that evidence of identity should, particularly in criminal cases, be treated with great care. Even an honest witness is capable of identifying the wrong person with confidence. Consequently, the witness should be thoroughly examined about the factors influencing his or her identification, such as the build, features, colouring and clothing of the person identified. An early identification before the trial (which is admissible as an exception to the rule prohibiting previous consistent statements) lends credibility to the evidence. Particular care should be taken if the only evidence connecting the accused with the crime is that of a single identifying witness; then the cautionary rule relating to single witnesses should also be taken into account.'

[12] In this instance Mr Mbatha was a single witness[1] and as per the caution sounded above, the courts below had to ensure that the evidence of the identification of the appellant was reliable beyond reasonable doubt.[2] On the contrary, in my view, the evidence on record, indicates otherwise.

[13] This case is distinguishable from *S v Mdlongwa*[3] where the court had the video evidence before it, and not merely the recollection of a witness, of what he could have seen on the video footage. I therefore do not deem it necessary to evaluate Mr Mbatha's evidence with regards to the video footage, as this evidence was not before the trial court. Significantly, at no stage, either after viewing the video footage or when the pointing out was conducted, did Mr Mbatha advise the police of the identification of the appellant on the video footage. He is the only one who saw the footage with the appellant having removed his balaclava. The other two staff members who had also viewed the footage never testified to that effect. Incidentally, the video footage relied upon by Mr Mbatha, as verification of what he saw, was not brought to court. I therefore cannot discount the probability that Mr Mbatha recognised the appellant from the pointing out and not from the video footage as he asserted. If it is accepted, as I think it must, the dock identification of the appellant by Mr Mbatha cannot be reliable beyond reasonable doubt. The full court misdirected itself by placing reliance on the identification evidence.

[14] There are material contradictions to the evidence given by Mogoboya before the trial court as to how the pointing out came about. First, in his statement, which he wrote shortly after detaining the appellant, he stated that he took the appellant out from the cells to interview him as opposed to his testimony to the trial court that the appellant volunteered to do a pointing out whilst taking him to the cells to be detained; Secondly,

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[1] It is trite that the evidence of a single witness is always treated with caution and must be substantially satisfactory in all respects or corroborated – *S v Stevens* [2005] 1 All SA 1 (SCA) para 17.
[2] *S v Charzen & another* 2006 (2) SACR 143 (SCA); [2006] 2 All SA 371 (SCA) para 11.
'… our courts have emphasised again and again, in matters of identification, honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be "dangerously unreliable", and must be approached with caution.'
[3] *S v Mdlongwa* 2010 (2) SACR 419.

Mogoboya testified that he was not involved in the case but was merely on standby duties when he detained the appellant, however, in his statement he states that he took the appellant out of the cells and interviewed him. Mogoboya struggled to explain these discrepancies during cross-examination.

[15] It is my view that the trial court misdirected itself in the assessment and reliance of the evidence of Mogoboya. It is trite, that in the evaluation of the evidence by the trial court and its approach to credibility findings of the state witnesses' evidence, an appeal court is reluctant to interfere with the trial court's findings.[4] However, given the contradictions pointed out in Mogoboya's evidence, the only irresistible inference to be drawn by this Court is that Mogoboya was not an honest witness and he violated the rights of the appellant to a fair trial.

[16] Before us, counsel for the State conceded that in light of the warning statement which was made prior to the pointing out, it could not be accepted that the pointing out was made freely, voluntarily and without violation of the appellant's constitutional rights.

[17] From the appellant's explicit request in the warning statement, to make a statement in court, it is clear that both courts totally overlooked the appellant's rights in terms of s 35(1) of the Constitution which provides that:

'(1) Everyone who is arrest for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;'

In addition, both courts also paid no attention to the provisions of s 35(5) of the Constitution:

'(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[4] *S v Pistorious* [2014] ZASCA 47; 2014 (2) SACR 314 (SCA).

[18] It is unfortunate in this case that the constitutional rights of the appellant were infringed: First, he was detained without being informed of such rights; Secondly, admissions were elicited from him without warning him of the consequences of making such admissions; Thirdly, he was assaulted to compel him to participate in the pointing out; Lastly, he exercised the right to remain silent which was ignored and the pointing out proceeded with disregard of his election to make a statement in court.

[19] The appellant challenged the admissibility of the evidence obtained during the pointing out in a trial within a trial, as he complained that the pointing out was not made freely and voluntarily, and was in violation of his constitutional rights. In this instance, indeed the pointing out was conducted in breach and in violation of the appellant's constitutional rights, thus, the admissibility of such evidence by the courts below, is tantamount to bringing the administration of justice into disrepute. This was a clear misdirection by both courts as this evidence should have been excluded and the admission thereof affected the fairness of the appellant's trial.[5]

[20] Considering the totality of the evidence I find the following: The evidence of the pointing out was elicited from the appellant after he had exercised his constitutional right to remain silent and ~~to~~ give his statement in court; Mogoboya elicited from the appellant, if he wanted to make a pointing out, whilst the appellant was in police custody, without warning him of his right to remain silent; It cannot be rejected that the appellant had been assaulted, as there was no explanation for the time lapse between his arrest and detention in the police cells; Mr Mbatha's evidence of the identification of the appellant in the video footage was not supported by any corroborative evidence, and was therefore unreliable. Accordingly, I cannot disregard that the appellant was coerced to point out as instructed.

[21] In light of the above I share the sentiments expressed in *S v Magwaza*[6]:

'I accept that, particularly in the current state of endemic violent crime, the public reaction to the exclusion of such evidence is likely to be one of outrage. But we need to remind ourselves

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[5] *S v Pillay & Others* 2004 (2) SACR 419 at 431 a-c.
[6] *S v Magwaza* 2016 (1) SACR 53 para 22; *Key v Attorney – General, Cape Provincial Division and Another* 1996 (2) SACR 113 (CC) (1996 (4) SA 187; 1996 (6) BCLR 788; ZACC 25) para 13.

that s 35(5) is designed to protect ‘even those suspected of conduct which would put them beyond the pale.’

[22] In conclusion, placing reliance on the evidence of the identification of the appellant by Mr Mbatha when there was no proof beyond reasonable doubt and admitting the evidence of the pointing out in spite of the infringements of the appellant’s constitutional rights, the trial was rendered prejudicial and unfair to the appellant. I find that the state failed to prove the case against the appellant beyond a reasonable doubt and that his constitutional rights were violated, accordingly the appeal succeeds.

[23] The following order is made:

1 The appeal is upheld.

2 The order of the full court is set aside and substituted with the following order:

‘‘The appeal is upheld and the conviction and sentence of the appellant are set aside.’

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W Hughes

Acting Judge of Appeal

Swain JA (Ponnan and Saldulker JJA concurring):

[24] I have read the judgment of my colleague and agree with the outcome of the appeal, but for the most part arrive at that conclusion, via a different route. I thus deem it necessary to set out my approach to the issues in a separate judgment. The evidence implicating the appellant was his identification by Mr Hamilton Mbatha, based upon security video footage of the robbery, as well as a pointing out made to Captain van Rooyen by the appellant, on 26 December 2003.

[25] As regards the identification of the appellant by Mr Mbatha: it is not necessary to deal with the issue raised by appellant's counsel, as to whether the video footage constituted real evidence or documentary evidence and whether the evidence of Mr Mbatha, as to what he had seen on the video footage, amounted to inadmissible opinion evidence. This is because it is quite clear that the identification was totally unreliable. Not only did Mr Mbatha see the appellant for the first time in a compromising situation, namely, in the company of the police during the pointing out but he also based his identification upon the video footage that he had seen some time before. No evidence at all was adduced by the State as to the video footage. Self-evidently the reliability of his subsequent identification of the appellant as a single witness, cannot be properly assessed in the absence of the video footage, upon which his identification of the appellant, was entirely based.

[26] As regards the pointing out by the appellant: The following evidence is relevant to the issue of whether the appellant did so, freely and voluntarily;

(a) The appellant testified, that when he was arrested by the Metro police on 24 December 2003 at 02h00, he was assaulted. In the absence of any compulsion, it has to be asked whether the evidence of the State is probable, that upon his arrest the appellant immediately stated that he wished to take the Metro police officers to 'another person who was with him' and that this person 'knows what happened there at Spar because he was a security guard' at Spar. Thereafter, the appellant was only brought to the police station at 11h00 and charged. The extremely long period of nine hours, between the time of his arrest and until he arrived at the police station, is not explained. Other than the arrest of the second accused, the evidence of the State did not account for this period. In addition, as will be seen, the appellant was denied the opportunity of giving evidence of what transpired during this period, which is relevant to whether he was subjected to further compulsion.

(b) In the absence of any compulsion, it has to be asked whether the evidence of the State is probable, that whilst Inspector Mogoboya was escorting both accused to the cells, he asked them whether they knew anything about the matter, to which they both immediately responded, that they did. The improbability is compounded by the further evidence, that having asked them whether they would have any problem in telling the police and showing them where the incident happened, they both

immediately responded, that they would not. One wonders why this alleged response by the appellant was such a revelation to the police, if the evidence of the State was the truth, that the appellant on his arrest had already implicated his co-accused and himself in the crime and had revealed where it took place, namely at the Spar. Simply put, this evidence raises serious doubts concerning not only its veracity, but also the veracity of the evidence of the police that what was allegedly said by the appellant at the time of his arrest, was not obtained by compulsion.

(c) During the main trial a warning statement from the appellant was produced dated 25 December 2003, in which he stated 'I wish to make statement at court' presumably in answer to the question 'Do you want to make a statement, answer question or remain silent?' as part of the standard 'Warning Statement' form. Having elected to remain silent in his warning statement on the 25 December 2003, it again has to be asked whether in the absence of any compulsion, it is probable that he would have decided to waive this right on the following day, when the pointing out occurred. Further, as will be seen, the appellant was denied the opportunity of giving evidence as to the circumstances surrounding the conclusion of his warning statement and its contents. This evidence was directly relevant to the enquiry as to why the appellant, on the following day, would waive his right to silence which he had expressly asserted, in his warning statement.

[27] With regard to the appellant's evidence that he had been assaulted by the police, the trial court accepted the evidence of Inspector Mogoboya, that he did not assault the appellant. However, in respect of accused 2, the trial court rejected Inspector Mogoboya's evidence that he did not assault him, which ultimately resulted in the acquittal of accused 2. As pointed out by counsel for the appellant, it was common cause that the appellant and accused 2 were arrested by the same Metro police team and were then taken to the police station, together. No cogent reasons were furnished by the trial court, as to why it was prepared to accept the reasonable possibility that the police officers involved in the arrest and detention of accused 2 had assaulted him, whereas it was not prepared to accept the reasonable possibility that the same police officers, could have assaulted the appellant.

[28] Regard being had to all of these deficiencies in the evidence of the State, the trial court erred in concluding that the appellant had participated, freely and voluntarily, in the pointing out. The approach of the full court to this issue was somewhat different. It held that the argument that the appellant was forced to make the pointing out, ignored his evidence that he did not do any pointing out and had said nothing at all. The full court then reasoned, that because the appellant had denied making a pointing out, or confession, no trial-within-in a trial had been called for and the issue to be determined was one of reliability and not admissibility. However, the distinction sought to be drawn, was artificial. This is because the thumbprint of the appellant appears on the pro forma, 'Notes of Pointing out of Scene(s)' recording certain answers of the appellant and he appears in photos taken during the pointing out. Quite obviously, the fact that the appellant denied saying or doing anything, nevertheless required a determination of whether the objective evidence of his participation, was voluntary. In other words, his denial that he had participated meant that it was incumbent upon the State to prove not only that he had participated in a pointing out, but that he had done so freely and voluntarily.

[29] In *S v Potwana* 1994 (1) SACR 159 (SCA) 168 D–F, it was held that the trial court had attached undue importance to the fact that the appellants had lied, when they had stated that they had been told what to say, in their confessions. As a result, the trial court rejected the evidence of the appellants on the critical issue of whether they had confessed voluntarily, on the principal if not decisive ground, that they had denied the truth of their confessions, which were declared admissible. At 169 E–F, the following was added;

'The fact that they were lying (about not having made a statement) in this regard must be seen in context and assessed accordingly. One may confidently conclude that these false assertions stem from the erroneous, though understandable, perception that a failure to dispute the authorship or authenticity of a confession would, or might, prove prejudicial even though at the end of the enquiry the confession is ruled out. After all, it requires a rather sophisticated knowledge of the judicial process and the objectivity of the presiding official to appreciate, and be confident, that no such risk of prejudice exists. For this reason, it is a matter of common experience for an accused person to give false evidence in this respect. This is not to say that this defect in their evidence is to be entirely disregarded. But it cannot, and ought not, to serve

as a cogent reason for rejecting their evidence on the pertinent question, namely, whether their confessions were as a result of assaults and threats.'

It was then held that the State had failed to discharge the onus of proving that the confessions were freely made. Following this decision, in *S v Ntuli* 1995 (1) SACR 158 (T) at 166 C-D, it was held that the fact that an accused says that the statement is false and has been made up by the police, does not mean that a trial-within-a-trial, does not have to be held. It follows that the full court therefore erred. The result was that the full court failed to consider, whether the trial court had correctly decided that the appellant had freely and voluntarily participated, in the pointing out.

[30] Of greater concern with regard to the trial-within-a-trial, was a misdirection committed by the trial court, in the conduct of this procedure. Counsel for the appellant pointed out that during the trial-within-a trial, the appellant started testifying that on the 24 December 2003 after his arrest, he had been taken to another place, before being taken to the police station. The Judge however intervened, stating that it sounded as if the appellant was now testifying concerning issues in the main trial. As a result, the legal representative did not lead any further evidence by the appellant as to what transpired in the nine hours, between his arrest and his arrival, at the police station.

[31] Later, during the trial-within-a-trial when the appellant wished to testify about what had occurred on the 25 December 2003, being the day he made the warning statement and elected to remain silent, the Judge intervened saying they were now venturing into the main trial. The appellant's counsel however assured the appellant, that he would be given an opportunity to give evidence concerning the events of the 25 December 2003, but continued to lead the appellant on the events of 26 December 2003, when the pointing out took place. During the main trial, the appellant again attempted to testify about the events of the 25 December 2003, but the Judge repeatedly interrupted appellant's counsel, holding that this should have been raised during the trial-within-a-trial, as he had already made a ruling, as the Judge put it, regarding the 'issue of rights.' Counsel for the appellant (who did not represent the appellant at the trial) therefore correctly submitted that the appellant was prevented from testifying about the events of the 24 and 25 December 2003 in both the

trial-within-a-trial and the main trial. In the result, the appellant was denied the opportunity of testifying as to the circumstances surrounding the furnishing of his warning statement as well as its contents, and the events that occurred during the nine hours between his arrest and his arrival, at the police station. This evidence was of vital importance to a proper assessment of the claim, by the appellant, that he was compelled to participate in the pointing out.

[32] As stated by this court in *S v Mkwanazi* 1966 (1) SA 736 (A) at 742 H – 743A;

'… The question of admissibility, as stated by the learned Judge himself in the main judgment, must be decided by, and remains throughout the sole responsibility of, the presiding Judge. If other factors touching upon the question of admissibility appear later in the trial he can and should reconsider any earlier decision, as he rightly did in the present case.'

The application of this principle in relation to a trial-within-a-trial, was described in the following terms in *S v Muchindu* 2000 (2) SACR 313 (W) at 316G – H;

'A ruling on admissibility in a trial-within-a-trial is interlocutory, and may be reviewed at the end of the trial in the light of later evidence. This principle in itself shows that subsequent evidence in the main trial may decisively affect the determination of the issues in the trial-within-the-trial.' (Authorities omitted.)

[33] As stated in Du Toit et al*, Commentary on the Criminal Procedure Act* at RS 59, 2017 ch24-p66J-2, relying upon these authorities;

'…should new facts bearing on the admissibility of a confession come to light at a later stage, it is the court's duty to reconsider the issue at that stage and not at the end of the trial, lest the accused be cross-examined on what later transpires to be an inadmissible confession. The prejudice caused to an accused in such an event might… prove impossible to remedy by the subsequent exclusion of the evidence. He might, moreover, be forced to testify in circumstances in which he would have decided otherwise had the court ruled the confession to be inadmissible.' (Authorities omitted)

At the trial, counsel for the appellant brought this principle to the attention of the Judge, but to no avail. The response of the Judge was that counsel had ample opportunity, to say anything he wanted to say, in the trial-within-a-trial. The Judge therefore committed a grave misdirection in treating his ruling on the admissibility of the pointing

out as final and not interlocutory. In doing so, he compounded his error in excluding this vitally important evidence, in the first place.

[34] I accordingly agree with the submission by counsel for the appellant, that the appellant did not enjoy a fair trial, because his constitutional right to challenge and adduce evidence, was infringed by the trial court. First, he was prevented from testifying about the events between his arrest and his arrival at the police station, some nine hours later. Second, he was prevented from testifying about the events on the 25 December 2003, when he made the warning statement, in which he elected to remain silent. In addition, the trial Judge committed an irregularity in deciding that the ruling he made, concerning the admissibility of the pointing out was final and not merely provisional. This evidence was of vital importance, in assessing whether the appellant participated freely and voluntarily, in the pointing out. The prejudice suffered by the appellant was not addressed by the full court, as a result of its finding that because the appellant had denied making a pointing out, or confession, no trial-within-a trial had been called for and the issue to be determined, was one of reliability and not admissibility.

[35] For these reasons I agree that an order should issue in the terms set out in the judgment of my colleague.

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K G B Swain

Judge of Appeal

Ponnan JA

[36] It remains to comment on the conduct of counsel for the State. Despite being informed on several occasions by the registrar of this court, that the heads of argument on behalf of the State had not been timeously filed and that a substantive application for condonation was necessary, counsel simply failed to take any steps to put matters

to right. Eventually, it was only from the bar in this court, when the appeal was called on 22 August 2019, that unsigned heads of argument came to be handed up on behalf of the State. They consisted of some six pages and dealt with the issues (if they dealt with them at all) in a perfunctory fashion.

[37] Given the unconvincing quality of the heads it is remarkable that it took counsel as long as she did to prepare them. The heads were accompanied by what passed for an application for condonation, to which was annexed a draft affidavit that had not been commissioned. When we pointed out to counsel for the State, that these steps were wholly inadequate to address the, by then, flagrant breaches of the rules, she sought a postponement of the appeal. We were not persuaded that a postponement was justified and proceeded to debate the merits of the appeal with her. However, we did grant counsel leave to file duly signed heads of argument, which was to be accompanied by a substantive application for condonation, by 28 August 2019. That has since been done. Those have received appropriate consideration. However, as should be apparent from the judgments by my Colleagues on the merits of the appeal and indeed, as counsel for the State was constrained to concede during argument, the conviction of the appellant and resultant sentence could not stand. We did intimate to counsel then that in the light of the flagrant breaches of the rules and the absence, in our view, of any satisfactory explanation therefore, that we felt obliged to bring the conduct complained of to the attention of both the National Director of Public Prosecutions (NDPP) and the Director of Public Prosecution, Gauteng (DPP).

[38] The registrar of this court is accordingly directed to furnish a copy of the judgments in this matter, together with the draft and final heads of argument, applications for condonation and accompanying affidavits, as also, the exchange of electronic communication, to the NDPP and DPP.

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V Ponnan

Judge of Appeal

APPEARANCES:

For the Appellant:	Adv. E A Guarneri Instructed by: Johannesburg Justice Centre Bloemfontein Justice Centre
For the Respondent:	Adv. D E Zinn Instructed by: The Director of Public Prosecution, Johannesburg The Director of Public Prosecutions, Bloemfontein