R.b. 72/85

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NTHOKOZISI NOBLEMAN SHEZI ..... Appellant

and

THE STATE ..... Respondent

Coram: RABIE, CJ, JANSEN, TRENGOVE, VILJOEN et VAN HEERDEN, JJA.

Heard:	Delivered:
17 May 1985.	30 May 1985.

J U D G M E N T

RABIE, CJ:

The appellant was found guilty of terrorism in terms of sec. 54(1) of the Internal Security Act 74 of 1982 in the Natal Provincial Division and sentenced

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to 10 years' imprisonment, part of which was suspended on certain conditions. The trial Court consisted of Viljoen, A.J., and two assessors. The appellant appeals, with the leave of the trial Judge, against his conviction.

The State's case against the appellant was that he had during the period July 1982 to December 1982, either alone or in concert with certain other persons, performed various acts in the district of Durban with intent to overthrow or endanger the State authority in the Republic. The acts which he was alleged to have performed were inter alia that he "established and/or concealed and/or assisted in establishing and/or concealing caches of arms, ammunition, grenades, mines, explosives, explosive devices.....",

and it was alleged that these acts were aimed at causing or bringing about or promoting acts or threats of violence.

The evidence against the appellant was the following: (a) the evidence of Bonginkosi Malinga, who, the State conceded, was an accomplice and who testified to the appellant's involvement in inter alia the concealment of explosives in a certain house; (b) the evidence of two police officers (major R.L. Welman and captain A.R.N. Taylor), who testified that the appellant had on 19 December 1982 directed them to a spot in the veld near Phoenix where a locked metal trunk and three plastic bags containing 6 TG 50 demolition mines, 10 limpet mines, two anti-personnel

mines and various other explosive devices, most of which were of Russian origin, had been hidden underground; and (c) the evidence of the aforesaid major Welman and of detective-sergeant K. Marrillich as to the appellant's knowledge of the construction and operation of the mines and other explosive devices referred to in (b). Welman's evidence was that on a day early in February 1983, at a police station in Durban where Marrillich was busy taking a statement from the appellant, he put some of the limpet mines and other objects found at Phoenix on a table and asked the appellant "of hy hierdie goed ken en of hy weet hoe dit werk", and that the appellant then proceeded to show that he had an intimate knowledge of how to dismantle and re-assemble the various types

of mines and, generally, of how to handle and operate the various types of explosive devices. Welman, who is an inspector of explosives in terms of sec. 2(5) of the Explosives Act 26 of 1956, stated inter alia that the appellant demonstrated something which he (Welman) had not previously known, viz. that the detonator which is intended for use with a limpet mine can also be fitted to, and used with, a TG 50 demolition bomb.

As to the evidence referred to in (a) above, the appellant disputed the evidence given by Malinga. As to (b), the appellant did not dispute the evidence of the police witnesses, but he gave what could be an innocent explanation of his knowledge of the place where the trunk and bags had been concealed.

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As to the demonstration referred to in (c), the appellant denied that he gave any demonstration or handled any of the things shown to him. His evidence was that he did not even see Welman on the day in question, that "explosives and other things" were shown to him and that the policemen present asked him to "connect" those things, but that he told them that he did not know how to do it. The Court rejected his evidence as untrue and accepted that of Welman. During the hearing appellant's counsel, who also represented him in this Court, did not object to the evidence relating to the demonstration. At the end of the trial, however, he contended that the demonstration

amounted/.....

amounted to an admission by conduct; that the State should therefore have proved that it had been given freely and voluntarily; that the State had not provided such proof, and that the evidence concerning the demonstration should therefore be excluded from consideration. In presenting this argument, counsel emphasized that the appellant had at the time of the demonstration been a detainee in terms of sec. 29 of the Internal Security Act 74 of 1982, and that he had not been warned by Welman that he was not obliged to give a demonstration. The trial Judge, considering that the decision as to whether the evidence was admissible or not was his alone, dealt with the demonstration on the basis that it was an admission by conduct and

that the evidence relating thereto would be admissible only if it had been given freely and voluntarily. His finding was that the demonstration had been given freely and voluntarily and that the evidence was accordingly admissible. In his judgment granting the appellant leave to appeal, the trial Judge states that if he erred in finding that Welman's evidence concerning the demonstration was admissible, it may "affect the whole outcome of the case" against the appellant.

The appeal is confined to one point only. Counsel's argument is that the demonstration given by the appellant was an admission by conduct; that the State should therefore have proved that it was given freely and voluntarily; that the State did not prove

that it was so given, and that the evidence should therefore not have been admitted.

In contending that the demonstration given by the appellant was an admission by conduct and that the State should therefore have proved that the appellant gave it freely and voluntarily, counsel relied heavily on the case of R. v. Barlin, 1926 A.D. 459, and particularly on the following passage in the judgment of Innes, C.J. (at p. 462):

> "The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any promise or threat proceeding from a person in authority."

I do not agree with the contention that the demonstration

is to be regarded as an admission, or an admission by conduct, and that proof that it was given freely and voluntarily is a condition precedent to the admissibiity of the evidence in regard thereto. The evidence relating thereto is, in my view, not to be regarded as evidence of an admission, but as evidence of an act performed by the appellant which reveals that he has a good knowledge of the operation of the limpet mines and other objects which were put before him, from which knowledge one may, depending on all the facts of the case, draw an inference as to his complicity in the crime with which he was charged. There is, I think, no real difference in principle between evidence

relating to a pointing out by an accused and evidence of a demonstration of the kind one has in the present case. In the case of a pointing out, the evidence in regard thereto is admitted on the basis that the act done by the accused shows that he has knowledge of the thing or place pointed out, from which knowledge it may be possible, depending on all the facts of the case, to draw an inference as to the accused's guilt. (R. v. Tebetha, 1959(2) S.A. 337 (A) at p. 346 D-E; S. v. Tsotsobe and Others, 1983(1) S.A. 856(A) at p. 864 D-E.) In the case of a demonstration as here in issue the evidence is likewise evidence of an act which reveals knowledge on the part of the accused of the construction and operation of the

things in connection with which the demonstration was given, from which knowledge it may be possible, depending on all the facts of the case, to draw an inference as to his guilt.

Counsel agreed, correctly in my view, with the proposition that there is no real difference in principle between evidence relating to a pointing out and evidence relating to a demonstration of the kind here in issue, but his argument is that a pointing out is an admission by conduct which must be proved to have been freely and voluntarily made before it can be admitted in evidence, and that it is only because of the provisions of sec. 218(2) of the Criminal Procedure

Act 51 of 1977 that evidence may be given of a pointing out that was not freely and voluntarily done. Consequently, counsel submits, if it had been the wish of the Legislature that evidence regarding demonstrations should be admissible even when not freely and voluntarily given, it would have specifically so provided, as it did in the case of pointings out in sec. 218(2) of the Criminal Procedure Act 51 of 1977.

These submissions are unfounded. In R. v. Samhando, 1943 A.D. 608 the question to be determined was the admissibility of evidence that the accused had pointed out to two "police boys", by whom he had been severely assaulted, a tree in which clothing and blankets belonging to the deceased were concealed,

and had shown them where an axe for which they were looking could be found. It was contended that the evidence was inadmissible because it had been induced by the assault committed on the accused. This Court (per Watermeyer, A.C.J.) held that the evidence was admissible "irrespective of the provisions of sec. 274 of Act 31 of 1917" (p. 615). This section read as follows:

> "It shall be lawful to admit evidence of any fact otherwise admissible in evidence notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or deposition which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of

> the witness against the wish or will of the accused."

In R. v. Duetsimi, 1950(3) S.A. 674(A), in which it was held that evidence that the accused had pointed out a shop which had been burgled was inadmissible because it was part of an inadmissible confession, the Court (per Schreiner, J.A.) stated (at p. 678 E-G) that the "true basis" of the decision in R. v. Samhando was that -

> "in relation to statements not amounting to confessions within the meaning of sec. 273, 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 things."

In view of the decision in R. v. Samhando counsel is wrong in submitting that evidence relating to a pointing out which was induced by improper means is admissible only because it is so provided by statute.

The effect of the decision in R. v. Duetsimi was undone by sec. 42 of the Criminal Procedure Act 29 of 1955, which section subsequently became subsection (2) of section 245 of the Criminal Procedure Act 56 of 1955. This subsection provided for the admissibility of evidence relating to a pointing out by an accused even if it formed part of an inadmissible confession or statement. In R. v. Nhleko, 1960(4) S.A. 712(A) Schreiner, J.A., left open the

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question whether a pointing out could be objected to on the ground that sec. 245(2) of Act 56 of 1955 (see now sec. 218(2) of the Criminal Procedure Act 51 of 1977) "does not render admissible a pointing out that is induced by violence" (p. 712 C), but in S. v. Nyembe, 1982(1) 835(A) this Court, referring to the decision of Milne, J.P., in S. v. Ismail and Others (1) 1965(1) S.A. 446 (N) at p. 450), held (per Diemont, J.A.) that the evidence of the pointing out by the appellant in that case "would be admissible by reason of s 218 even if the evidence of police threats were accepted" (p. 865 B). See also S. v. Tsotsobe, supra, at pp. 864 F - 865 E.

In/.....

In support of his submission that the demonstration in issue in this case is to be regarded as an admission by conduct and that the evidence relating thereto is inadmissible unless it is proved that it was freely and voluntarily given, counsel referred us to the case of R. v. Rufus Nato Nzo and Others (Case No. 180/82, Eastern Cape Division), where the Court (Howie, J.) dealt with the demonstrations given by certain of the accused in connection with AK 47 rifles and certain explosive devices on the basis that they were admissions by conduct and that evidence with regard thereto would consequently only be admissible if the State proved that they were freely and voluntarily given. It is stated in the learned Judge's judgment,

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however, that the demonstrations "were treated by counsel on both sides as admissions by conduct and not as pointings out or discoveries to which section 218 of the Criminal Procedure Act applies", and it appears that he dealt with them on that basis, without deciding whether they were indeed admissions which had to be proved to have been freely and voluntarily made. Counsel for the State in the present case did not adopt the approach of counsel for the State in the case before Howie, J. His argument, based on the views expressed by Schmidt, Bewysreg, 2nd ed., at pp. 499-500, is that the demonstration given by the appellant is to be regarded as circumstantial evidence from which an

adverse inference can be drawn against him, and that the evidence is admissible even if it should be held - contrary to the State's contention - that it was not freely and voluntarily given. In any event, appellant's counsel's submission that a pointing out has to be dealt with on the basis that it is an admission, is in conflict with what was said by this Court in S. v. Tsotsobe, supra, in connection with a contention similar to the one that was advanced by counsel in the present case. The Court said (at p. 864):

> "The basis of counsel's argument is that the pointing out of a place or thing may, in certain cases, amount to an admission by

conduct/.....

conduct, and that a Judge sitting with assessors should, therefore, when it is sought to lead evidence of a pointing out, dismiss the assessors and then decide, in their absence, first, whether the pointing out in issue amounts to an admission by conduct, and thereafter, if he has so found, whether the admission was made freely and voluntarily.....
The argument is based on a wrong premise. Evidence of pointing out is not admitted in evidence on the ground that it is, or amounts to, an extra-curial admission, but on the basis that it shows that the accused has knowledge of the place or thing pointed out, or of some fact connected with it, from which knowledge it may be possible, depending on the facts of the case concerned, to draw an inference pointing to the accused's guilt. See eg R. v. Tebetha 1959(2) S.A. 337 (A) at 346. Section 219A is concerned with the question of the admissibility of admissions and it does not affect the issue with which we are here concerned."

In/.....

In view of all the aforegoing I consider that the evidence concerning the demonstration given by the appellant was admissible without proof that it was freely and voluntarily given. Counsel conceded that if the evidence was correctly admitted the appeal cannot succeed. It is therefore unnecessary to consider counsel's attack on the trial Judge's finding that the demonstration was freely and voluntarily given.

The appeal is dismissed.

P J RABIE
CHIEF JUSTICE.

JANSEN, JA.
TRENGOVE, JA.
VILJOEN, JA.
VAN HEERDEN, JA.

Concur.