

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

10/2/17

Case number ~~1~~ 968/14

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
10 Feb 2017	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

ERIC BHEKAHUBA LANGA

FIRST APPELLANT

MHLETHULE NORMAN NDLOVU

SECOND APPELLANT

SIBONELO BONGINKOSI NTSELE

THIRD APPELLENT

and

THE STATE

RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal against both conviction and sentence. The appellants were convicted of the following offences:

Appellant 1 (accused 1): Robbery with aggravating circumstances (Count 1) and sentenced to 18 years imprisonment;

Appellant 2 (accused 3): Robbery with aggravating circumstances (Count 1) and sentenced to 18 years imprisonment;
 Illegal possession of a firearm (Count 3) and sentenced to 3 years imprisonment;
 Illegal possession of ammunition (Count 5) and sentenced to 18 months imprisonment; the sentences of counts 3 and 5 to run concurrently with the sentence in count 1 ;

Appellant 3 (accused 5): Robbery with aggravating circumstances and sentenced to 15 years imprisonment;

BACKGROUND

[2] The alleged robbery occurred at Jansen Meat Market, the butchery premises of the complainant, Mr Sardinah. He was robbed of an amount between R20 000.00 and R30 000.00 which included monies in the till of one of his employees, Ms Lategan. She was assaulted with the butt of a firearm. She sustained injuries and was treated in Hospital. A customer Mr Naude, was robbed of his wallet and cellular phone. The assailants also took coins contained in money bags from the office of Mr Sardinah.

[3] Mr Tyekela was a car guard who had seen a combi park next to the butchery. After being made aware that a robbery was taking place at the butchery, he noticed someone in possession of a firearm and a shot was fired. He took down the

registration numbers of the combi. After the assailants fled he gave the registration numbers to Mr Sardinah and the police.

[4] The following facts were common cause:

- (i) the police on patrol in the area were alerted that a white combi with registration numbers YRW 393 GP was involved in the robbery; the police arrested a man whom they had seen alight from the combi they were tracing and he had been shot;
- (ii) after the combi was tracked down the driver, the first appellant, was arrested and money bags and coins were found in the combi;
- (iii) Five men were arrested among them were the three appellants in this matter;
- (iv) two police officers patrolling in a marked police vehicle came across a group of men who were on foot and were heavily armed; shots were fired in the direction of the vehicle killing one of the occupants .

[5] The appellants pleaded not guilty and elected not to disclose their defence. None of the victims were able to identify their assailants. The State relied on the statements made by the appellants to the police as evidence against them. After close of the State's case the first and second appellant elected not to testify in their own defence. The third appellant testified and closed his case without calling witnesses.

GROUND OF APPEAL

[6] The grounds of appeal against conviction in respect of all three appellants related to the statements obtained from them by the police which were handed in as exhibits 'F', 'G' and 'J' .

- 6.1 In respect of the first appellant it was submitted that his statement, exhibit 'G,' was not an admission but was a confession to a lesser offence, that of an accessory after the fact.
- 6.2 In respect of the second appellant it was submitted that statement 'F' should not have been admitted as a confession. It was submitted that the procedure adopted for determining the admissibility of the statement was flawed. Therefore the trial court committed a material irregularity by first hearing testimony on the contents of the appellants statement in the main trial and thereafter ordering a trial-within- a trial. Furthermore, the competence and effectiveness' of this appellant's counsel at trial was challenged.
- 6.3 In respect of the third appellant the procedure and enquiry engaged by the court in determining the admissibility of his statement 'J', was questioned. It was further submitted that the police officer taking down the statement had not complied with the requirements in the pro forma form before and after obtaining the statement.

- 6.4 In respect of the second and third appellants the conduct of the police in not referring the appellants to a magistrate to take a confession was challenged. They had been in custody for two days and statements were taken by the police before expiration of the 48 hours of their detention, and on the day they were due for their first appearance.

THE LAW

[7] Section 217 of the Criminal Procedure Act 51 of 1977 (the Act) provides that a confession is admissible as evidence against an accused person in criminal proceedings if the confession “*is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto,*”

Section 219A of the Act provides that any admission made extra judicially, and where such admission does not amount to a confession, shall be admissible in criminal proceedings against an accused person if proved to have been voluntarily made.

[8] It is trite that a confession means “*an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law*”, **R v Becker** 1929 AD at 171. Where the admissibility of a statement as an admission or a confession is in dispute, it is the duty of the prosecutor ‘to investigate the circumstances under which the statement was made’ and to inform the court of such fact. Where there is doubt, it ultimately becomes the duty of the court to determine first the nature of the statement the State seeks to rely upon and the objections raised in order to determine whether it is necessary to hold a trial-within-a trial, **S v Bontsi** 1985 (4)

SA 544(BG). In **S v Nkosi** 1980 (3) SA 829(A) Botha AJA at 844H-845 A-C stated the following:

“It seems to me that it is the duty of prosecuting counsel in cases where evidence is available of an admission made by an accused, and where there is any possibility, flowing from information at counsel’s disposal, that such admission was part of an inadmissible confession,to investigate the surrounding circumstances in order to satisfy himself of the propriety of proving the admission before he tenders evidence in that regard. If the matter is doubtful and arguable, counsel should convey that to the trial Judge in order to alert him to the necessity of an enquiry into the relevant circumstances. This is particularly important when the judge is sitting with assessors. When the evidence of an admission by an accused is tendered without more, the presiding Judge should be entitled to assume that counsel for the State has satisfied himself that there was no reason for thinking that the admission was linked to an inadmissible confession in such a way that the admission itself was inadmissible. In no case should counsel for the State leave it to the trial Judge himself to initiate an enquiry into circumstances surrounding the making of the admission when it appears that it may have been part of an inadmissible confession. Ultimately, however, whether or not counsel for the State follows the correct procedure, it remains the overriding duty of the trial Judge to satisfy himself that an admission was properly established to have been admissible in evidence, before reliance is placed upon it in convicting the accused.”

[9] Since the State relied solely on the statements made to the police to convict the appellants, it is important first to consider whether the statements were properly

admitted as confessions or admissions. It is my view that the principles stated in **Bontsi** and **Nkosi** *supra* were not adhered to in respect of all the appellants. This is evident from the discussions at trial which preceded the testimony of the police officers who took down the statements. The said discussions displayed some uncertainty by the prosecution, the defence and finally the trial court as to which procedure to follow, alternatively, uncertainty as to what needed to be considered by them in order to determine admissibility of such statements.

First Appellant

[10] Mr Matshego submitted that the first appellant's statement amounted to a confession as an accessory after the fact and not to an admission as found by the the court. Mr Molokoane submitted on behalf of the State that there was no evidence justifying that conclusion. He agreed with the trial court that the statement was an admission and further submitted that it had not been proved that the statement carried all the requirements at law for a conviction on the competent verdict as an accessory after the fact and as required by section 257 of the Criminal Procedure Act.

[11] **Snyman Criminal Law 5 ed** (2008) 278, states that a person '*is an accessory after the fact to the commission of a crime if, after the completion of a crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime or to facilitate such a person's evasion of liability*'. (my underlining)

I am of the view that the first appellant's statement does not amount to an admission of all elements of the offence. The offence has not been proved beyond a reasonable doubt.

[12] In his judgment the trial Judge found that the appellant's statement consisted of several admissions which did not in themselves constitute a confession and that the only issue in dispute regarding the statement handed in by agreement, was the appellant's denial that Mr Nkonyane had correctly recorded that he noticed the firearms when the robbers got out of the combi. As shall be seen below the record reflects that there were more issues of dispute raised on behalf of this appellant in his counsel's address before evidence was led and during cross examination. These are not addressed in the judgment.

[13] Another factor considered in the judgment was that the appellant elected not to testify 'about anything at all'. The appellant pleaded not guilty and offered no explanation for such plea. After close of the State's case he elected not to testify. It is trite that an accused person has no obligation to testify in his defence, he bears no onus, However, should he elect to testify, his testimony need only be reasonably possibly true. Furthermore, this was not an instance where the court was entitled to draw an adverse inference due to his refusal to testify. I now return to the appellant's statement.

[14] The trial record reflects that:

14.1 Mr Kgokane informed the court that although he did not have proper instructions from the first appellant, there was no need to hold a trial within a trial because voluntariness was not in dispute. He

informed the court that to a large extent the statement was in line with the appellant's version, except for the fact that part of the content was disputed, and that it would be a waste of time to challenge the statement.

14.2 After a postponement Mr Sibara who appeared for the state, had discussions with the defence counsel and it was agreed that there would be no trial within a trial in respect of the first appellant and that the issue to be argued would deal only with the issue of credibility.

14.3 After another postponement, Mr Kgokane informed the court that on reflection the first appellant's statement was exculpatory, which does not amount to an admission, that he would request the court to look at the statement first, in order to make a ruling whether it amounted to an admission or whether it was just an exculpatory statement. The trial Judge then enquired what his response would be if, when looking at the document as a whole he should find that there were admissions. Mr Kgokane responded that his instructions were that the appellant was forced or assaulted to make the statement. The record reflects the following exchange, page 200 :

"Court: *So in any way if those are admissions then they comply with the requirements of section 219(A)*

Mr Kgokane: *Yes ..*

Court: *Then it is not necessary to examine it*

Mr Kgokane: *I am in the hands of the court.*

Court: *It is not for us to provide you with whether it is admissions or not then it is admissible according to Section 219(A). You can as the case proceeds decide what you want to do about this statement call witnesses or whatever.....whatever explanation has been given by accused 1...are we clear about this?*

Mr Kgokane: *May I just have a word with my colleague regarding that because I think the first witness he is going to call is going to testify in respect of accused 1's statement.'*

Court: *Mr Sibara do you agree...*

Mr Sibara : *A hundred percent*

[15] Mr Nkonyane read the first appellant's statement into the record. The thrust of the complaint in cross examination pertained to him not recording questions put to the appellant on the pro forma form as he was required to do. Another issue related to him not recording in the statement that he had questioned the appellant whether Shezi referred to in the statement was accused 2. He confirmed that during the interview there was no interpreter and the appellant communicated to him in the Zulu language and that he recorded the statement in the English language.

[16] However in the interviewer's certificate it is not stated in which language the statement was read back to the appellant. It was put to this witness that the first appellant would deny that he stated that he noticed the firearms 'for the first time when the guys were alighting the combi..with me keeping guard in the parking area'. It was put to the witness that the first appellant's version was that he informed Mr Nkonyane that 'he noticed the firearms for the first time when they came back to the combi', furthermore, that the statement was not read back to him.

[17] The first appellant's statement reflects that Mr Nkonyane observed injuries and that the appellant had informed him that he had been assaulted during arrest, which in my view should have sounded warning bells to the court. Firstly, the trial Judge should not have left it to Mr Kgokane without proper instructions to make an election on behalf of the appellant not to hold a trial within a trial. Secondly, when later, before evidence was led, he informed the court that he was instructed that the appellant had been forced to make a statement and was assaulted at arrest, the trial Judge should have conducted a preliminary investigation to determine whether a trial within a trial was necessary and in fact should have ruled in the affirmative.

Second Appellant

[18] It is common cause that the second appellant's statement was treated as a confession. However, as I see it, this occurred where the procedure engaged for its admission was irregular and where it could be said that the appellant did not receive a fair trial.

[19] Mr Matshego submitted that Mr Serepong incorrectly agreed with the court on 1 August 2011 that voluntariness was not in dispute. This was the basis upon which the court ruled that it was not necessary to hold a trial within a trial and that the appellant would be given an opportunity to testify when his turn came.

Mr Molokoane submitted that the different versions of the appellant as conveyed to the court by his counsel amounted to a fishing expedition. He submitted that the court had correctly found that the statement was freely and

voluntarily made.

[20] The record reflects that on 29 July 2011 Mr Serepong informed the court that a trial within a trial had to be held because the statement was not freely and voluntarily made. It was alleged that the appellant was tortured, assaulted and forced to make a statement and that the content of the statement was dictated to him. The initial ruling was that a trial within a trial was necessary. When the court resumed on 1 August 2011 instead of proceeding with the trial within a trial the subject was rehashed and by Mr Serepong subsequently conceded that the statement was disputed only on grounds that the appellant alleged that it was not his statement and that it was only the issue of voluntariness that had to be determined.

This concession should not have persuaded the court to change its ruling and not to hold a trial within a trial, especially because there were alleged assaults by police officials on two consecutive days prior to the statement being taken.

[21] Captain Masha testified and handed in two exhibits, "E" the questionnaire and "F" the statement, and both were read into the record. Subsequently, the trial Judge expressed the view that the statement constituted a confession. He enquired from Mr Seropong whether the statement had been freely and voluntarily made and whether the appellant was assaulted between 1 and 3 March 2010 and he confirmed that it had not been freely and voluntarily made.

[22] The trial judge acknowledged that irregularities had been committed as appears on page 138 of the record : "*the statement we have exhibit 'F' was clearly not voluntarily made.....it cannot be admitted unless the state proves the contrary..*

...meaning that evidence we have heard so far from this captain is not evidence in the main trial.....it was an irregularity so far because there was not proper instructions from accused 3 so we regard this evidence as trial within a trial” .

[23] In the judgment it is stated that the appellant had not given proper instructions to his counsel because the preliminary discussions were focused on the statement containing admissions. This conclusion was incorrect because the instructions he was referring to pertained to the first appellant. A request by Mr Serepong to expunge the statement, exhibit “F”, from the record was declined.

[24] As I see it the following was irregular, (a) The rulings that the proceedings revert to a trial-within a trial, (b) the refusal to expunge the statement from the record, (c) allowing Mr Serepong to continue with the cross-examination of Mr Masha; (d) the calling of Mr Nkonyane and the appellant to testify and their cross examination after exhibit “F” had been read into the record; and (e) finally ruling that the state had discharged its onus of proving that the statement had been freely and voluntarily made.

[25] It is only after the court had made a finding in the trial within a trial that the State has discharged its onus, and ruling that the statement is admissible, that the main trial is reverted to and the statement is read into the record and handed in as an exhibit.

Appellant 3:

[26] Mr Matshego submitted that the court was not absolved from holding a trial within a trial where an accused alleges that the statement was not his. Mr Molokoane

submitted the decision not to hold one was informed by the submission of his counsel that the dispute related to credibility, which was an issue to be dealt within the main trial.

[27] Before evidence was led, Mr Kgokane informed the court that the appellant did not make any statement; that he was just given documents to sign and that he did not know what was contained in such documents. Furthermore, that although the appellant had been assaulted at some stage and despite the content of the statement, it was not necessary to hold a trial within a trial relating to a statement which the appellant did not make. This view he said was subject to the correction and direction by the court. He would approach the court at the end of the trial to consider during *'judgement to use its discretionary powers to revisit the question of admissibility if the court will deem it fit at that stage'* (page 113 of the record).

[28] The statement was not taken by Mr Nkonyane who was the investigating officer. He requested Mr Dlamini, a captain from another station to take down the statement. The prosecutor, Mr Sibara, without indicating whether the statement was an admission or confession, informed the court that he had agreed with Mr Kgokane not to lead evidence relating to the preliminary questions in the pro forma statement. The trial Judge did not at this stage make enquiries as to the nature of the statement, as he was obliged to do, **Bontsi** and **Nkosi supra**. Mr Dlamini was called and the statement was read into the record. So, no trial within a trial was held. It was only in cross examination where the contentious issues were raised.

[29] In the judgment, the statement of the appellant and the evidence of Mr Dlamini were analysed and the trial Judge arrived at a conclusion that the statement was a confession. He found that Mr Dlamini was a credible witness in that he

admitted to the mistakes made when recording the statement which stated that (a) he is the investigating officer when he was not; (b) that he admitted that he had booked the appellant out of the cells, interviewed him, and charged the appellant; and (c) that he had not recorded when taking down the statement the date on which the appellant alleged he was with a group of men when the robbery was committed. The trial Judge further found that there was no evidence to suggest that Mr Dlamini had any reason to falsely incriminate the appellant.

[30] The appellant was the only one of the five accused who elected to testify in his defence. It was during his testimony where his version of how the statement was taken came to light. Mr Dlamini testified that he was requested by Mr Nkonyane to obtain a statement from the appellant. I do not understand how the trial court arrived at a conclusion that the statement was a confession when Mr Dlamini admitted to having booked the appellant out of the cells and where he conducted an interview for an hour regarding the appellant's participation in the robbery and, finally, being responsible for charging the accused and for booking him back into the cells.

[31] It is improbable that Mr Dlamini would not have been in possession of the docket during this interview. An interview conducted by a police officer for taking down a statement is not similar to the instance when an accused informs an investigating officer that he wishes to make a confession and the accused is then taken before a justice of the peace neutral to the investigation, or to a magistrate. There were issues in dispute being an alleged assault, and denial that the statement was that of the appellant. If the statement was a confession and there was doubt as to its admissibility, the State had to prove that it was freely and voluntarily made by the appellant in his sober senses and without undue influence.

[32] Our courts are called upon to be vigilant and cautious in instances where the State relies for conviction of an accused solely on statements in the form of admissions or confessions made to police officers. The duty placed upon the prosecution and finally the court as stated in *Nkosi supra*, is to ensure that an accused person's constitutional right to a fair trial is protected. Allegations of assault, coercion and threats should sound the warning bell and should always be sufficient reason for the holding of a trial within a trial in order to determine properly whether such statement should be admitted. There should be no room for uncertainty as to the procedure to be followed and the responsibility of making such determination rests on the State and finally the Court.

[33] In **S v Gcam- Gcam** 2015 (2) SACR 501 (SCA) Cachalia JA stated:

"[49] When confronted with confessions made by suspects to police officers whilst in custody – even when those officers are said to be performing their duties independently of the investigating team – courts must be especially vigilant. For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case.

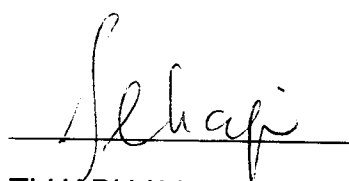
This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial.

[50] In addition courts must be sceptical when the state seeks to use a confession against an accused where he repudiates it at the first opportunity he is given. Because ordinary human beings experience shows that it is counter-intuitive for a person facing serious charges to voluntarily be conscripted against himself. Often it is said that the accused confessed because he was overcome with remorse and penitence, 'a desire which vanishes as soon as he appears in a court of justice'. That is sometimes true, but is usually not."

In light of the above I have no option but to recommend that the appeal of all three appellants against their conviction and sentence be upheld and such convictions be set aside.

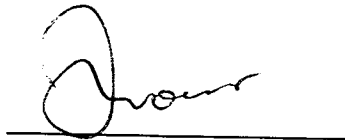
[34] In the result the following order is given:

1. The Appellants' appeals on conviction in respect of all counts are upheld;
2. The convictions and sentences are set aside.


TLHAPI V V

(JUDGE OF THE HIGH COURT)

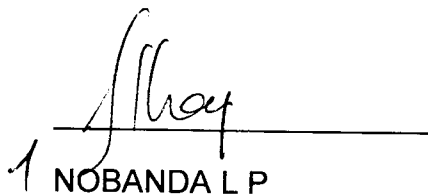
I agree,

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LOUW J W

(JUDGE OF THE HIGH COURT)

I agree

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(ACTING JUDGE OF THE HIGH COURT)