

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG**

CASE NO: **AR480/07**

In the matter between:

NJABULO NZAMA

FIRST APPELLANT

NTOKOZO MCHUNU

SECOND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

KRUGER J:

[1] The Appellants (who shall hereinafter be referred to as Accused No. 1 and Accused No. 2 respectively), were convicted of the crimes of housebreaking with intent to rob and robbery with aggravating circumstances (Count 1) and of murder (Count 2). Accused No. 1 was sentenced to eighteen years imprisonment in respect of Count 1 and to life imprisonment in respect of Count 2. Accused No. 2 was sentenced to fifteen years imprisonment in respect of Count 1 and to life imprisonment in respect of Count 2. The sentences in respect of both accused were ordered to run concurrently. With leave of the Court *a quo*, both accused appeal against their convictions.

[2] The deceased was a 38 year old male who lived alone in a house in Cowies Hill. During the night of the 22nd August or the early hours of the morning of the 23rd August 2005, the home of

the deceased was broken into. The assailants found the deceased asleep and attacked him with a baseball bat and a pool/snooker cue. It is common cause that the deceased died as a consequence of this attack, the cause of death being established as a "head injury". The assailants thereafter stole various items from the premises. Each of the accused made a confession in which he implicated himself in the commission of the crimes in question.

[3] Counsel for the parties are *ad idem* that the confessions stand as the only evidence against the accused. That is, in the absence of the confessions, there is no evidence to support a conviction on either count. At the conclusion of a trial-within-a-trial, the Court *a quo* found both confessions admissible and accordingly convicted the accused on the strength thereof. The correctness of the trial Court's acceptance of the confessions as admissible, therefore falls to be the crucial enquiry in this appeal.

[4] The admissibility of confessions is governed by the provisions of Section 217 of the Criminal Procedure Act 51 of 1997. Section 217(1) provides:

"(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been duly influenced thereto, be admissible in evidence against such person in criminal proceedings relating to such offence. ..."

[5] The onus of proof rests on the State to prove beyond a reasonable doubt that a confession was freely and voluntarily made by the accused, in his or her sober senses and in the absence of undue influence – **S v Nene and Others (2) 1979(2) SA 521 (D); S v Mphalele and Another 1982(4) SA 505 (AD); S v**

Zuma and Others 1995(1) SACR 568 (CC); S v Mvelase 1997(2) SACR 445 (N).

[6] In **S v Dlamini 1973(1) SA 144 (AD)** Holmes JA, in considering the first proviso to Section 244(1) of the Criminal Procedure Act 56 of 1955¹, held (at 146 A-F):

“In considering whether the State has proved that an accused made an alleged confession without having been unduly influenced thereto, in *R v Ndozana and Another* 1958(2) SA 562 (E) at p564A, De Villiers JP (at one time a Judge of this Court), said bluntly:

‘Where the only evidence for the Crown implicating an accused person is an alleged confession it is immediately suspect.’

In *Rex v Nchabeleng* 1941 AD 502 Centlivres JA giving the judgment of the Court of five Judges, said at p507 that it was “perhaps not inapposite” to quote the remarks of Cave J in the *Queen v Thompson* 1893 2 QBD 12 at p18 namely-

‘I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner’s guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not unfrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice.’

Now it may be that the remarks in the foregoing two cases put the position rather too strongly; see in regard to the first-

¹ Section 244(1) of the Criminal Procedure Act 56 of 1955 is couched in much the same terms as the current Section 217(1) of the Criminal Procedure Act. Section 244(1) provides as follows:

“(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence, to have been made by any person charged with such offence, whether before or after his arrest and whether on a judicial examination or after committal, and whether reduced into writing or not, be admissible in evidence against such person provided such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been duly influenced thereto ...”

mentioned case, *S v Mkwana* 1966(1) SA 736 (AD) at p745G. However, what is clear is that in such cases the judicial officer should analyse very carefully indeed the evidence relative to the first proviso to sec. 244(1) lest trial by Court tend to be in danger of being supplanted, in effect, by trial at the police station. Furthermore, there must be borne in mind what was said by Innes CJ in *Rex v Barlin* 1926 AD 459 at p465, namely-

'A police officer who has charged or arrested a person, or who has him in his custody, occupies in regard to that person a very special position of authority – one which may in itself strongly affect a weak or ignorant man.'

To sum up so far, all the relevant evidence, from the time when the police first got in touch with the accused to the time when he made a confession to the magistrate, has to be analysed very carefully indeed, the pros and cons gong into their respective scales; and, after the weighing, the Court has to decide whether there is a reasonable possibility that the confession was not made freely and voluntarily; or that the accused was not in his sound and sober senses; or that he was unduly influenced "thereto" (i.e. to make a confession). In other words, in all the circumstances is there proof beyond reasonable doubt that the accused's exercise of free will was *not* unduly influenced."

[7] Labuschagne J, in ***S v Mokoena and Others* 2006(1) SACR 29(WLD)** cautioned that where statements of the accused are the only evidence implicating them in the commission of the crimes, a Court must be mindful that circumstances may arise which call for a particularly careful assessment of the question whether the statements of the accused were made freely and voluntarily. See also ***S v Zulu and Another* 1998(1) SACR 7 (SCA)**.

[8] With this prelude I turn now to consider and analyse the evidence adduced during the trial-within-a-trial to determine the admissibility of the alleged confessions.

[9] The State's case consisted of the evidence of Captain Hodgett, Captain Lockem, Inspector Mhlongo and the two inspectors who served as interpreters, namely Inspectors Shandu and Ngcongo. Both the accused and Accused No 1's father also testified.

[10] The basis for the accuseds' challenge to the admissibility of the confessions is encapsulated in the Court *a quo*'s judgment as follows:

"...the attack on the admissibility of the statement was two-pronged. The first attack was that the accuseds' rights as embodied in Section 25 of the Constitution were not explained to them; and secondly, that the statements were illicit pursuant to certain assaults perpetrated on the accused themselves."

[11] During the course of the hearing this challenge evidenced a broader ambit. It took the additional form of offers, inducements and undertakings given to Accused No. 2 by the police, in particular by Inspector Mhlongo. Accused No. 2 testified that Inspector Mhlongo also misled him into believing that Accused No. 1 had already implicated him. Against this, Inspector Mhlongo assured Accused No. 2 of his assistance and he promised Accused No. 2 that he would be taken to attend his sister's wedding and that he would be out of prison well before Accused No. 2's sister's wedding anniversary. Accused No. 2 testified that all of this induced him into making the statement. Accused No. 2 was also threatened that he would not see his children again if he did not make the statement. Whilst the learned trial judge was correct in criticising Accused No. 2's counsel's failure to put all of this to the State witnesses, in particular to Inspector Mhlongo, that failure should not serve to reject Accused No. 2's version as false or as unacceptable. On the

trial court's own finding, the State witnesses' testimony was to be faulted for similar reasons of inconsistencies but these were excused by the Court *a quo* since they related to "discrepancies" on the "surrounding circumstances".

[12] Such "surrounding circumstances" are central to this enquiry and wholly relevant to the circumstances surrounding the taking of the accuseds' statements by the police under circumstances that lend grave concerns as to whether such statements were indeed freely taken, this regardless of whether there was any assault on the accused and equally regardless of whether the accuseds' constitutional rights were strictly complied with or not.

[13] Accused No. 2's version as was put by his counsel to Inspector Mhlongo, was that if Accused No. 2 did not narrate the story as was told to him, he would be further assaulted to his eventual death. The Court *a quo* noted that this was however not testified to by Accused No. 2 and that Accused No 2 "... was not able to indicate ... as to how and to what extent the promises induced him to make a statement." The difference between Accused No. 2's version and that put by the counsel to the witnesses, was explained by Accused No. 2 as being attributable to him not having had enough time to consult with his counsel or that he was confused.

[14] Both accused who are relatively young, remained in custody during the trial, and this must have impacted negatively on their freedom to consult with their respective counsel. That Accused No. 2 gave such an explanation is to be considered against these background facts that are not in dispute.

[15] "How" and the degree to which the inducements had caused Accused No. 2 to make the statement is not *stricto sensu* the test.

That such inducements, to whatever degree, had removed the free and voluntarily participation by Accused No. 2 in making the statement is a salient enquiry. I shall return to this later.

[16] I turn now to Accused No. 1. An assault of Accused No. 1 was in part corroborated by his father who saw a police officer slap his son. The Court *a quo* was correct in being circumspect about its approach to his evidence, based only on the potential for his being biased by reason of his relationship to his son. However, it was incorrect to compare this part of the father's confined testimony to the expansive whole of Accused No. 1's testimony and to consequently fault it. The Court *a quo* reasoned as follows:

"His father indicated that he saw his son being assaulted by being slapped once across the face. This is unlike as to what evidence Accused No. 1 himself testified that he was assaulted right from the time he was arrested."

[17] The apparent logic in this excerpt does not follow and is a *non sequitur*. The resultant rejection of the evidence of Accused No. 1 and his father, alternatively the State's evidence being preferred over this, must also be faulted.

[18] Although the testimony of Accused No. 1 was not imbued with the desired clarity of precision and exacting cohesion, the following test as set out in the trial court's judgment must also be faulted:

"He did not explain that the duress was of such a nature that he was left with no option but to make a statement to Captain Hodgett". (my emphasis)

[19] That clearly is not what is required of an accused to show in a trial-within-a-trial. It is not the test. Duress that renders the

making of the statement not free and voluntary is the statutory dictate embodied in Section 217 of the Criminal Procedure Act 51 of 1977.

[20] The Court *a quo* correctly criticised the accused and their respective counsels for the following difficulties that arose during the trial-within-a-trial. There were various questions put by their counsel which were not supported by the accused's testimony. There were also aspects that the accused dealt with during their testimony which were not covered by their counsel in cross-examination of the State witnesses. This led to an admittedly undesirable situation. That aspect has however been explained, in part by the accused and is what the Court *a quo* substantially based its finding on, in the trial within a trial. Whilst that is so, sight must not be lost of the fact that the onus rests squarely on the State to prove the admissibility of the confessions beyond a reasonable doubt. The equally undesirable role played by the various police officers in obtaining the statements from the accused is also an aspect that impacts negatively on the question of whether the State has so discharged its onus or not.

[21] I return to the question of the alleged undesirable role of the police in taking the statements. Under cross-examination by Mr Venter (Counsel for Accused No. 2), Captain Hodgett, who took down the statements of both accused in a "large hall" which was often frequented by the Investigating Officer Inspector Mhlongo, conceded that he may have been present at the arrest of Accused No. 2, and would have had prior knowledge of the incident, and that it was undesirable for him to have taken both statements. After conceding that he was present at briefings, which would have dealt with the facts of this case and the arrest of the accused, and that he

may have been present at the arrest of the accused, Captain Hodgett stated the following:

“Mr Venter – So you would have known exactly what matter the accused had been arrested for? – Yes, M’Lord.

Yes. That being the case, is it not correct then that you would have known the details of the murder? – Yes M’Lord, I would, yes.

That being so, you would have had prior knowledge of the facts of this case before you took down the statements of the two accused? – Yes, M’Lord, that’s correct.”

[22] Captain Hodgett conceded under cross-examination that Inspector Mhlongo was “in and out” of the “big hall” that they were in with the accused, and that although Inspector Mhlongo’s office was at the front door of the hall, there were no partitions as they were all in “one big hall”. Questioned then on what the effect of Inspector Mhlongo’s presence on the accused might have been, especially if he had earlier applied pressure on them to make the statements, Captain Hodgett conceded that Inspector Mhlongo’s presence in the hall may well have been “daunting” on the accused.

[23] When Captain Hodgett was questioned on the propriety of his having featured so prominently in the taking of the statements, having such prior knowledge, and being a part of the same unit, he conceded that “to take two (statements), I must admit, of the same case, is not advisable ...”

[24] Captain Hodgett also conceded under cross-examination that having taken the one statement and immediately thereafter taking the second statement of the accused would have meant that he knew what the previous person had said.

He admitted that he had correctly recorded in the statement the request by Accused No. 2 to be taken to a Magistrate to “tell his story”, but that he could not explain why Accused No. 2 was not taken to a Magistrate. He also conceded that he did oversee the investigation in this case as well.

[25] Captain Hodgett confirmed that it was Inspector Mhlongo, the Investigating Officer, who brought the accused to him, that he had spoken to the Accused in English with the use of the Detective Inspectors Shandu and Ngcongo as interpreters. As in the case of Captain Hodgett, Detective Inspectors Shandu and Ngcongo are also attached to the Serious and Violent Crimes Unit.

[26] All of this must be seen against the background of the State’s testimony that the accused, at the time they made the statements, had refused legal representation, in as much as both accused had briefed legal counsel to defend them during the trial.

[27] Both the accused had made their statements shortly after they had returned from a journey they were taken on by the police (to the crime scene). The accused maintain that they were assaulted during this journey, leading up to their making the statements.

[28] Strangely Captain Hodgett could not remember, and therefore did not deny that he may have been present when Accused No. 2 was interrogated after his arrest.

[29] Captain Hodgett conceded under cross-examination that whilst he was taking a statement from Accused No. 2, Accused No. 1 was sitting a short distance away from him (approximately 4 metres) and when called on to comment on the impropriety of both

accused being present together at the time their statements were taken, and that they could hear each other, his answer was "M'Lord, there is no other situation we can ... that is my desk. I can't change that." That situation is most undesirable.

[30] Captain Hodgett was further questioned on the alterations and errors on the dates that featured in Accused No. 2's statement as taken down by him. The statement was dated the 24th November, that is the day immediately following the day of Accused No. 2's arrest, but that date on the statement was altered to read the 25th November. Captain Hodgett conceded this correction. However this conflicted with the date stamp which read 24th November and strangely Captain Hodgett conceded that this was a mistake on his part and that he often made such mistakes. Whatever turns on the dates, it is clear that the statement was taken very shortly after the accused were arrested.

[31] The Court *a quo* found that the constitutional rights were indeed explained to the accused, and this is supported, so the Court found, by the existence of appropriate paragraphs in the statements wherein the accused conceded their acknowledgement and understanding of such constitutional rights. In this regard the dicta by Holmes JA in **S v Dlamini**, (supra) at page 147, is indeed relevant:

"Finally, with regard to the correct approach in analysing the relevant evidence, the fact that the accused's written confession to the Magistrate contains an introductory admission of the absence of inducement or encouragement or promises to make a confession, does not *per se* carry the day. It ranks as a factor, and an important one, in favour of the State, to be considered together with all other relevant factors."

[32] The assistance by fellow police officers in assisting to take a confession, particularly one from the same unit as the Investigating Officer, has been repeatedly criticised – **S v Latha and Another 1994(1) SACR 447 (AD)**, **S v Mafuya and Others (1) 1992(2) SACR 370 (W)** and **S v Khoza en Andere 184(1) SA 57 (AD)**. That approach is all the more applicable in *casu*. Captain Hodgett (often in the presence of Inspector Mhlongo) took both accused's confessions in a single room, whilst both sat together and this was done shortly after their arrest and after both the accused had been taken on an almost four hour journey where the accused contended that they were assaulted. Neither the Investigating Officer nor Captain Hodgett who were assisted, offered to take the accused to the Magistrate for the recording of such confessions notwithstanding Accused No. 2 having specifically requested to be taken to one.

[33] The Court *a quo* accepted that the overall onus rested on the State to prove the admissibility of the confessions beyond a reasonable doubt. That apart and arising from the accuseds' attack of the confessions on constitutional grounds, the Court *a quo*, relying on the dicta in **S v Mathebula 1997(1) SACR 10 (WLD)**, held that the onus rested on the accused to show that their constitutional rights actually existed and were indeed infringed. No finding was however made on whether this onus was discharged or not, in as much as the Court found that their constitutional rights were not infringed and that they were indeed appropriately advised of their rights. The eventual decision to admit the confessions appear to have been reasoned largely on the weighing of the testimony heard in the trial-within-a-trial and on the credibility of the witnesses.

[34] This reasoning in the **Mathebula** case was not followed in the case of **S v Mgcina 2007(1) SACR 82(T)**. After carefully

considering Sections 35(2) (b) and 35(5) of the Constitution, du Plessis J had regard to the “double-barrelled” approach set out in **Mathebula**, as relied on by the Court *a quo in casu*, and compared it to the dicta in **S v Zuma and Others** and **S v Brown en 'n Ander 1996(2) SACR 49 (NK)** and disagreed with the approach adopted in **Mathebula** and concluded as follows:

(at 95d-i)

“In sy aantekening oor art 217 van die Strafproseswet sê Kriegler R ‘die bewyslas is in alle gevalle op die Staat om te bewys dat die bekentenis toelaatbaar is’ (Hiemstra *Suid-Afrikaanse Strafproses* 6 uitg bl 563). Dit is die gemeenregtelike reël wat Kentridge Wn R in para [29] tot [33] van die *Zuma*-saak bespreek. In para [33] sê die geleerde Regter:

‘... (T)he common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s “golden thread” – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt.’

Die regte wat art 35(2)(b) van die Grondwet vir aangehoue persone verskans, hou verband met en beskerm 'n aantal ander regte, insluitende grondwetlike regte. In die geval van aangehoue persone wat later beskuldigdes word, beskerm dit ook verskeie aspekte van die reg op 'n billike verhoor wat weer in art 35(3) beskerm word. As sodanig is die regte in art 35(2)(b) ook deel van die onderhou van die “golden thread” waarna Kentridge Wn R verwys het. Vir dieselfde redes waarom die bewyslas gemeenregtelik op die Staat is om te bewys dat 'n bekentenis vrywillig gemaak is, is die bewyslas ook op die Staat om te bewys dat die beskuldigde se fundamentele regte nie geskend is om die bekentenis (of erkenning of ander getuienis) te bekom nie. Daar is geen bewyslas op die beskuldigde om te bewys dat sy of haar fundamentele regte geskend is om die bekentenis te bekom

nie. Ek meen dus met eerbied dat *S v Mathebula (supra)* in hierdie opsig verkeerd beslis is.” (my emphasis)

[35] I agree with the reasoning of du Plessis J in the **Mgcina** case. However, as stated earlier in this judgment, the trial court’s ruling in the trial-within-a-trial was not based on a finding of such onus nor did the Court *a quo* rule on whether the test as set out in **Mathebula** was indeed applied and whether that onus was discharged by the accused.

[36] The Court *a quo* rejected the accuseds’ version and admitted the confessions into evidence. This is clear from the following concluding remarks in the judgment in the trial-within-a-trial”

“I reiterate that the unsatisfactory aspects of the accuseds’ evidence have impacted negatively on their veracity. I do not accept that their constitutional rights have been violated or that they were coerced or assaulted or threatened in any way to make the statements. Having made that conclusion, I make the following ruling ...”

[37] It has been held that the untrustworthy evidence of an accused and even where the Court did not believe the evidence of the accused and found the accused to be lying, does not automatically render the confessions as admissible. – See **S v Dlamini** (*supra*); **R v Gumede and Another 1942 (AD) 398**; **S v M 1963(1) P.H. H88**. The ultimate test is whether the State has discharged its onus beyond a reasonable doubt.

[38] Regard being had to the State’s own undisputed testimony as to how the accuseds’ statements came to be taken does in itself beg questions as to whether the accused were not influenced thereby to make such confessions. The admitted role of the police in obtaining the accuseds’ statements, as discussed earlier, is of concern and

leads one to the inescapable conclusion that something happened to induce the accused on that day to make the statements which they did.

[39] I am not satisfied that the State has proved, beyond a reasonable doubt, that the accused were not unduly influenced to make the confessions to Captain Hodgett. The prerequisites in Section 217 of the Criminal Procedure Act, especially the aspect of a free and voluntary requirement has, to my mind, not adequately been met. Accordingly, in my opinion, the State had failed to discharge the onus which rested upon it.

[40] In the result, I would allow the appeal and set aside the convictions and sentences of both Appellants.

Wallis J :

Levinsohn DJP :

DATE OF CAV: 23 February 2009

DATE OF JUDGMENT: April 2009

FOR THE FIRST APPELLANT: Z ANASTASIOU

FOR THE SECOND APPELLANT: A KHAN

FOR THE RESPONDENT: M E MTHEMBU