

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 22/2005

In the matter between:-

THE STATE

versus

<u>THABISO JOHANNES MOLOI</u>	Accused 1
<u>THULANI MOSES MOLOI</u>	Accused 2
<u>SIAS HERRIE MOLOI</u>	Accused 3
<u>OUPA WILLIAM MOLOI</u>	Accused 4

HEARD ON: 6 – 10 JUNE 2005

JUDGMENT BY: H.M. MUSI J

DELIVERED ON: 03 November 2005

[1] A trial within a trial was conducted to determine the admissibility of the statements made by Thulani Moses Moloi, (accused no. 2) and Oupa William Moloi, (accused no. 4,) respectively on 4 December 2003 and 8 December 2003

to Magistrates H.P. Mohosho and A.M. Schoeman. At the conclusion thereof I ruled that the statement of each accused was made freely and voluntarily whilst the accused was in his sound and sober senses and without having been unduly influenced thereto as is required by section 217 of the Criminal Procedure Act 51 of 1977. I indicated that I would give reasons for the rulings at the conclusion of the whole trial. Such reasons follow hereunder.

- [2] I shall deal first with the case of accused no. 4. Four witnesses testified for the State and for the defence only the accused testified. The most important evidence is that of the investigating officer, Inspector L.P. Maseko, who is attached to the Serious and Violent Crime Unit at Bethlehem. Briefly it is to the effect that on 8 December 2003 he got a telephone call from the police at Harrismith to the effect that someone wanted to see him there. He went there and was led to an office where he found the accused no. 4 (the accused). He realised that it was a suspect he had been looking for. He had already arrested some suspects, all of whom were the

accused's brothers. He says that the accused disclosed that he knew about the incidents giving rise to the crimes being investigated and wanted to relate what had happened, but Maseko stopped him and told him he was being arrested in connection with the crimes forming the subject of this trial. Maseko says that he then proceeded to explain to the accused his constitutional rights, *inter alia* the right to legal representation, the right to remain silent and not to make any statement and that if he said anything it will be recorded and may be used against him in any subsequent trial. He had got from the police at Harrismith a formal police document containing an explanation of such rights which he completed and explained contents thereof to the accused. He and the accused were speaking in Sesotho and he says that the accused understood all that was explained to him, whereafter the document was signed by both of them. The document was handed in as exhibit K.

- [3] Maseko says that he also took the accused's warning statement right there at the Harrismith police station. He

explained the contents of the statement which the accused also understood and signed. In such warning statement, the accused indicated that he would make a statement to a magistrate. The warning statement was handed in as exhibit L. Maseko says that the accused had been co-operating and had indicated that he would make a full statement of what had happened to a magistrate. The following statement appears in the warning statement:

“Ek sal ‘n verklaring voor die landdros gaan aflê.”

Maseko says that the accused was thereby referring to making a confession. He had then made arrangements to take the accused to a magistrate at Harrismith to make the confession that very same day.

- [4] Maseko further says that the accused had of his own accord disclosed that he had a firearm which he wanted to hand over and for that reason he had accompanied the accused to his place of residence in the informal settlements outside

Harrismith. When they came back Maseko handed the accused to Inspector Thipa Mofokeng and the latter took him to Magistrate Schoeman for the confession.

- [5] Inspector Maseko was extensively cross-examined by Miss Ismail, for the accused, but he stuck to the gist of his version. It was put to him *inter alia* that he had threatened the accused with violence in order to coerce the accused to co-operate and further that Maseko had dictated to the accused what to tell the magistrate. Significantly no actual act of violence was alleged nor was it alleged that the accused sustained any injuries. In his evidence, the accused could only complain of being handcuffed as the only act of ill-treatment actually meted out to him.
- [6] It was also put to Maseko that he had been in the company of another police officer when he interrogated the accused and that the interrogation and threats were made in the presence of one Thembisile, the accused's girlfriend. Maseko disputed all this and maintained that he went to

Harrismith alone and was alone when he interviewed the accused and further that the accused himself had been alone all along. It was further put to Maseko that he had personally taken the accused to the magistrate and that he had repeated the threats of violence on the doorstep on the magistrate's office and further that Maseko had stood outside the magistrate's office as the statement was being taken. He denied all this.

[7] Now Inspector Maseko was fully corroborated by Inspector Thipa Mofokeng on the following points:

- 7.1 That Maseko handed the accused to him and it was he (Mofokeng) who took the accused to the magistrate for the confession and fetched him afterwards;
- 7.2 That Maseko had left the magistrate court buildings after handing the accused to him and was telephonically contacted by Mofokeng to come and fetch the accused after the confession;

7.3 That Maseko did not stand next to the window of the magistrate's office whilst the confession was being taken.

[8] Maseko is further corroborated by Mr. Gideon Msimanga, the interpreter who interpreted for Magistrate Schoeman during the taking of the confession, that Maseko was nowhere near the magistrate's office. Nor did Msimanga meet Maseko that day. In paragraph 5.1 of the preamble to the confession, exhibit F, Magistrate Schoeman also records that the accused was brought to him by Inspector Thipa Mofokeng.

[9] Magistrate Schoeman testified and confirmed what he recorded in the preamble to the confession, exhibit F. The interpreter, Mr. Msimanga, also testified and confirmed that he interpreted concisely and accurately the explanations made and the questions posed by Mr. Schoeman from Afrikaans to Sesotho, the language that the accused spoke and also the accused's responses from Sesotho to Afrikaans.

[10] The accused version was briefly that he had reported to the police station at Harrismith only because he had heard that the police were looking for him and was keen to know the reasons therefor. He said that he had no knowledge of the relevant crimes and had not wanted to hand himself over to the police. He said that Maseko had threatened to take him to his offices in Bethlehem to be tortured if he did not co-operate, that Maseko had then told him what had happened and instructed him to repeat that to a magistrate. He agreed to do so only due to the threats of assault. He said that Maseko had taken him to the magistrate personally and had then stood outside the magistrate's offices as the statement was being taken. He also claimed that he did not know that it was a magistrate who was taking his statement, but believed that it was a senior police officer, because Maseko had told him that he was being taken to the head of the police.

[11] Now all these state witnesses gave a favourable impression

in the witness box and there were no material contradictions in their evidence. Moreover they corroborated each other in all material respects. I can find no reason to question the reliability of the testimony of each of them, nor was any suggestion to the contrary made during oral argument.

[12] The accused, on the other hand, was a poor witness. He was generally vague and uncertain about his assertions. The record teems with instances where simple and straightforward questions had to be repeated. And there are many instances where he would deny aspects of the state evidence but when pressed he would resort to saying that he could not recall. Miss Ismail was in fact candid when she conceded in argument that the accused did not impress at all as a witness.

[13] An aspect that further dented the accused's version is the following:

He had all along said that his girlfriend, Thembisile, was

present during the interview with Maseko and would have seen and heard what transpired. Thembisile reported at court on 11 October 2005 presumably to testify on behalf of the accused and Miss Ismail requested an adjournment in order to consult with her. When the court resumed she was inexplicably not called. In my view, it is clear that the accused had been lying when he said that Thembisile and an unknown police man were present. It is improbable that Maseko, who is clearly an experienced police investigator, would interrogate a suspect in such a serious case as murder in the presence of his girlfriend. And, as Maseko said, why would he conceal the presence of a colleague who would have provided corroboration?

[14] In my view, the version of the State was overwhelming that the accused no. 4 had wanted to make a statement of his own accord.

[15] I now turn to consider the position of the accused no. 2. Four witnesses testified on behalf of the State, whereas for

the defence only the accused no. 2 (the accused) testified. Inspector Maseko, the investigating officer, and Inspector M.P. Bierman were involved in the arrest on 3 December 2003 of the accused on a farm outside Harrismith where the accused was employed. The two officers corroborated each other that Bierman only assisted in the arrest and did not take part in the subsequent interrogation that afternoon, that it is Maseko and Inspector N.D. Moshuaduba who together interrogated the accused at the offices of the Serious and Violent Crime Unit in Bethlehem. They corroborated each other that the accused co-operated and was not assaulted or in any way threatened. They both denied the accused's averment that he was tortured and that Bierman was involved. Moshuaduba said that the accused's indicated that he knew what had happened in relation to the crimes and wanted to relate that, but he stopped the accused and suggested he tell that to a magistrate. Moshuaduba then informed Maseko to make the necessary arrangements for a magistrate to take the statement. Maseko had also taken the accused's warning statement that day and handed this as

exhibit J. Therein the accused indicated that he would make a statement to a magistrate. Maseko said that this referred to the wish to make a confession. The officers say that they spoke to the accused in Sesotho as all of them are Sesotho speaking.

[16] Maseko is corroborated by Inspector P.A. Msimanga that the accused was handed to the latter to take to the cells that afternoon. Msimanga said he had then explained to the accused his constitutional rights upon detention by way of a document which he completed and contents of which were explained to the accused in Sesotho. He handed in such document as exhibit G. It is common cause that the document was left in the accused's possession. Exhibit H was also handed in showing that the accused was handed to the cells on 3 December 2003 at 18h20. Entry no. 107 records that the accused had no injuries when detained.

[17] In line with the accused's wish to make a statement to a magistrate, Maseko says that the following day, 4 December

2003, he tried to arrange for a magistrate to take it, but could find none available at Bethlehem and so he arranged, through a public prosecutor, to take the accused to Phuthaditjaba. The Accused and the erstwhile accused no. 1 and 3, had to appear in court in Harrismith that day, so Maseko took them along via Phuthaditjaba. He was accompanied by Inspector Msimanga. Msimanga corroborated Maseko that no threats were made to the accused that morning to influence him to make a statement and that it was Msimanga who took the accused to Magistrate Mohosho when they got to Phuthaditjaba and fetched him after the statement was made. Both officers denied that the accused had been misled into believing that he was being taken to their superior.

- [18] Magistrate Hlapane Paulus Mohosho testified that the accused was brought to him on 4 December 2003 to take his statement. He confirmed under oath contents of the preamble to the confession, exhibit D. He confirmed in particular that the explanations made and questions posed to

the accused were all correctly interpreted to the accused in Sesotho and that the accused understood these and further that he accurately recorded his responses.

[19] Two aspects of the recording of the accused's statements as per the preamble to the confession, need to be dealt with. Firstly, the responses to the explanations contained in paragraphs 1.1, 1.2 and 1.3 of exhibit D were not recorded. This provided a basis for the contention that the relevant explanations were not made to the accused. The accused had alleged that the police had told him that he was being taken to their superior at Phuthaditjaba and warned that if he did not do as they had instructed him, their superior would tell them. He said that he had believed Mr. Mohosho to be such senior police officer and that the latter did not tell him that he had nothing to do with the police.

[20] Mr. Mohosho's explanation was that he had not considered it necessary to elicit any responses from the accused as the relevant paragraphs contained only explanations and he had been satisfied that the accused fully understood the

explanations. He was adamant, however, that he had fully made the relevant explanations to the accused. He went on to state that he did not see it as his duty to simply inform the accused of the contents of the document, but that he had to ensure that the accused understood the position clearly. And if there was any doubt in his mind whether the accused wanted to make a statement he would not take it, so he said. A perusal of the relevant document reveals that whatever is not applicable throughout paragraphs 1.1, 1.2 and 1.3 have been deleted. This shows that the magistrate did go through these paragraphs. Mr. Mohosho came forth as a diligent, conscientious judicial officer and I can find no reason to doubt his *bona fides*. He did concede in hindsight that it was an oversight not to record the answers and I accept his explanation.

[21] I think that the accused was being opportunistic when he denied that these paragraphs were explained to him, and contradicted himself along the way. He conceded that the right to legal representation was explained to him and yet

such explanation is contained in the same paragraphs that he claims were not read to him. He also admitted that Mr. Mohosho did tell him that he was a magistrate, yet in the same breath he insisted that he thought that Mohosho was a senior police officer.

[22] The second issue is that the interpreter who interpreted for the accused, Mr. Potsane, has died and could not testify to confirm his role. Mr. Skibi, for accused no. 2, argued at the conclusion of the trial within a trial that the magistrate's evidence as to what the accused said, is hearsay and inadmissible. This raises an interesting legal question to which I shall return in due course.

[23] As for the accused, his version was that he had been threatened by the police and forced to agree to make a confession. He gave details of what was allegedly done to him by Inspectors Maseko and Bierman on 3 December 2003. He says that his head or face would be covered by plastic bags whilst lying face down, wires connected to his

feet and electric shocks administered to him. And that when he felt pains, Maseko would stop the shocks and demand that he talks. The process was repeated five times. Significantly he did not say how Maseko would know that he felt pains because he never said that he screamed. He related this story as a matter of fact and did not give any sign of emotion as one would expect from someone who was being made to relive a painful and traumatic experience. He also suffered no injuries, nor did he complain of any when admitted to the cells that day.

[24] He would also not tell in his evidence in chief what is it that Maseko wanted him to relate to the magistrate or when was this drilled into his head. The information had to be extracted from him piece meal under cross-examination by Mrs. Bester, for the State. He also claimed that he had no knowledge of what was told to Magistrate Mohosho, as per exhibit D, and said that he was hearing this for the first time in court. But he soon changed that and said that all that he told the magistrate was what he got from Maseko. In short,

the accused no. 2 contradicted himself a lot and adjusted his evidence. His version was neither convincing nor probable. It simply has no ring of truth and cannot be accepted.

[25] On the other hand, all the state witnesses were credible.

There are of course some discrepancies in the evidence of each of them, but these were not material and do not detract from the credibility of each of them. I can cite as an example one aspect of Inspector Moshuaduba's evidence. He said that the accused no. 2 was interrogated on 4 December 2003, but later he conceded that he did not recall this date, but that he had taken it from the statement he had made long after the incident. This was clearly a mistake, as it is common cause that the interrogation took place on 3 December 2003. Most importantly, the state witnesses corroborated each other in material respects. The probabilities also favour the version of the state. I concluded therefore that the State had discharged the onus resting on it to prove beyond reasonable doubt that the accused made the statement freely and voluntarily and without being unduly

influenced thereto.

[26] I now turn to consider the legal question of whether what the accused said to Magistrate Mohosho and recorded by him in the preamble to the confession is hearsay and inadmissible. If it is, that will mean that the entire evidence of the magistrate and his role in the matter would have been an exercise in futility and the statement that he ultimately took would likewise be worthless as it would also be hearsay. It is important to give a brief factual background to and evidence in which the issue arises. Mr. Mohosho made it clear that he is Sesotho speaking just like the accused and the interpreter, the late Mr. Potsane, and that he understood not only what the accused said but also the Sesotho translation of what he (the magistrate) had said in English. He went on to explain that he had gone out of his way to ensure that what he said was fully and accurately interpreted to the accused and that the accused understood it. Significantly the accused did not dispute this portion of Mr. Mohosho's evidence. Nor did the accused suggest that his answers were not correctly

recorded. He disagrees with some statements attributed to him, not because they were incorrectly recorded, but because he says that was what Maseko told him to say.

[27] It is interesting to note what the accused said when led by his counsel:

“The Magistrate testified that there was an interpreter and you were satisfied that everything was interpreted to you. What is your comment about that? --- Yes, there was an interpreter. He interpreted what I said and he also interpreted what was said to me but I know nothing about this which is written down in this document, ...”

The accused was thereby saying: “Yes I said this, but it is not my own story.” In fact no basis was laid for the legal point raised.

[28] In support of his submission Mr. Skibi cited in **S v MATHE** 1976 (1) SA 233 (O). It was decided in this case that where a magistrate had taken a confession through an interpreter

what the magistrate recorded would be hearsay, unless the interpreter was called to confirm under oath that he correctly interpreted the accused. Though this is not stated, it can be inferred that the magistrate concerned did not understand the language of the accused and hence the rationale of the decision that what the magistrate took down was in effect what was said by the interpreter. This decision was in line with the cases of **R v MUTCHE** 1946 AA 874 and **R v MAGOROSIE** 1951 (2) SA 126 (T) both of which were cited with approval. (**MUTCHE** and **MAGOROSIE** are probably misnomers respectively for **MOCHE** and **MOGOROSI**.)

- [29] The above stated legal position is also in line with the decisions of the estuarial Appellate Division in *inter alia* **R v MAKATANE** 1948 (3) SA 384 (AD) and **S v NAIDOO** 1962 (2) SA 625 (AD). The judgment in **S v NAIDOO** dealt mainly with the case of an interpreter who is not an official court interpreter and had not been sworn in prior to interpreting. It was held that the account of a witness given through such interpreter is to be regarded as unsworn testimony. Strictly

speaking, the objection here is not that the evidence is hearsay, but rather against the reception of unsworn testimony. However, a clear indication of the basis on which it was thought that the evidence would be hearsay, is given at p. 632 A:

“If a witness states in Court that a person, an accused for instance, previously made a statement to him in a language which the witness did not understand but which was interpreted to him then that witness’s evidence as to what was said is by itself hearsay and not admissible as proof of what was said. When, however, in addition the person who interpreted is called to testify on oath that he correctly interpreted what was said there is a completed chain of sworn testimony as to the terms of the prior statement and this testimony can be accepted as proper proof of such terms.....”

By implication if the witness understood the language of the speaker, then his/her evidence of what was said would not be hearsay and the presence of an interpreter becomes irrelevant.

[30] **R v MAKATANE** *supra* dealt with the provisions of section 284 of the old Criminal Procedure Act which required that a conviction for perjury could only follow upon the evidence of at least two witnesses. A magistrate had testified about a statement allegedly made to him by an accused through an interpreter and the interpreter had confirmed under oath that he had correctly interpreted the accused. It was held that the evidence of both counted as that of one witness for purposes of the section. The rationale was that since the magistrate did not understand what the accused had said, his evidence alone would be hearsay and confirmation by the interpreter was necessary to render it admissible. Significantly the following is stated at the bottom of p. 389:

“But as correctly laid down in **R v Charles** (1942 CPD 179) and a number of other cases by itself the evidence of the Magistrate as to what was said before him by a witness through the medium of an interpreter is mere as hearsay unless it be shown that he understood the language spoken by the witness.”(my own underlining)

This is a clear indication that if the magistrate understood the language of the deponent, what he/she recorded would not be hearsay. That was the position in the instant case.

[31] **S v PONYANA** 1981 (1) SA 139 (Tk) may appear to contradict what has just been said above. There the interpreter had interpreted to the accused only what the magistrate said from English to Xhosa but did not interpret what the accused said in Xhosa because the magistrate understood Xhosa. This was during a public hearing in open court. The review court held that this was a gross irregularity that vitiated the proceedings. The court remarked as follows at p. 140 G – H:

“It is what is said in public and what is interpreted whether it be evidence from one language into another or expert evidence, that is the evidence which is given for practical purposes and which is to be recorded. One can see all sorts of difficulties arising should any other view be held. The first and foremost which comes to mind is that the interpretation given by the Magistrate is his own, as recorded by him and nobody in that

court except the Magistrate knows what he has recorded in English insofar as the accused or the witness's version in Xhosa is concerned."

[32] **PONYANA** is clearly distinguishable from the instant case and is, in my opinion, no authority for the view that where a magistrate takes an extra-curial statement like a confession from a deponent whose language he/she understands, but uses an interpreter, his/her record of what the deponent said would be hearsay. The above passage is certainly valid insofar as proceedings in open court are concerned. The reasons why different considerations apply to the taking of evidence in a public trial as opposed to the taking of an extra- curial statement are obvious and need not be stated. In practice, where the magistrate is fluent in the language of the accused no interpreter is ever used. *In casu*, Magistrate Mohosho could easily have dispensed with the services of an interpreter. He probably used the interpreter purely as a matter of practice because the standard forms used are written in either English or Afrikaans.

[33] I conclude that the recording by the Magistrate of what the

accused no 2 said in this matter is not hearsay and needed no confirmation by the interpreter.

H.M. MUSI, J

On behalf of The State : Adv. A. Bester

On behalf of accused 2: Adv. N.L. Skibi

On behalf of accused 4: Me. S. Ismail

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