



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

Case No.: **AR 247/24**

In the matter between:

INNOCENT THABANI NGCOBO

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: the KwaZulu-Natal Division of the High Court, Northeastern Circuit Local Division, Mtunzini (Ploos Van Amstel J sitting as court of first instance):

1. The appeal against conviction and sentence is upheld.
 2. The conviction and sentence of 12 May 2022 is set aside.
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JUDGMENT

Harrison J (Radebe and P Bezuidenhout JJ concurring)

Introduction

[1] The appellant in this matter, Innocent Thabani Ngcobo, was convicted in the KwaZulu-Natal Division of the High Court, Northeastern Circuit Local Division,

Mtunzini, on 12 May 2022 of three counts of murder and one count of attempted murder. On the same day, he was sentenced to life imprisonment on two of the counts of murder, 15 years on the third count of murder, and eight years for the attempted murder. Leave to appeal was granted against conviction and sentence by the Supreme Court of Appeal on 28 September 2023.

[2] On 30 May 2025, we heard argument in the appeal. At the close of oral argument, we made an order upholding the appeal and setting aside the convictions and sentences, indicating that reasons would be given later. These are the reasons for that order.

[3] The core issue in this appeal is the admissibility of the confession which was ruled admissible during the course of the trial. The appellant's conviction followed as a direct consequence of the confession having been ruled admissible. Once that confession was ruled admissible, the State tendered two statements, by SM Ngena and ET Shandu, neither of which name nor identify the appellant as being implicated in any of the four counts which the appellant faced. The conviction is entirely reliant on the confession.

[4] The trial commenced with a trial within a trial to admit the appellant's confession. That trial within a trial had been preceded by the appellant's counsel clearly stating:

'Firstly, the statement was obtained in violation of the accused's constitutional rights. He had indicated that he had an attorney and that he wanted to consult with his attorney and subsequent thereto by means of threats and acts of violence he was taken to this commissioned officer whereat he was further assaulted and told he had to make a statement in favour of the State. . . '.

[5] Within that opening statement, there are two challenges to the admissibility of the confession. The first is the constitutionality of the admissibility and the right to consult an attorney, and the second aspect is the admissibility of the statement and whether it was obtained under some form of duress.

The facts

[6] The appellant, on Sunday, 11 November 2018, had received information from his family that the police were looking for him. They had, apparently, been told that should the appellant not report himself, the police would 'bury him'.

[7] The family organised an attorney, Mr Manzini, who accompanied the appellant to the Empangeni Police Station. The investigating officer in the matter, Sergeant ('Sgt') Shange, then drove from Durban to collect the appellant in Empangeni and, when the appellant was handed over, received a business card of the attorney, Mr Manzini, who specifically advised Sgt Shange that he was representing the appellant, and '...that whenever a statement needs to be taken from him, then they will have to call me because I will have to be there before the statement is taken from him. . .'. That evidence from attorney, Mr Manzini, was led in the trial within a trial, and was never challenged.

[8] Having collected the appellant at the Empangeni Police Station, Sgt Shange proceeded to return to Durban. However, at the Umdloti Toll Plaza, turned around and returned to Empangeni as, apparently, the appellant had decided to make a confession. Sgt Shange had, whilst driving to Durban contacted his superiors who had advised him that a magistrate was not available, but they had arranged for a Lieutenant Colonel (Lt Col) Ngubane, from the Mtunzini Detective Branch, to take the confession at the Empangeni Police Station.

[9] At the trial within the trial concerning the admissibility of the confession, Lt Col Ngubane testified that he was alone when the appellant was brought to him and, furthermore, testified as to the taking of the statement.

[10] In cross-examination, he was specifically asked about the appellant having an attorney and whether he was informed of this by Sgt Shange. In this regard:

MR DLAMINI: Did Shange also tell you or not tell you that the accused person had also indicated that he was going to consult with his attorney at his own time?

MR NGUBANE: No, M'Lord, I would have not continued if that information was made available to me.

MR DLAMINI: Now, I put to you that the investigating officer who called you has in fact completed a statement regarding an interview with the suspect, namely the accused person

before Court, in which he confirms that the accused person had told him that before making a statement he wanted to consult with his attorney and that he would do so in his own time.

What do you say to that?

MR NGUBANE: I've got no idea about that information.'

[11] Subsequent cross-examination elicited a different answer, that, according to Lt Col Ngubane, the appellant had advised him that he was brought by his attorney and that he knew he was making a statement.

[12] The next witness at the trial within a trial was S Mngomezulu, a constable, working at CSC at Empangeni. His evidence was that it was his responsibility to take the appellant through to the room where Lt Col Ngubane was to take the statement. When he took the appellant, there were others in the room, he did not know their names but they were police officers.

[13] Sgt Shange thereafter testified that he was part of a political task team and that they had been looking for the appellant. He confirmed that he came and collected the appellant, and when he was there, Mr Manzini introduced himself as a legal practitioner. Sgt Shange thereafter testified that during the drive back to Durban, according to him, the appellant indicated he wished to make a statement, and having called his superiors and unable to secure a magistrate, he returned to Empangeni as a commissioner officer had been found to take the statement.

[14] Under cross-examination, it was put that Sgt Shange had also taken a statement from the appellant, wherein it was recorded: 'I will consult with my legal practitioner of my own choice'. When cross-examined on this, Sgt Shange suggested that he was only going to require the legal practitioner's service upon appearance in court, not at that stage as he was only making a confession. Sgt Shange denied the allegations of assault.

[15] The final witness for the State in the trial within a trial was FN Makhaza, the doctor, who performed the medical examination both before and after the confession was taken. She denied that the appellant had been assaulted.

[16] The appellant, thereafter, testified as to how he came to be arrested, how he had received word the day before that the police were looking for him, and how his family had arranged for an attorney. He confirmed that he was taken to the police by Mr Manzini and, thereafter, testified that he was assaulted whilst on the drive back to Durban, thus resulting in him making a confession.

[17] Mr Manzini thereafter testified. He is a practising attorney in Mtubatuba and he specifically testified that:

'MR MANZINI: Yes, M'Lord, I told them I am representing the person and that whenever a statement needs to be taken from him, then they will then have to call me because I will have to be there before the statement is taken from him ...'.

[18] Mr Manzini had gone to Ngwelezane Court on the Tuesday in order to represent the appellant at the first appearance, but the appellant was not there. He subsequently met the family who advised him that they had engaged another attorney.

[19] The last witness at the trial within a trial was the appellant's brother, who testified as to how the police had come to their homestead on the Sunday, demanding to know the whereabouts of the appellant, and advising that if he did not hand himself over, they were going to 'bury him'.

[20] Pursuant to the trial within a trial, the judge admitted the confession and, after the admission of the confession together with two other above mentioned statements, convicted the appellant.

[21] Post-conviction and sentence, the appellant was granted leave to appeal by the Supreme Court of Appeal, and it was this appeal that then presented before us.

The law

[22] A useful starting point is the evaluation performed by Ponnann J in *S v Magwaza*,¹ namely:

¹ *S v Magwaza* [2015] ZASCA 36; 2016 (1) SACR 53 (SCA) paras 13-17.

[13] In the later case of *Thomson Newspapers Ltd et al v Director of Investigation and Research et al* (1990) 67 DLR (4th) 161, La Forest J stated:

"A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the Charter is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way".

Canadian jurisprudence has since rejected a strict distinction between real and testimonial evidence holding that the *Collins* distinction was unfounded (see *R v Burlingham* (1995) 28 CRR (2d) 244). For example *R v Ross* (1989) 37 CRR 369 at 379 emphasized that the admissibility of evidence under s 24(2) depended ultimately not on its nature as real or testimonial, but on whether or not it would only have been found with the compelled assistance of the accused.

[14] In *Pillay* (at 432e-h), Mpati DP and Motata AJA summed up the Canadian position as follows:

"What emerges from this is that evidence derived (real or derivative evidence) from conscriptive evidence, ie self-incriminating evidence obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that, but for the conscriptive evidence, the derivative evidence would not have been discovered.

And Scott JA, who wrote separately, expressed himself thus at 445c-e:

"As noted by Martland J in *R v Wray* (1970) 11 DLR (3d) 673 at 691, there is a clear distinction between unfairness in the method of obtaining evidence and unfairness in the actual trial. The former does not necessarily result in the latter. Where the infringement results in the creation of evidence which would not otherwise exist, for example a self-incriminatory statement or, as it is sometimes called, conscriptive evidence, it is generally accepted that the admission of such evidence will affect the fairness of the trial. The reason, of course, is that without the infringement the evidence would not have come into existence. But where, as in the present case, the infringement results in the discovery of a fact, ie the presence of the money in the roof, which would have existed whether there was an infringement or not, the impact on the fairness of the trial, if any, is less obvious."

Both judgments appear to be at one in respect of the kind of evidence with which we are here concerned, namely "self-incriminatory" or "conscriptive" evidence. Whether they, likewise, are

at one in respect of the other category alluded to, namely 'derivative' evidence, need not detain us.

[15] Although s 35(5) of the Constitution does not direct a court, as does s 24(2) of the Charter, to consider "all the circumstances" in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered (*Pillay* at 433*h*). *Collins* lists a number of factors to be considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute, such as, for example: the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event. In *Collins* (at 282), Lamer J reasoned that the concept of disrepute necessarily involves some element of community views and "thus requires the Judge to refer to what he conceives to be the views of the community at large". *Pillay* (at 433*d-e*) accepted that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interests of the public.

[16] To the extent here relevant s 35(1) and (2) of the Constitution provides:

- "(1) Everyone who is arrested for allegedly committing an offence has the right –
 - (a) to remain silent;
 - (b) to be informed promptly –
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- ...
- (2) Everyone who is detained, including every sentenced prisoner, has the right –
 - ...
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. . ."

Of those rights, Froneman J (*S v Melani and others* 1996 (1) SACR 335 (E) at 347*e-h*) observed:

"The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which 'have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision' (in the words of Kentridge

AJ in *Zuma's* case). In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognising the right to be informed of the right to consultation with a lawyer. (Cf *S v Makwanyane* (*supra* at [paras 49, 50 and 51]).)

[17] It is clear that the rights in question exist from the inception of the criminal process, that is from arrest, until its culmination (up to and during the trial itself). In the case of the appellant's co-accused, accused 1, the State produced what was described as a standard constitutional rights warning form, to which was appended his signature as proof that he had indeed been warned. Not so in respect of the appellant.

Neither Mbatha, nor Govender were models of clarity as to exactly what was conveyed to the appellant. But, even were it to be accepted that the cumulative effect of their evidence is that there was a warning of sorts, it appears to have been woefully inadequate. For, whilst there is some reference in the evidence of Govender and Mbatha to the rights to silence and legal representation, there is no indication that the appellant was warned of the consequence of not remaining silent (the logical corollary of the right to silence) or of his entitlement to the services of a legal representative at State expense. There was some suggestion in argument from the bar in this court that such deficiencies as there were came to be cured by the rather detailed warning by Captain Eva. But what is readily apparent from the document introduced into evidence, is that by the time the appellant had been warned by Captain Eva he had already confessed to the robbery. It is important to appreciate that a constitutional right is not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making a suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are (*R v Cullen* (1993) 1 LRC 610 (NZCA) at 613G-I). It must therefore follow that the failure to properly inform a detainee of his constitutional rights renders them illusory. What must govern is the substance of what the suspect can reasonably be supposed to have understood, rather than the formalism of the precise words used (*R v Evans* (1991) 4 CR (4th) paras 144, 160 and 162).'

[23] The issue of confessions has been subject to two recent decisions in this Division in *Mchunu and another v S* ('*Mchunu*')² and *S v Ndlovu* ('*Ndlovu*').³

[24] The analysis performed by Steyn J in *Mchunu* is apposite to this appeal. In quoting *R v Barlan*,⁴ Steyn J sought to emphasise

'Our duty in the case of any departure from the standard of conduct desirable to be observed by police officers is to weigh that departure in connection with all the facts of the case in arriving at a decision as to the voluntariness of the statement thus obtained.'

[25] The facts in *Ndlovu* deal specifically with where the police were aware that the declarant had a legal representative and that the legal representative had not had an opportunity to consult with his client prior to the taking of the statement. As Olsen J said:

'[21] Section 35(1) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right to remain silent and to be informed promptly of that right, and of the consequences of not remaining silent. Section 35(2)(b) is to the effect that everyone who is detained has the right —

"to choose, *and to consult with*, a legal practitioner and to be informed of this right promptly". [Our emphasis.]

The word "promptly", when applied to the right to consult with one's legal practitioner, must be taken to convey that the detained person must be informed of that right at least in reasonable time to permit of its meaningful exercise. Rushing to secure a confession from a detained person before there is an opportunity for such consultation is a material breach of the constitutional right. Doing it intentionally brings the administration of justice into disrepute. Section 35(5) of the Constitution applies on that account, and because Mfusi's conduct breached the fair-trial rights of the appellant. The section reads as follows:

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

[22] For these reasons, and following the reasoning set out in *S v Mphala and Another* 1998 (1) SACR 388 (W) at 388-400, the magistrate ought to have refused to admit the confession into evidence. (See *S v Magwaza* 2016 (1) SACR 53 (SCA) ([2015] 2 All SA 280; [2015] ZASCA 36) (25 March 2015) paras 16-22.) Regarding para 22 of the judgment in *Magwaza*, we would

² *S v Mchunu and another* 2025 (1) SACR 257 (KZP)

³ *S v Ndlovu* 2025 (1) SACR 506 (KZP).

⁴ *R v Barlan* 1926 AD 459 at 466, see *Mchunu* para 10.

merely add that we experience little anxiety over the outcome in this case, given that the alleged confession of the appellant raises a number of questions or issues which were within the capacity of the state to investigate, and which would in all probability have generated supporting evidence, if in fact what appears in the document is true. The statement contains no information so personal to the appellant that only she could have provided it'

Analysis

[26] It is clear from the foregoing and especially the manner in which the preliminary questions to the taking of the confession are framed that the appellant had the right to consult '*before*' the making of the statement.

[27] Just like in the matter of *Ndlovu*, Sgt Shange and Lt Col Ngubane were aware that the appellant had a legal representative and, crucially in this instance, the evidence of Mr Manzini was never questioned. Mr Manzini was clear and unequivocal that he had to be consulted and be present when his client made any statement.

[28] The judgment of the court *a quo* deals with Mr Manzini in a somewhat perfunctory manner:

'Shange drove to the Empangeni Police Station where he found the accused and a Mr Manzini in an office where they had been waiting for him. Manzini introduced himself as an attorney. Shange told the accused that they had been looking for him. He explained to him that he was a suspect in a murder case, read his rights to him and arrested him. He handcuffed him and told him that he was going to take him to Durban.'

[29] The judgment goes further:

'The accused testified that he had been taken to the police station by attorney, Mr Manzini, because he had been told that the police were looking for him and had threatened to kill him. He confirmed that Sergeant Shange met them there, arrested him and said that he was going to take him to Durban. He says Mr Manzini told Shange that the accused was not to make a statement in his absence and if he needed anything from the accused, he should contact him. Shange denied this and said that Manzini only said that he would see him at court for the first appearance.'

[30] The judgment fails to deal with any of the evidence of the attorney, Mr Manzini, and Mr Manzini's evidence that he was to be present when his client was to be

interviewed, was never rejected nor, in fact, dealt with in the judgment. Whilst the judgment concentrates on the rejection of the appellant's version that he had been assaulted, there is no credibility finding made against Mr Manzini, nor was his version ever rejected.

[31] Just like in *Ndlovu*, where the police were aware of the attorney of record, and specifically, as testified to by Mr Manzini, that he was required to be present when there was going to be examination of his client, the failure by the police to allow the appellant to consult with his attorney prior to the making of the confession or, indeed, have his attorney present whilst making the confession, results in, as Olsen J found in *Ndlovu*, the confession being falling foul of being admissible in terms of s 35(5) of the Constitution.

[32] In a similar vein, we consider the admission of the confession in the present appeal to be unsafe.

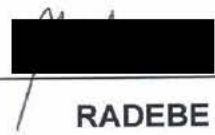
[33] Where an accused person has an attorney of record, and where the police ask the question whether an accused wishes to consult with their attorney '*before*' the making of a confession, then, it is unsafe for the court to rely on the confession where no such consultation has taken place.

Order

[34] Hence, the appeal succeeded and the following order was granted on 30 May 2025:

1. The appeal against conviction and sentence is upheld.
2. The conviction and sentence of the Court *a quo* is set aside.

I agree.


[REDACTED]
HARRISON J
[REDACTED]
RADEBE J

I agree


[REDACTED]
P-BEZUIDENHOUTJ

Appearances

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Date of order granted with reasons to follow:

30 May 2025

Date of delivery of reasons:

12 June 2025