



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

Case No.: AR370/17

In the matter between:

**SIFISO WISEMAN SITHOLE
MDALUYAZI MTHETHWA**

First Appellant
Second Appellant

and

THE STATE

Respondent

ORDER

On appeal from: the Regional Court for the Regional Division of KwaZulu-Natal held at Durban (Magistrate ES Mthembu presiding):

1. The appeal against conviction and sentence is upheld.
 2. The conviction and sentence of appellants 1 and 2 is set aside.
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JUDGMENT

Harrison J (MOSSOP J concurring):

[1] The admissibility of two confessions is the issue which is at the core of this appeal. Those confessions by appellants 1 and 2, who were the first and second accused respectively, in the court *a quo*, relate to charges of robbery with aggravating circumstances and rape. In writing this appeal, this court is mindful of the old adage that law students are taught in the very first semester of their legal studies, that 'It is better to free ninety-nine guilty men than convict one innocent man'. That adage resonates in this appeal as we are not convinced of the innocence of the two appellants, however, owing to the overzealous nature of the police in seeking to secure confessions and the manner in which the regional magistrate allowed the confessions to be admitted, we deem it unsafe for the court *a quo* to have relied on those confessions. In making such comments, we are also mindful that the justice system has also failed the complainant and victim through its failure to properly uphold the constitutional values and adequate procedures which ensure fair trials and sound convictions.

[2] The appellants, together with Lindelani Zamakuhle Khumalo ('Mr Khumalo') (accused 3), faced three charges before Magistrate ES Mthembu in the Regional Division in Nongoma. The charges were:

- (a) count 1 – robbery with aggravating circumstances;
- (b) count 2 – rape;
- (c) count 3 – possession of an unlicensed firearm.

(On the charge of possession all three accused were discharged in terms of s 174 of the Magistrates Court Act 32 of 1944, and it is unnecessary to deal further with this count).

The trial and the confessions

[3] The complainant, SK, had come to Esikhawini area to stay at her uncle's homestead in order to school at the local high school. She arrived at the homestead over the weekend. On the night of the incident in question, her half-brother had been with her until just before midnight. He had left and after midnight, three men broke into the homestead, held her at gun point, initially placing a basin over her head and, thereafter, covering her face with a scarf. The three men had removed her uncle's fridge and taken her outside. Whilst in the *ve/d*, she was gang raped by three men, the identities of whom were unknown to her.

[4] She had subsequently contacted her uncle who had then called another family member, who was a police officer.

[5] After SK had testified, the State called Mr BS Manzini, who had purchased the stolen fridge from accused 3. When the fridge was sold to him, appellants 1 and 2 were in his presence.

[6] The uncle, who was the first report, thereafter testified, confirming that SK had called him.

[7] The trial then proceeded to a trial within a trial relating to the admissibility of two confessions. The court dealt with the confessions in reverse order, namely, that of appellant 2 before dealing with appellant 1 and it is appropriate that we deal with the evidence in the same order.

[8] Captain Ntombela who took the confession of the second appellant, was from the self-same police station as the investigating officer. Appellant 2 was brought to him in order to record the confession. Captain Ntombela testified as to the answering of the questions as well as his observations as recorded in the preamble to the confession, which he read into the record.

[9] It is clear from the confession statement that Captain Ntombela was approached by the investigating officer, Detective Warrant Officer Buthelezi, directly, and asked to take the statement. The confession records that appellant 2 was arrested at '± 11h00' and the statement was taken at '14h15'. The confession records in pre-printed form that—

'He stated that I was requested to record the statement, and not a Magistrate, because (set out steps taken to secure the service of a Magistrate ...'

[10] The recordal by Captain Ntombela was:

'He informs me that he failed to get a Magistrate'.

[11] One of the questions which is contained in the preamble to the confession was question 10 which is set out as follows (the manuscript answers are recorded in bold):

‘10. You also have the right to consult, *before making of the statement*, with a legal representative of your choice, and if you cannot afford the services of such legal representative, a legal representative can be appointed for you who is not in the employment of the State and who’s services will be provided at no cost to yourself.

10.1 Do you understand these rights? **Yes**

10.2 Do you wish to exercise any of them?(sic) **Yes**

10.3 If so, how do you wish to do that? **To employ a State legal representative at Court.**

[12] In cross-examination, Captain Ntombela was specifically asked:

‘And you asked him if he wishes to exercise any of the rights you explained to him, including the one I’ve read to you just now, he said “Yes”?’

To which Captain Ntombela replied:

‘Yes’.

[13] It was further conceded by Captain Ntombela that appellant 2 had been escorted to him by what was known as ‘the task team’.

[14] During cross-examination, Captain Ntombela, when asked as to why there was a rush for him to take the confession and not wait for a magistrate to take it, he suggested that it had to be done as:

‘three hours doesn’t have to lapse because that might lead him - to the change of mind’.

[15] Captain Ntombela also conceded that he asked appellant 2 to show him his upper body, to see whether he had been assaulted, but then conceded that it was not his duty to assess appellant 2, those were a doctor’s duties.

[16] The evidence of Captain Ntombela was the only evidence led as regards the admissibility of the confession made by appellant 2.

[17] The trial within a trial then turned to the admissibility of the confession made by appellant 1. This confession was taken by Captain AM Zulu, who was, likewise, a captain at the self-same Nongoma Police Station as the investigating officer.

[18] In the confession taken by Captain Zulu, the explanation why he was requested to take the statement and not a magistrate, was answered with the response:

‘The Magistrate was busy’.

[19] Captain Zulu had been approached by the investigating officer, Detective Warrant Officer Buthelezi, personally, at 13h10, and proceeded to take the statement at 15h30.

[20] Captain Zulu testified as to the contents of the preliminary questions which he recorded, which mainly focussed on appellant 1 not having any injuries, and that he had not been assaulted.

[21] During the testimony of Captain Zulu, it was elicited that appellant 1 was also not taken to a district surgeon for any examination, either prior to, or post, the confession being taken. During cross-examination it was put that appellant 1 was assaulted, with injuries to the mouth and a tooth. This was denied.

[22] Appellant 1 was the only person to testify for the appellants in the trial within a trial. Appellant 1 testified that he was arrested by the members of the TRT team. He was placed in a bag and put inside a Quantum. He was taken to a dam where a black municipal plastic bag was filled with pepper spray and placed over his head. His head hit some stones and he broke a tooth. He was then taken to the police station where he contended that he was further assaulted and made to sign ‘many papers’. He signed the papers before Captain Zulu, who did not say anything to him.

[23] The regional magistrate admitted the statements and indicated that he would give reasons for the admission during the course of his judgment.

[24] The trial proceeded and the appellants, together with accused 3, were convicted of robbery with aggravating circumstances and rape.

[25] In his judgment, as regards the admission of the first confession made by appellant 2, the regional magistrate reasoned as follows:

‘Accused 2 informed him he was going to require the services of a Legal Aid attorney in Court and the accused 2 went on to say he still wished to continue making a statement before him, despite the fact that he had been given the preceding information and warning. .
.’.

[26] The judgment, thereafter, proceeds to record that Captain Ntombela, having undressed the second appellant, had not observed any injuries or any evidence of him being assaulted.

[27] As regards appellant 1, the judgment records the evidence of appellant 1, recording that:

‘The police continued assaulting him until one of his teeth broke after he had fallen with his face onto the ground.’

[28] In analysing the foregoing, the regional magistrate concluded that because appellant 2 did not give evidence under oath to support his contention of an assault, his credibility on that story could not be tested by the State. The judgment fails to deal with the issue of the legal representation and the warnings in any fashion.

[29] As regards appellant 1, the regional magistrate reasoned that because appellant 1 had not mentioned to the regional magistrate when he first appeared in court that he needed to see a doctor, that he had not been assaulted. The court a quo also found that there was no evidence of improper conduct by the police.

The law

[30] A useful starting point as to the admissibility of a confession is the evaluation performed by Ponan J in *Magwaza v S*,¹ which reads as follows:

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

[31] 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

[32] The analysis performed by Steyn J in *Mchunu* is useful as regards appellant 1. 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.’

[33] I agree that there is a need for there to be independence between the investigating officer, and/or investigating team, and the commissioned officer, as is emphasised in *Mchunu*, where Steyn J quotes from the minority judgment of Kruger J in *S v Nzama and another*.⁵

[34] Where *Mchunu* is applicable to appellant 1, the more recent judgment of *S v Ndlovu* is apposite to appellant 2.

[35] 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

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.

⁵ *S v Nzama and another* 2009 (2) SACR 326 (KZP) paras 32-33, see *Mchunu* para 12.

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 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

[36] The admission of the two confessions in the present matter was done in circumstances where safeguards to ensure the independent manner in which the confessions had been attained, were completely ignored by the police. It was unsafe to admit these confessions where:

- (a) The officers taking the confessions were from the same police station.
- (b) The reason for the failure to take the arrested person before a magistrate is vaguely stated as being the unavailability of a magistrate.
- (c) The investigating officer and the officer taking the statement were interacting with each other and not acting independently of each other.
- (d) There was no examination pre- or post-confession by a district surgeon.
- (e) There were other people present during the taking of the confessions.
- (f) The constitutional warnings in regard to appellant 2 were ignored.

[37] The regional magistrate, in ruling the confession admissible against appellant 1, sought in part, to rely on the reasoning that because appellant 1 had not told the magistrate at the bail application of his need to see a doctor, he did not do so as he had not been assaulted. There is an obvious flaw in this logic, particularly as the regional magistrate, in the trial, was equally aware of the allegation of assault

and yet did not refer appellant 1 to the district surgeon to see whether his tooth had been broken or not. The judgment is singularly silent on this point. It is not like a tooth can regrow and the issue of the broken tooth could and should have been independently verified with proper medical evidence, prior to the admission of the confession. The regional regional magistrate hearing the trial, was in no better or worse position than the magistrate hearing the bail application in directing that appellant 1 be medically examined. That no medical examination was performed renders the admission of appellant 1's confession unsafe.

[38] As regards appellant 2, it is clear that what was put to him by Captain Ntombela is 'you also have the right to consult, *before* making of the statement. . .' The very phrasing of the statement to which appellant 2 assented, was that he was informed of his right to legal representation before making the statement. The suggestion by Captain Ntombela 'that the right was going to be exercised at a later stage', ignores the very constitutional warning that was given, namely, that appellant 2 was informed of his right to consult before he made the statement. Appellant 2's constitutional right to consult with his legal representative before he made the statement was not upheld. This is a clear breach of s 35(2)(b) of the Constitution.

[39] The interview, and the taking of the statement of appellant 2, ought to have ceased at the point when appellant 2 had indicated he wished to exercise the right of having a legal representative present, and Captain Ntombela should not have continued with the taking of the confession. The taking of the confession after that indication renders that confession unsafe and inadmissible again in terms of s 35(5) of the Constitution.

[40] Once the confessions are excluded, the State's case as regards appellants 1 and 2, and their identification, collapses. The State led no other evidence so as to connect appellants 1 and 2 to the crime of robbery with aggravating circumstances, or the rape.

[41] Once the confessions are excluded, there is no basis for the conviction of appellants 1 and 2. The regional magistrate, for all the reasons aforesaid, ought not

to have accepted the confessions and, in addition thereto, the admission of those confessions render the trial of appellants 1 and 2 unfair in terms of the provisions of s 35(5) of the Constitution and, for those reasons, the appeal by appellants 1 and 2 must succeed, and their conviction and sentences set aside.

[42] In light of these findings, this judgment needs to be brought to the attention of accused 3, Mr Khumalo, who was not an appellant before this court.

[43] As a Parthian shot, whilst appellants 1 and 2 may have succeeded on appeal, they have done so purely because this court considers it unsafe to have relied on the confessions so obtained, based on the upholding of the principles of the Constitution. The complainant victim has been let down by overzealous police and an overzealous regional magistrate in seeking to admit inadmissible evidence.

[44] I, accordingly, propose the following order:

1. The appeal against conviction and sentence is upheld.
2. The conviction and sentence of appellants 1 and 2 is set aside.

G M HARRISON J

I agree and it is so ordered;

RG MOSSOP J

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