

IN THE HIGH COURT OF SWAZILAND

In the matter of: CRIM. CASE NO. 270/85

THE QUEEN

VS

AMOS SITHOLE AND 2 OTHERS

CORAH: DUNN A. J.

FOR CROWN: MR THWALA

FOR DEFENCE: MR MATSEBULA FOR ACCUSED NO. 1

MR SHILUBANE FOR ACCUSED NOS 2 & 3

RULING ON THE ADMISSIBILITY OF ONFESSIONS

MADE BY ACCUSED NOS 1, 2, and 3

(Delivered on the 23/10/85)

DUNN A. J.

The 3 accused are jointly charged on counts 1 and 2 with the crimes of murder and robbery respectively. On counts 3 and 6 accused Nos 2 and 3 are jointly charged with the crimes of House-breaking with intent to steal and Theft. Accused No. 1 pleaded guilty on counts 4 and 5 wherein he was charged with contravening sections 11 (1) and 11 (2) of the Arms and Ammunitions Act No. 24/1964.

At the inception of the trial the Crown called a Magistrate, Mr Luthuli, to give evidence of confessions made to him by each of the accused at Pigg's Peak. The defence, conducted by Mr Matsebula on behalf of accused No. 1 and Mr Shilubane on behalf of accused Nos 2 and 3, indicated that it was contesting the admissibility of the confessions by the accused on the grounds that such confessions had not been freely and voluntarily made by the accused and without having been unduly influenced thereto.

the A trial within trial was then held to determine the admissibility of the confessions.

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Mr Luthuli gave evidence of the preliminary questions which appear on the roneoed forms for the recording of statements by accused persons which he stated he put to each of the accused. It was his evidence that he was satisfied that each of the accused was in his sound and sober senses and that he explained to the accused that they were not obliged to say anything to him and that whatever they said would be recorded in writing and could be given in evidence at their trial.

The confessions of accused Nos 1 and 2 were recorded on the Friday 31st May 1985 and that of accused No. 3 was recorded on Monday 3rd June 1985. According to Mr Luthuli accused No. 1 stated that he had been arrested on the 11th May and had been held in custody at the Mbabane Police station. Accused No. 1 replied in the negative to question 5 on the form which reads:

Was any promise or threat made to you or was anything said or done to you to induce you to make a statement to me?.

The accused replied in the affirmative when asked if he had received any injuries since his arrest.

(Question 6), There is a note to question 6 which reads:

If any injuries are shown a note of their nature and location should be given below.

The following appears in the space provided below question 6: I received two injuries on the right leg. Accused shows two injuries which are about two (21 cm each) (sic). I also received injuries on my private parts. These were inflicted by the Police at Mbabane Police Station. Mr Luthuli explained in his evidence that the injuries were

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about two centimetres each. Accused No. 1 further stated that he had previously made a statement to some police officers whose names he did not know, at the Mbabane Police Station on the 30th May 1985.

Mr Luthuli stated that accused No. 2 informed him that he had been arrested on the 9th May 1985 and that he had been held in custody at the Mbabane Police Station. Accused No. 2 replied in the negative to question 5 on the form. The following appears in the space below question 6: Accused shows a wound on the leg (right) which is about 2 cm which is an open wound. On the forehead accused shows an open wound which is about 3 cm with stitches. In reply to question 7 which reads:

Have you previously made any statement?" Accused No.2 replied:

Yes. At the Police Station Mbabane on the 30th May, 1985. Three police officers took down the statement but I do not know their names. Others just asked questions.

Accused No. 3 told Mr Luthuli that he had been arrested on the 9th May 1985 and held in custody at the Mbabane Police Station. Accused No. 3 replied in the negative to question 5. He replied that he had not received any injuries since his arrest and none were visible to the Magistrate. He stated that he had not previously made any statement.

According to Mr Luthuli the 3 accused spoke what he thought was either Portuguese or Shangaan. The Station Commander Pigg's Peak, arranged for an interpreter. The interpreter interpreted from Portuguese to siSwati and the

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Court interpreter interpreted from siSwati into English. Mr Luthuli stated that the confessions were read back to each of the accused who each acknowledged that they had been correctly recorded. The statements were signed by the accused.

It was evident from the cross-examination of Mr Luthuli that he had offended against what has been stated in numerous decided cases that a Magistrate who records a confession from an accused should not permit himself to become merely an amanuensis, in making the preliminary enquiries reflected on the roneoedforms. See R v MTABELA 1958 (i) S. A. 264; R v D 1961 (2) S. A. 341 Mr Luthuli made no attempt to ascertain when accused Nos 1 and 2 had received the injuries. They had been in custody for over 20 days. No attempt was made to ascertain why the accused had received the injuries and by whom the injuries were inflicted on the accused. Mr Luthuli stated that he did not as a man consider it "proper" to examine accused No. 1's private parts. This is of course entirely unsatisfactory and is a matter which the Magistrate should have gone into particularly as the accused's evidence which I shall deal with was to the effect that the police had crushed one of his testicles. Had the Magistrate gone beyond merely asking the questions on the roneoed form he would no doubt have been in a better position to put and explain the purport of the questions on the form in the context of the provisions of section 226 (1) of Act 67/1933, to the accused, before recording their statements.

Several matters which go towards the accuracy of the statements recorded by the Magistrate were raised by the defence in the cross - examination of the Magistrate. These related to the fact that the interpreter

who was called to interpret from Portuguese into siswati was not sworn in as

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an interpreter. Further, that the interpreter was not competent to the extent that there were lengthy exchanges between him and the accused for which the interpretation amounted to no more than short sentences. It was put to Mr Luthuli that he had shown very little patience throughout the recording of the statements and had on occasion threatened to stop recording the statements if the accused did not give smooth, step by step accounts of what they stated had taken place. It was put to Mr Luthuli that he had in fact torn up the statement being given by accused No. 1 and had told him to leave the office to go and think before proceeding with his statement.

These matters were denied by Mr Luthuli. It is, however, clear from the evidence of the two interpreters who were called by the Crown after the accused had given evidence that what was put to Mr Luthuli was in fact what had taken place when the statements were recorded. I am, however, not concerned at this stage of the trial, with the truth or otherwise of the statements but with the question of whether or not they were made freely and voluntarily without the accused having been unduly influenced thereto.

Mr Luthuli was most difficult as a witness, displaying extreme impatience under cross - examination. He took it upon himself to determine what were and were not relevant questions, declining whenever it suited him to answer the latter type of questions. I am at pains to understand the Magistrate's attitude in this case. It was not the first time for him to record a statement from an accused person and thereafter to give evidence in the High Court on the recording of such statement. I will not deal any further with this aspect of the Magistrate's evidence, at this stage.

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The 3 accused each gave evidence, at the conclusion of the Magistrate's evidence. Accused No. 1 told the Court that he was arrested on the 11th May 1985. He stated that he was assaulted on that day to the extent that he lost consciousness for 3 days. Thereafter he was assaulted everyday until the day on which he made the statement to the Magistrate, Accused No. 1 stated that the police questioned him about a woman who had been killed. He denied knowledge of the murder and the police proceeded to assault him. The police threatened to blindfold him and the other accused and take them to a forest where they would be killed. He stated that in the course of the assault one of his testicles was crushed by the police. It was accused No. 1's evidence that as a result of the beatings that he and the other accused received they decided to build up a story placing responsibility for the murder on one Julio Candido. The plan was discussed in the cells, in the presence of Paulo Nobella who was also being held by the police. According to accused No. 1 the story was invented after the 3 accused had been identified by some body who said that they had come to the deceased's house to ask for water. The police at that stage then said that they would kill the accused if they did not confess. Accused No. 2 told the Court that he was assaulted everyday by the police during the first 8 days following his arrest. Nothing was done to him thereafter. Accused No. 2 stated that he accepted that he was involved in this case in order to stop the police from assaulting him further. The police insisted that he was the person who was carrying a gun at the deceased's house. It was accused No. 2's evidence that the police threatened him with further assaults if he did

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not repeat the story which they had told him, to the Magistrate.

Accused No. 2 explained that he had received the injury on his forehead when he was attacked by somebody, sometime before his arrest. He had reported the matter to the police and had been referred to the Government Hospital where the wound was stitched.

Accused No. 2 pointed out 6 police officers whom he said had assaulted him at the police station.

Accused No. 3 told the Court that he was assaulted for about a week after his arrest. He was assaulted with sjamboks, rubber sticks and fists. He did not sustain any visible injuries but stated that he informed the Magistrate of pains he had around his ribs. He stated that what he told the Magistrate was what the police had told him to say, in the course of the assault. Accused No. 3 pointed out 7 police officers whom he said assaulted him. He pointed out Allen Ndlovu as the officer that assaulted him and taught him the story he repeated to the Magistrate.

The police officers that were pointed out by the 3 accused were called by the Crown to rebut the allegations of assault made by the accused. It is not necessary for me to consider this evidence in any great detail. The allegations of assault were denied by the police. The evidence of the officers was that the accused were co-operative and in fact voluntarily made statements on the 30th May 1985 on the basis of which they were advised to appear before a Magistrate. It emerged from the evidence of the Police that the

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accused were brought together at about 11.00a.m. on the 30th May 1985. Assistant Superintendent Vilakazi headed several police officers who interrogated the 3 accused until at least 3.00p.m. on that day. It was at the end of this interrogation that arrangements were made to convey the accused to the Magistrate. Assistant Superintendent Vilakazi was not clear in his evidence of the circumstances leading up to the accused being taken before a Magistrate. It was not his evidence that the accused had said anything to him which caused him to explain to them the manner in which statements are made for a judicial officer. It cannot be in the circumstances be held that the accused were taken before the Magistrate at their own instance.

The police officers who arrested the 3 accused stated that the accused did not have any visible injuries at the time of their arrest. It must on this evidence be accepted that whatever injuries the Magistrate observed (excluding the injury on accused No. 2's forehead) were sustained by the accused during the period they were held in custody at the Mbabane Police Cells.

The two interpreters who assisted the Magistrate in recording the statements from the accused were called to give evidence. Whilst as pointed out earlier, their evidence relates to the accuracy of the recording, there is clear evidence of a gross irregularity by the Magistrate in losing his patience with accused No. 1 and tearing up his uncompleted statement. It was not the Magistrate's function to dictate to accused No. 1 the fashion in which he was to give his statement. It was not the Magistrate's function to inform accused NO. 1 that what he was saying differed from what had been said by accused No. 2. It was open to the Magistrate to question the

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accused in order to clarify any misunderstandings in his statement but certainly not to prevent the accused from what the Magistrate might have seen as unnecessary wandering from one point to the other by the accused. The Magistrate should have recorded the statement as given by accused No. 1 no matter how confusing it sounded or appeared to the Magistrate.

The interpreters confirmed the defence allegations that accused No. 1 had been ordered out of the Magistrate's office to go and put his thoughts together and return to the Magistrate for his statement to be recorded de novo. The evidence was that the accused was made to return to the police vehicle where the other accused were. There were police officers near the vehicle. This was no doubt highly irregular on the part of the Magistrate.

It further emerged from the evidence of the interpreters that accused Nos 1 and 2 complained of hunger to the Magistrate.

This fact was recorded by the Magistrate in the statement of accused No. 2. Accused No. 1 was said to have been unable to speak properly as he was weak and shivering from hunger. The Magistrate had first

to allow food to be obtained for the accused before recording his statement.

Julio Candido was failed to give evidence by the Crown. He denied that he was in any way involved in the murder of the deceased. He stated that he had been falsely implicated by the accused who refused to give him a reason for having done so. Julio was detained briefly and then released by the police without being charged.

At the request of the Court, accused No. 1 was examined by Dr Sarugasser. The purpose of the examination

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which was unfortunately done at a very short notice was to attempt to establish the truth or otherwise of accused No. 1's evidence that he had sustained injuries to his private parts. The doctor testified that accused No. 1's right testicle was enlarged and showed tenderness. The accused's left testicle was about the size of a pea. According to doctor Sarugasser the accused's condition could have been congenital. He could not however rule out the possibility that the condition arose as a result of an assault as stated by the accused. The failure by the Magistrate to make a proper enquiry into accused No. 1's complaint that he was injured on the private parts, leaves the matter in the balance. The Magistrate's observations at the time might well have shed some light on the doctor's evidence.

I was addressed at some length by the defence and the Crown at the conclusion of the trial within the trial. The question of the truth of the confessions was overemphasised by the defence. This is of course not the issue for determination in the trial within the trial, the issue being whether or not the statements were made freely and voluntarily by the accused. An attempt was made by the defence to introduce the fact that accused Nos 1 and 2 had been starved before being taken before the Magistrate and that the accused had been subjected to unduly lengthy interrogation. There is no merit in these submissions. It was not the accused's evidence that these two matters had any bearing on their being taken before the Magistrate. Accused No. 2 stated that he had last eaten at 3.30p.m. on the day before he went before the Magistrate. It was not accused No. 1's evidence that he had been deliberately starved in order to have him confess to the Magistrate. He did not complain of hunger to Assistant Superintendent Vilakazi

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on the 30th May. The accused stated that they were given bad food which they did not like. It was not their evidence that they were given no food at all. The evidence tendered in the trial within the trial did not in anyway suggest that the interrogation of the accused was unduly lengthy as to have had a bearing on the accused's appearance before the Magistrate.

It cannot in my view be said that the interrogation of the accused and the fact that they complained of hunger when brought before the Magistrate were matters which were improperly brought to the attention of the accused and were calculated to induce them to confess to the Magistrate.

The accused were to some extent questioned on the contents of the statements they made to the Magistrate. The accuracy of the interpretation was very much in issue as the accused indicated that the interpreter had not interpreted correctly. The Crown did not pursue this line of cross - examination.

It appears to me that the evidence on the assaults and the denial thereof is in the balance. Evidence which could have to some extent settled this issue one way or the other was allowed to go unrecorded by the Magistrate who failed to appreciate the need to carry out a proper enquiry as to the history of the injuries he observed on the accused before recording the statements.

It is trite law that the onus rests upon the Crown to prove the requirements of admissibility as laid down in the first proviso to section 226 (1), and that this onus is discharged by proof beyond any reasonable doubt. See R v DOUGLAS ZWANE and OTHERS 1970 - 1976 S. L. R. 231, The Crown has not in my view discharged this onus. I rule

that the confessions made by the 3 accused are inadmissible as evidence in this case.

B. DUNN

ACTING JUDGE.