

In the matter between:

REX

VS

**SAMSON MAGAGULA
LUCAS MAGAGULA**

CORAM: MASUKU J.

**For the Crown : Mr M.T. Nsibande
For the Accused : Mr J.W. Maseko**

RULING ON ADMISSIBILITY OF STATEMENT (S.226)

9th March 2001

Masuku J.

On the 2nd March, 2001, I held that the statement made by Accused 1 before the Magistrate was freely and voluntarily made and was therefor admissible. I indicated that reasons therefor would follow. These now follow.

The accused persons stand before me charged with two counts, namely of murder and attempted murder. They have both pleaded not guilty to both charges.

On the 29th October 1998, Accused 1 made a statement to the Senior Magistrate, Lubombo District. The admissibility of this statement was contested, primarily on the grounds that it was not freely and voluntarily made, it being alleged that a Police Officer affectionately known as "Tallman" threatened the accused person with shooting before he went to record the statement before the Magistrate.

The admissibility of the statement in question in this matter is governed by the provisions of Section 226 (1) of the Criminal Procedure and Evidence Act, 67/1938.

In order for a statement to be rendered admissible, three requirements must be shown to exist. This is provided for by the proviso to Section 226(1), namely

- i) the statement must have been freely and voluntarily made;
- ii) in that person's sober sense; and
- iii) without having been unduly influenced thereto.

Regarding the first requirement, it was stated that it has to be shown that the statement was not induced by any promise or threat by any person in authority - **R v BARLIN 1926 AD 459 @ 562**. As to the second, it was stated that it does not mean that the accused was in a state of quiet serenity, free of physical or mental discomfort when he made it. The test rather, is whether the accused was in sufficient possession of his understanding so as to have known what he was saying. That he was inebriated at the time does not *per se* mean that he was not in his sound and sober senses, save in circumstances where he was motherlessly drunk so as not to appreciate what he was saying.- **R v RAMSAMY 1954 (2) SA 491 (A)**.

The last requirement has been held to mean that it must be shown that there has been no threat or promise proceeding from a person in authority and no statements induced by violence, threats, promises, or subtler inducements that negative his freedom of volition.

The onus is on the Crown to show that the statement was freely and voluntarily made. This onus must be discharged on a balance of probability.

In discharging the onus, Mr Nsibande called Magistrate Gumede who recorded the statement in question. It was his evidence that Accused 1 was brought to him by 3898 Constable P.

Ntshangase on the 29th October, 1998 at Simunye Magistrate's Court. He testified that he was alone with the accused person when the statement was recorded and the door was closed.

He testified that he told the accused that he was a Magistrate and that the accused could tell him whatever he wished to, which would be recorded and could be used against him in his trial. The learned Magistrate proceeded to record the statement from the accused in Siswati and it was later translated to English by an interpreter. Each page of the statement was initialled by both of them. He filled the *pro forma* with all the enquiries to be made of the accused.

It was put to him that "Tallman" was sitting in a vehicle within the Courtyard and had accompanied Constable Ntshangase. It was also suggested that Tallman and 3187 Constable Mfanasibili Dlamini had threatened the accused that he would be shot if he refused to record the statement and that if he did not tell the Magistrate the truth, they would know and would deal with him. It was also suggested to him that the officers said that they would watch the proceedings from a vantage point. All this the learned Magistrate understandably stated he

did not know as it never happened in his presence nor was he informed about it.

Having recorded the statement, it was translated to English as aforesaid, typed and later taken to the Tshaneni Police Station. The Magistrate testified further that before administering the caution to the accused, he established the accused's mental state and from his observation, accused, although he did not know him previously, was neither angry nor happy and there were no visible injuries on his person. The Magistrate satisfied himself that he was fine. It was his evidence in re-examination that the accused was asked if he had been threatened and he said he had not been threatened to induce him to make the statement.

The Crown then called 1823 Detective Sergeant Paul Magagula (a.k.a. Tallman). He testified that he was not involved in the arrest and that his role involved accompanying some officers who went to collect exhibits. He also read the accused's statement to the Police and advised him to go and make a statement to a Magistrate. He testified that he never threatened the accused with shooting as there was no need and he never took him to make the statement to the Magistrate. He denied buying any food for the accused and further denied saying the accused done well by recording the statement. It was his evidence that he was not the investigating officer in the matter. He was cross-examined at length but he maintained his story.

The next witness was 3187 D/ Constable Mfanasibili Dlamini, the investigating officer. He denied being accompanied by Tallman during the accused's arrest. He further denied offering any threats to the accused if he refused to make a statement to the R.S.P. and the Magistrate and further denied that he threatened to shoot the accused if he gave a different story to the Magistrate. He testified that he saw the statement made to the Magistrate some two (2) months later. He denied having interrogated the accused with Tallman.

In cross-examination, it was put to him that he was with Tallman during the arrest and that he threatened the accused with shooting him which he denied. He testified that he cautioned the accused in terms of the Judges' Rules. He further denied that he would shoot the accused if he changed his story before the Magistrate and cause would him to feel what his victims felt when he shot them.

The next witness was Constable Phathumuzi Ntshangase, who testified that he was detailed to take the accused before the Magistrate on the 29th October 1998, having arrived at the station the previous day. He was with a driver by the surname Magagula and also with both accused persons. 3187 D. Constable Dlamini was not with him. He denied that "Tallman" was with him and stated that the statement recorded by the accused was not given to him by the Magistrate.

In cross-examination, it was put to him that he only took A1, not A2, but he said both were there. He denied being accompanied by Tallman on that trip. He stated that he sat outside, next to the door, which was closed and could not hear what was being discussed inside.

The Crown closed its case. The accused testified that he was arrested by D/Constable Dlamini and Tallman. They took him to Tshaneni Police Station around 12 noon. At 9pm, they took him from the cells gave him a pen and paper and instructed him to write about what had happened and that if he did not, they would shoot him since they knew everything regarding that matter. He then complied. The following day, they told him to fetch the firearm and would shoot him if he refused. He said he was afraid of the R.S.P. and had no

previous contact with them; had read newspapers and listened to news on the radio to the effect that people were shot by the Police. He therefor went to fetch the firearm.

Tallman then told him, that they would go to the Magistrate to record a statement which should be in *pari materia* with the one given to the Police. Tallman told him that the statement would assist him during the trial. He further stated that if it differed, he (Tallman) would know and see and would shoot him again. He further said he would listen to what the accused would say to the Magistrate and indeed the accused says he saw Tallman sitting in the Police van through a window which was open.

He stated that the Police were armed with firearms when they arrested him and they never cautioned him in terms of the Judges' Rules. He was not cautioned before recording the statement before the R.S.P. He states that the following morning, Tallman told him what questions would be put to him by the Magistrate and said the accused should not tell the Magistrate that he (Tallman) had caused the accused to record the statement. He said the Magistrate asked him about threats and he said there were none because he feared the Police as he was going back to their custody. He stated that had he not been threatened, he would not have recorded the statement and would not have produced the firearm.

In cross examination the accused stated that the only reason why he wrote the statement was because he was afraid of being shot and that nothing else was said or done to him to induce him to record it. He stated that when he went to record the statement before the Magistrate he was very much shaken. He stated that the Police never advised him to make the statement. It was put to him that people of his class do not fear the Police but know them as people who render assistance. He agreed but stated that he personally feared the Police.

I have serious problems with the accused's story as will appear below. First, the Magistrate's evidence was very clear. He duly cautioned the accused before recording the statement. The accused told the Magistrate that he asked the Police to bring him to the Magistrate and said nothing was said to force him and further stated that nothing was said or done to induce him to make the statement. He volunteered the fact that he was not assaulted. The Accused said in Court that he was very shaken but the Magistrate's version was that the accused looked fine and was cool calm and collected and talked freely such that the statement was about six pages. He observed no injuries on the accused.

If it was true that Tallman had threatened to shoot him, he could have, with his level of sophistication told the Magistrate. He however emphasised to the Magistrate that this was not the case.

Secondly, the Police Officers impressed me with their evidence, which was given matter of factly, in particular, Tallman and D/Constable Dlamini. When put to them that they threatened the accused with shooting, they both showed an unrehearsed shock at the suggestion, which caught my attention. In particular, there is no reason why Tallman should have distanced himself from the interrogations in this matter if he did carry them out. Further, there is corroborative evidence that he did not accompany the accused to Simunye and did not interrogate the accused. I am satisfied about this as it is clear from Tallman's evidence and from that of Constable Ntshangase. I find for a fact that he did not participate in the manner suggested. The suggestion that he did is outright falsehood. Ntshangase was however unimpressive when he said Accused 2 also went with him to make a statement before the Magistrate. This finds no corroboration in the Crown's evidence. He may have

been mistaken on this point, regard being had to the time lapse. In any event, the question as to whether Accused 2 was present is immaterial to the crucial issue, in this trial within a trial.

Thirdly, the accused started introducing new issues which were never suggested to the Crown's witnesses. These include the following-

- a) It was never suggested to Tallman that he told accused what questions the Magistrate would ask him. Further, it was not suggested to him that he told the the accused not to inform the Magistrate that he had told the accused to make a statement;
- b) It was never suggested that Tallman told the accused to write the statement because it would assist him during the trial. What was put was that the accused would be shot if he did not write the statement; and that it would assist him with his release;
- c) It was never put to any of the officers, particularly D/Constable Dlamini that they were armed with pistols when they arrested the accused;
- d) The accused never stated as would be expected, that the Police said they would mete out the treatment he meted out to the deceased and Mpamane as was constantly being put by Mr Maseko to all the Crown witnesses. This was crucial;

The above issues only emerged when the accused took the witness stand for the first time . In the circumstances, I am fully justified in regarding them as an afterthought – **R v Dominic Mngomezulu Crim. Case No. 94/90 , S v P/1974 (1) SA. 581 at 582** (unreported).

Forthly, the accused was taken before the Magistrate within two days of his arrest and according to Tallman, there was no need to threaten him, suggesting that he was co-operating during interrogation and as a result, the accused confirmed that no assault or other threat was offered to him. Du Toit *et al* "Commentary on the Criminal Procedure Act," Juta, 1995, state as follows at page 24-59.

"Confessions extracted by persistent questioning cannot be excluded on that ground alone...They will however be excluded if the accused's freedom of volition is sufficiently impaired by persistent and aggressive questioning, or where fatigue breaks down his powers of resistance and induces him to speak where he would otherwise not have done so"

In this case, there was no persistent or aggressive questioning. The accused testified that

nothing other than the alleged threat was made and nothing else was done to him. Had there been a prolonged interrogation, his story could be believable. Tallman stated that he advised the accused to go and make the statement to the Magistrate and this was not controverted until the accused took the witness stand and said he was never advised. The circumstances of this case support Tallman's version that there was no need to threaten the accused, especially in view of the date of his arrest and the making of the statement.

There is also some fallacy in the accused's story that Tallman said he would know if the accused told a different story as he (Tallman) would be listening. The accused testified that the window was open and Tallman was in a vehicle and was visible to the accused as he made the statement. When asked how far the vehicle was, the accused hesitated and then pointed at a distance some ten metres away. Clearly, this was a lie. A man ten metres away and in a vehicle could not hear discussions going on in a room even if the window was opened. Even if the accused was naïve and gullible, he could not have expected Tallman to hear the content of his conversation with the Magistrate from the distance and the place alleged.

The accused further told a story that was mutually destructive. He said that Tallman, (who said he was not there and I believe him in this) bought him a chicken take-away and said he had done well. Two problems arise from this. Firstly, Tallman did not and could not have known what the accused had said to the Magistrate (if he was there, which I have held he was not) because from where he was, he could not hear what went on. Secondly, he did not have the statement from which he could read and confirm that the story had been told as he expected thus rendering congratulations in order. It was not even suggested to Tallman that he asked the accused what he had said to the Magistrate, in which case congratulations would have followed a confirmation by seeing the written statement.

Regarding this issue, the accused also said that when Tallman gave him the food he was shocked and thought that this was because he had recorded the statement Tallman wanted. Tallman could not know at this stage what the accused had said to the Magistrate. Later he said the Police congratulated him by buying him the food. The alleged shock by the accused is quite incongruous with the congratulations and this renders the accused's story not worthy of belief. If he had told the story as expected he would not be shocked at being congratulated therefor.

The accused did confirm that the Magistrate treated him well but then said the Magistrate did not warn him of his rights but only told him to be free. This is false because the Magistrate did say the he warned the accused of his rights and he was not controverted on this. Furthermore, this is also confirmed by the *pro forma*. According to the Magistrate, the accused was cool, calm and collected as he told his story.

In the premises, I reject the accused's story as false. He was not being truthful that Tallman was present at Simunye or during his interrogation. Having regard to the statement and the surrounding circumstances, the questions posed and the answers given thereto, it is my

considered view that the statement meets the criteria set out in section 226 (1) and the first proviso thereto. It is therefor held to be admissible in evidence against the accused.

T.S. MASUKU
JUDGE