

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 188/07

In the matter between:

MXOLISI GAMEDZE

VS REX

CORAM:MONAGENG, J

FOR CROWN:MR. P. MDLULI

FOR ACCUSED:MR. C. HLANZE

ACCUSED: PRESENT

RULING **7th JULY 2008**

[1] The accused person Mxoliso Gamedze faces three criminal charges viz: murder, robbery and rape. He has pleaded not guilty to murder and rape and guilty to the charge of robbery.

[2] The Crown has sought to have the Court admit an

inculpatory statement that the accused gave to Magistrate David V. Khumalo, after the accused gave a statement to the police, which statement the police decided should be given to a judicial officer, and reduced to writing as required by the law.

[3] The defence objected to the admission of the statement on the ground that it was not given voluntarily. The defence in essence asks the Court not to admit it as part of evidence. As a result of this, and on request of the defence, I acceded to a holding of a trial within a trial, in order to establish the voluntariness of the statement.

[4] This is pursuant to Section 226 of the Criminal Procedure and Evidence Act, which section provides that the confession should have been made freely, voluntarily and made by a person in his sound and sober senses, without having been unduly influenced thereto.

[5] The Crown bears the onus of proving that the statement was given voluntarily. The Magistrate gave evidence as TWTI. The Crown called several witnesses. My understanding of the accused's objection to the statement is that the magistrate did not go beyond the pre-typed form that he completed before recording the statement. The defence contends that the magistrate should have asked the accused why he had

come to make a confession statement not only why he had come to him.

[6] Further that the judicial officer should have informed the accused of his right to legal representation, since Swaziland presently operates under a constitution that provides for this right.

[7] I have failed to appreciate why the magistrate is expected to ask the accused why he had come to make a confession, because at that stage, the magistrate would not have known that the accused had come to make a confession. It would actually be prejudicial on the accused for the magistrate to suggest that the accused was appearing before him to make a confession, statement. After all accused persons do not necessarily always appear before a magistrate to make a confession statement.

[8] The prison officer who brought the accused to Court confirmed that he did not inform the magistrate that the accused had come to give a confession. As for informing him of his right to legal representation, again, the magistrate could not say that to him when he did not know what he had come for. The accused gave his statement, and confirmed that no pressure had been applied on him to say what he knew about the case. And in any case, the police had already

told him that. Learned Counsel also said that the fact that he was brought to Court from a prison cell, could have induced him to relate what he related to the magistrate. All other witnesses for the Crown denied using any pressure on the accused person.

[9] As a suspect, and a detainee who was still under investigation, I do not know where else he could have been kept, except in a place of detention, and if the prison environment made him confess, this is mere speculation. Learned Counsel canvassed all possibilities of duress as possibilities and as having been applied on the accused. The accused himself in his evidence in Court denied all the propositions by his Counsel and confirmed that there was no pressure on him to make the statement, just as much as he confirmed this to the magistrate.

[10] I am minded to agree with Counsel for the Crown, that in this case the accused is asking me to speculate and draw conclusions that are not based on facts.

[11] It is trite that in considering voluntariness of a confession, external coercive factors should be proved to have existed. These could, as both Counsel submitted, be threats, actual physical assaults and promises, especially those designed to trick the accused into expecting leniency if

he inculpated himself among others.

[12] By the accused's own admission, none of these have been proved to exist. The Court can therefore not speculate. Whichever way I look at the surrounding circumstances I have failed to identify any factor that can be said to have played a role on the accused giving this statement. In the result, I find that it was given freely and voluntarily and that the accused was in his sound and sober senses when he did so. I find no evidence of undue influence.

[13] The statement is therefore admitted as part of evidence of the Crown. The main trial shall continue.

SM MONAGENG

JUDGE