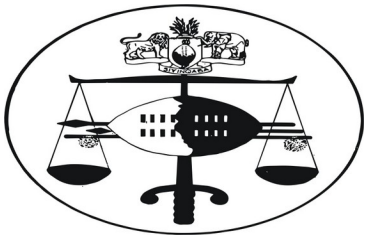

IN THE HIGH COURT OF SWAZILAND

Case No. 296/11

In the matter between

REX

and

MZWANDILE MZWAKHE DLAMINI
MANQOBA KOBAS ZWANE
MLUNGISI MLUNGU DLAMINI

Neutral Citation: *Rex v Mzwandile Mzwakhe Dlamini & 2 others* (296/11) [2013] SZHC 50 (21 February 2013)

Coram: **Mamba J**

Heard: **18 and 19 February 2013**

Delivered: **21 February 2013**

RULING ON
THE ADMISSIBILITY OF STATEMENTS MADE BY ACCUSED BEFORE A JUDICIAL OFFICER

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[1] Criminal Law – s 226(1) of Criminal Procedure and Evidence Act 67 of 1938 – Admissibility of Statement by suspect made to a judicial officer – onus rests on crown to prove admissibility thereof.

[2] Criminal Law and Procedure – use of interpreter – interpreter to be proficient and knowledgeable of languages used – interpreter to be a sworn one and must state that she interpreted to the best of her knowledge and ability – where correctness of interpretation questioned – evidence of interpreter crucial failing which interpreted version hearsay.

[3] Criminal law – in a case where authenticity or correctness of statement challenged by accused and crown failing to rebut this – statement inadmissibility.

[4] Criminal law – where accused not warned of their legal rights to legal representation, to remain silent and what the consequences of making an extra curial statement before a judicial officer were – such may render resultant statement inadmissible.

[1] It is common cause that the first and second Accused persons (hereinafter referred to as A1 and A2 respectively) were arrested on 21st July, 2011 by members of the Royal Swaziland Police in Manzini. It is common cause further that on 25th July 2011, they were separately taken before a magistrate in the same city before whom they made a statement pertaining to the crimes they had been arrested for and charged with, namely MURDER AND ROBBERY.

[2] A1 made his statement before magistrate Dumisa Mazibuko (Pw1) whilst A2 made his before magistrate Sindisile Zwane (Pw2). Both magistrates testified that the accused were brought to them by Police Officer 5202 Mkhwanazi. Each of these accused persons have challenged the admissibility of his statement and in order to determine the admissibility or otherwise of these statements, the court embarked on a trial-within-a trial or *voire dire*.

[3] At the beginning of this exercise and relying on the procedure and practice advocated for by this court in R v MAGUNGWANE SHONGWE AND OTHERS, 1982-1986 (2) SLR 427, the court asked the defence to state or place on record each Accused's grounds for challenging the admissibility of the statements in question. This was done and as expected, these grounds of objection were made clearer and or substantiated when the defence cross-examined the crown witnesses. Before stating the grounds of objection by the defence, I set out the procedure as laid down by Hannah CJ in *Magungwane Shongwe* (supra) at 427H-428B:

> 'In my judgment the better course and the course which would normally be followed, is for the prosecution to lead evidence first. It is, after all, the prosecution which has the burden of proving that the statement was made freely and voluntarily and the accused may have no need to enter the witness box at all. Defence counsel should outline the grounds of his objection and in most cases the details of those grounds will clearly emerge during cross-examination. It may reasonably be expected that in most cases witnesses as the prosecution may need to call will be present at court. However, to avoid the possibility of adjournment and consequent delay defence counsel should regard it as his duty to give prosecuting counsel forewarning of the general nature of the objection to be taken in order that arrangements may be made in advance to have all necessary witnesses in attendance. It is only in exceptional circumstances that the accused should give evidence first on a *voire dire.*'

Again, that is the course or procedure that was adopted or followed herein.

[4] A1's objection to the statement is two-fold, namely:

(a) the statement is incorrectly recorded in that it records that A1 said he had picked up or found the cellular telephone on the ground whereas in fact he had said he got it from A2 and

(b) the statement is incomplete inasmuch as certain things said by A1 to Pw1 do not appear on the statement.

Mention must also be made that it also emerged in cross-examination of Pw1 that A1 was also contending that the statement is inadmissible because he was not informed by Pw1 of his rights to legal representation before he recorded the statement.

[5] A2 also listed two grounds of objection namely :

(a) that he told the magistrate (Pw2) that he was sixteen (16) years old and not 18 years as recorded by her and

(b) that he had come to report or talk about an altercation he had had with someone near or at the Grand Valley bar and not that he had come to report about an offence he had committed together with A1.

Again, as in the case of A1, it was argued on his behalf that the statement was also inadmissible because Pw2 did not advise A2 of his rights to legal representation before he recorded the statement from him.

[6] In his evidence in chief A2 also told the court that he was told by Police officer Msizi that he and A1 had killed someone and taken his mobile telephone and he should tell that to the magistrate and not bit about the bush. He was also told by the said police officer that if he acted as advised or told by him, this would facilitate his early and speedy release from custody. Lastly, A2 told the court that Pw2 did not advise him that the statement he was about to record could be used in evidence against him in his trial or simply, what the consequences of recording that statement were. That in summary form are the defence objection to the admissibility of the two statements herein, as I understand them.

[7] In support of its case, the crown led the evidence of the two magistrates referred to above, Pw10, the police officer who escorted the two accused persons into the magistrates' chambers and Pw13 Pretty Nxumalo who was the interpreter for Pw1. These are the only witnesses whose evidence appears to be relevant to the issue under consideration herein.

[8] It is common cause that both accused persons herein made their statements to the magistrates concerned in the Siswati language and this was interpreted for the magistrates by their respective interpreters. Similarly, whatever the magistrate said to the accused was in English and was interpreted by the interpreters into Siswati for the benefit of the accused

persons. Therefore, whatever was said by the magistrates to the accused and vice versa, was communicated by the interpreters. Consequently, the magistrates cannot vouch for the accuracy or otherwise of what he or she actually wrote down as having been said by the accused, or that which was actually said to the accused was what was actually being communicated by the magistrate to them. In fairness to the learned magistrates, they have not sought to say that what each of them wrote was correctly and legitimately interpreted by their interpreters or that what each said to the accused and vice versa, was correctly interpreted. Logic dictates, I think, that the evidence of the interpreters in such a situation is key to unravel this conundrum.

[9] The interpreter who interpreted for Pw2 and A2 did not give evidence. As stated above, Pw13 was the interpreter for Pw1 and A1. She told the court that she has worked as an interpreter in the magistrate's court in Nhlangano and is now in Mbabane. In July 2011 she was attached to the Manzini Magistrate's Court. She essentially or substantially corroborated Pw1 on what took place in the Magistrate's office when A1 was brought therein. In particular, she confirmed that A1 was appraised of his legal rights to legal representation by Pw1 and that the recorded statement was read back to the accused who then signed it after confirming that it was correctly recorded.

[10] However, most importantly, Pw13 did not tell the court of her knowledge of either Siswati or English – the two languages used between Pw1 and A1 during the recording of the statement. Further, she did not say whether or not she is a sworn interpreter. These two issues are, to my mind, crucial for the integrity or accuracy and reliability or authenticity of the exercise at hand.

[11] As already stated above, Pw2's interpreter did not testify at all.

[12] It is trite law that the crown bears the onus to establish, beyond a reasonable doubt that the statements made by the accused were freely and voluntarily made, without the accused having been unduly influenced thereto. Authority for this proposition, should such be necessary, is *MZINYONI MZUNGU DLAMINI V R* 1982-1986(1) SLR 231 at 233C-234E where AARON JA said:

> "…s 226(1) of the Criminal Procedure and Evidence Act 67 of 1938 provides in part that "any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced to writing or not), be admissible in evidence against such person:

Provided that such evidence is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto …"

Mr Donkoh, who appeared for the Crown, conceded that if the trial judge was referring to the general onus of showing that a confession was freely and voluntarily made, then he misdirected himself. He contended however that the learned judge must have been referring, not to the general onus – which remains throughout on the Crown – but to a subsidiary onus which arises where the accused puts up a particular version of the facts. I doubt very much whether there can even be a general onus and a different subsidiary onus (as distinct from the burden which may rest upon an accused of leading evidence in rebuttal), but it is unnecessary to debate this question, as I do not consider that the trial judge's remarks can be construed in the manner contended for by Mr Donkoh. A more likely explanation of the judge's remarks is that he was influenced by the procedure which exists in South Africa, and which is set out in the textbooks on criminal procedure. In South Africa, provision was made in the 1977 Criminal Procedure Act for the onus to shift to the accused where the confession was made before a magistrate and reduced to writing by him (see s 217(1)(b)(ii), and Lansdown and **Campbell South African Criminal Law and Procedure** vol. v, 862). No such provision exists however in the law of this country, and the general rule continues to apply which requires the State to prove that the confession was made freely and voluntarily, and without the appellant having been unduly influenced thereto (**The State v Loate and others** 1962(1) SA312 (A)). The issue relates, not to what occurred when the appellant was brought before the judicial officer, but to what transpired before that. It was made clear at the trial that the appellant's objection did not relate to the magistrate, but to "the police officers who got him to make the statement to the magistrate". The contention was that the confession was not freely and voluntarily made, because prior to his being brought before the

> judicial officer, the appellant had been subjected to improper inducements by the police officer who had taken him into custody. If the accused had earlier been subject to pressure in order to induce him to make a confession which he would not otherwise have made, then the later interposition of a judicial officer should not be permitted to "drop a veil" between the previous interrogation by the police and the subsequent appearance before the judicial officer (to use the words of Feetham JA in **Rex v Gumede and another** 1942 AD 398 at 433), and so to give to the statement "an aura of respectability and admissibility" (to borrow another phrase from Harcourt J in **S v Majozi and others** 1964 (1) SA 68 (N) at 71F)."

[13] I should note that although both magistrates and Pw13 told the court that the accused were informed or advised of their rights to legal representation, this information does not appear ex facie the relevant documents herein. Again both magistrates told the court that informing an accused of his or her legal rights under such circumstances was routinely done but not written down. Pw1 said inspite of the fact that he considered himself enjoined to give such advice to A1, he did not consider it necessary to note it down in writing.

[14] I am fully alive to the fact that the complaint or objection by the accused that the recorded statements are incomplete has not been particularized. It is given in general terms, with no specifics as to what is missing that was said by either of them. Again, whether A2 told Pw2 that he was 18years or

16 years old, does not go to the crux of the issue whether the statement was freely and voluntarily made by him. Nonetheless, it may cast some doubt on the accuracy of the recording. (On being asked by the court A2 said that he had informed Pw2 that he was 17 years old and not 16 years as suggested by his counsel when cross-examining Pw2). Likewise, the fact that A1 did not sign all the pages of the relevant statement, because he was not instructed to do so, does not, in the circumstances of this case suggest that the statement was not made by him freely and voluntarily. (It would of course be different if he had said he did not sign a particular page or portion of the statement because it had been incorrectly recorded).

[15] I have not been able to find any authority from this jurisdiction in support of the submission that simply because an accused has not been appraised of his rights to be legally represented, before making a statement before a judicial officer, such failure vitiates the admissibility of such a statement. But it is not inconceivable that such want of advice may render the statement inadmissible where for instance, an accused states that had he taken advise from his legal representative and advised of the legal consequences of making such a statement, he would not have done so. (Compare S v Mathebula, 1996 (1) BCLR 123 where the court held that

where the statement is obtained in violation of the maker's constitutional rights, it is not receivable in evidence).

[16] Again, as in the judges, it is vitally important for an accused to be informed of the legal consequences of making a statement before a magistrate; namely that the statement will be taken down in writing and may be used in evidence against him in his trial. In *R v MABUZA SIPHO*, 1987-1995(1) SLR 343 at 347b-f SAPIRE AJ put the position as follows:

> "The judicial officer before whom a suspect is brought for the purpose of recording a statement is required to warn the suspect. If the warning has the effect of dissuading the suspect from confirming his statement, the warning would have had its foreseeable effect. It is, in my view, illogical and cynical to require a magistrate in the accused's position to give a warning, but expect him to give the warning in such equivocal terms that the real dangers to the suspect are disguised and the prejudicial nature of what he is about to do is hidden from him. If a magistrate, in questioning the person before him adheres strictly to the form which has been devised for the recording of confessions, this I fear may be exactly what is done. While the suspect is told that what he is about to say may be used in evidence against him he is assured that he has nothing to fear from making a statement. On the contrary, the suspect has everything to fear, namely that he can be convicted on the strength of the statement alone.
>
> The magistrate has a duty to satisfy himself that the statement which he expects to record is made freely and voluntarily by the suspect, without being unduly influenced thereto. There can be nothing wrong, therefore,

> in pointing out to the suspect the possible dire, if not fatal results of his making a statement and enquiring whether the suspect appreciates what he is about to do, if he is still desirous of so doing, and if so why."

(The underlining is mine).

[17] With all due deference to the learned judge, I do not share the opinion expressed in the words I have underlined above (Counsel for the crown does). First, in principle and jurisprudence or legal reasoning, it is not the duty of a judicial officer taking down a statement from a suspect to decide whether or not the statement is a confession or that it is being made freely and voluntarily. As it often happens, the undue influence occurs during the suspect's interrogation by the police and away from the comfort of the judicial officer's office. Secondly, whether or not the statement is being made freely and voluntarily is a matter for the trial court. Thirdly, for the judicial officer to refuse to take down a statement from a suspect because he is of the view that the statement is not being made freely and voluntarily, has the potential of denying the suspect a record, at the earliest opportunity away from the investigation team, of reporting and documenting whatever undue pressures or abuses he has suffered in the hands of the police. Our law reports are replete with cases or instances where statements have been rejected as inadmissible because they were not freely and voluntarily made,

whilst prima facie they appeared to have been so made (freely and voluntarily).

[18] Whilst judicial officers are certainly encouraged to go outside the standard form in questioning an accused who is about to make a statement, this is not a license to conduct a mini one-sided trial on the admissibility or otherwise of the prospective statement. The whole object (of going beyond the standard questions) is to ensure clarity and completeness of the answers given by the suspect. Everything, however, must be included in the statement to enable the trial court to determine whether the statement is admissible or not.

[19] Again, a confession may be held inadmissible if it was induced by either a promise of advantage or threat of disadvantage – carrot or stick situation. But of course, this may not be enough. The inducement or influence must be improper or undue and must emanate from a person in authority. Once the trial court holds that the confession is the product of or the fruits of a poisonous tree, it has to reject it, ie, hold it inadmissible as evidence in the trial. As CJ Rehnquist of the USA Supreme Court stated in *Dickerson v United States, 530 US 428,*

> "A free and voluntary confession is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt but a confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape that no credit ought to be given to it and therefore it is rejected."

[20] As already stated above, the onus to prove or establish the admissibility of the confessions remains on the crown, throughout the proceedings. This is, I think, in line with the fundamental precept of our law that one is presumed innocent until proven guilty by his accusers. As a direct consequence of this principle or notion, an accused has no duty to prove that a confession made by him is inadmissible. (These two preceding statements may, in a way be viewed as two sides of the same coin).

[21] I have referred above to the nature of the objections by the two accused herein. These objections are not specific in many respects, especially those pertaining to the incompleteness of the statements. Furthermore, these objections do not touch or relate to the voluntariness or otherwise of these statements. However, it is trite law that an accused has a right not to incriminate himself, has a right to remain silent and has a right to be legally

represented by counsel of his choice, should he so desire, in the course of the criminal process. The process starts upon arrest and not just when the accused appears in court for a remand or trial. An unsophisticated accused or one who is not conversant with these rights, can hardly be said to have exercised them if he has not been fully advised thereon. Again advising an accused that he is free to make a statement before a judicial officer, without informing him of the consequences of doing so, amounts to no advice at all in my judgment. (See Sipho Mabuza *supra*).

[22] The present matter suffers from the following inadequacies viz;

(a) lack of proper interpretation,

(b) incompleteness of the statement and

(c) want of proper advice by the police and to some extent, the magistrates, on the rights of the accused. It would be unsafe and prejudicial to the overall interests of justice to admit a statement that is incorrectly recorded and incomplete.

[23] For these reasons, I an unable to hold that the crown has proven beyond any reasonable doubt that the statements by the accused are admissible in these

proceedings or that they were made freely and voluntarily by them without being improperly or unduly influenced thereto. Consequently the two statements are inadmissible in evidence herein.

MAMBA J

For the Crown : **Ms Q. Zwane**

For the Defence : **Mr B. Dlamini**