IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 276/10**

In the matter between:

REX

VS

FANA SHONGWE

Neutral citation: *Rex v Fana Shongwe (276/2010) [2018] SZHC 191 (15 August 2018)*

CORAM: **MAMBA J**

HEARD: **02 AUGUST 2018**

DELIVERED: **15 AUGUST 2018**

[1] Practice and procedure – Procedure to be followed in a trial – within- a- trial to determine admissibility or otherwise of etra curial confession made before a Magistrate. Defence obliged to inform crown of grounds for objection. Crown bears onus to prove admissibility of confession and consequently first to lead evidence.

[2] Criminal law – evidence- confession made by an accused before a Magistrate – admissibility thereof as per section 226 (1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Crown bears onus of proof to establish admissibility thereof – Test- proof beyond a reasonable doubt.

[1] The accused is charged with two counts. The first count is that of murder. It is alleged by the crown that on or about the 29th day of September 2009 at or near Nhlambeni in the Region of Manzini he unlawfully and intentionally killed one Lombango Shongwe. On the second count he is alleged to have set on fire a house, being an immovable object. Again, it is alleged that he acted unlawfully and intentionally and thus committed the crime of Arson. This offence is said to have been committed on the date and place stated above. (It is hereby noted, however, that the evidence indicates that the crimes were committed in the Hhohho region and not in Manzini. Nothing, however, turns on this in this ruling).

[2] On being arraigned, the accused pleaded not guilty on both counts.

[3] When the matter started on 01 August 2018, it became obvious to the court that no pre - trial conference had been conducted in this case or at least that both counsel were not au fait with what had been decided by the parties during the pre - trial conference. Both counsel were apparently not involved in such vital pre – trial exercise. This became apparent when the police pathologist (PW1) was called to give evidence yet his evidence was not challenged at all and eventually his report on the post mortem examination was handed in without him being cross examined thereon. This was the same situation with the evidence of PW2, 4625 Detective Constable Nimrod Motsa, who attended to the scene of the crime at the relevant time. He took pictures or photographs of the scene. There were eight pictures in all and these were handed in and marked as exhibits B1 – B8.

[4] After a brief consultation with both counsel in my chambers regarding the further conduct of the case, it emerged that the admissibility of the statement made by the accused before a judicial officer on 01 October 2009 was being contested or challenged. This necessitated that a trial – within – a- trial should be held or conducted to determine that issue. Counsel were referred to, amongst others, the decision of this court in *R V Magungwane Shongwe and others 1982 – 1986 (2) SLR 427* where Hannah CJ stated as follows:

‘The first question to be considered is the procedure which should be followed on a *voire dire* as to the admissibility of an extra-judicial statement by an accused person. No authorities were cited in this regard but Mr. Nsibandze for the Crown contends that the usual practice is for the accused to give evidence first so as to lay the foundation for the objection. Mr. Nsibandze’s reasoning is that if such procedure is not followed the Crown will be at a loss as to what evidence to call. I do not know to what extent this procedure has been followed by the courts of this country in the past but it is certainly alien to the courts of England and my understanding is that it is not the normal practice followed by the courts of South Africa. On one view it is merely a matter of convenience which side should give evidence first on a *voire dire* and the only matter of real importance is that the court should keep in mind that the onus of establishing the voluntariness of the statement remains always with the Crown. However, on another view to require an accused to give evidence first also involves placing on him a burden to give evidence. I do not see why he should have that obligation placed on him. In my judgment the better course and the course which should be normally be followed, is for the prosecution to lead evidence first. It is, after all,

the prosecution which bears the burden to prove 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 be reasonably expected that in most cases such witnesses as the prosecution may need to call will be present in court. However, to avoid the possibility of adjournments and consequent delay, defence counsel should regard it as his duty to give prosecution 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*.

Another point which arose during the course of cross-examination of the third accused was whether prosecuting counsel is entitled to put questions concerning the truth of the statement. The answer is that such questioning is not now permissible on a *voire dire.* While the position was for many years governed by the decision in

RvHammond (1941)28 Cr App R 84 that case was overruled by the Privy Council in **Wong Kam-ming v The Queen[1979]** 1. All

ER 939 where the majority of their Lordships held that the prosecution is not entitled to cross examine an accused as to the truth of the statement. The sole issue on the voire dire is whether the statement had been made voluntarily and whether it was true is not relevant to that issue. That decision must be followed by the Courts of Swaziland by virtue of s 275 of the Criminal Procedure and Evidence Act 67 of 1938.'

[5] In this case, counsel for the accused indicated that the admissibility of the statement was being challenged or put in issue based on the allegation by the accused that it was not voluntarily made by him. It was alleged that the accused had been taught, much against his will, what to say before the Magistrate. The accuracy of what he said to the said Magistrate was not in issue and thus the person who acted as the interpreter for the Magistrate was, it was conceded by the defence, not required or necessary to give evidence.

[6] Section 226(1) of the **Criminal Procedure and Evidence Act 67 of 1938 (as amended)** (hereinafter referred to as the Act) provides:

‘ *226(1)*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 into writing or not be admissible in evidence against such person:

Provided that such confession 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:

Provided further that if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a magistrate or any justice who is not a police officer: and,

Provided also that if such confession has been made on a preparatory examination before any magistrate, such person must previously, according to law have been cautioned by such magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him.’

Therefore, the admissibility or otherwise of the said statement has to be tested or considered in the light of the first proviso to sub section (1) of the Act.

[7] It is also important to note that these provisions of the Act must be read and interpreted together with whatever constitutional provisions are relevant and or applicable in each situation or case. Section 21 of the Constitution is relevant in this case and provides that:

> '21. (1) In the determination of Civil rights and obligations or any criminal charge, a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.
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> (2) A person who is charged with a criminal offence shall be-
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> (a) Presumed to be innocent until that person is proven or has pleaded guilty.
>
> …

(e) Permitted to present a defence before the court directly or through a legal representative chosen by that person; …'

Subsection 2 (a) above, must of course be read and understood subject to the provisions of 21 (13) (a) of the constitution; viz, where the accused bears the burden of proving particular facts.

[8] The right to a fair trial is thus enshrined in section 21 of the Constitution. In *S v Zuma 1995(1) SACR 568 (CC)* at para 16, Kentridge AJ stated that:

> 'The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. (That was in reference to section 35 (3) of the interim constitution, which is section 25 (3) of the current constitution of South Africa).

[9] From the above – cited provisions of the law and the plethora of court judgments by this court and the Supreme Court, an extra-judicial statement

made by an accused person is admissible against such accused person at his trial provided that it has been proven to have been freely and voluntarily made by such accused person, while in his sound and sober senses and without him having been unduly influenced thereto. And again, where the statement in question has been made before a Magistrate, it must be proven or established by the crown that the accused was duly warned before he made such a statement. See the third proviso to section 226(1) above. The corresponding section in the Republic of South Africa is section 217(1) of the Criminal Procedure Act 51 of 1977 (as amended). There is also section 219A of the same Act.

[10] In its quest to prove that the statement made to PW3 (Leo Dlamini) was admissible, the crown led the evidence of the said Magistrate, the interpreter, Sipho Dlamini (PW5) and one of the arresting or investigating officer, Goodwill Dlamini, who testified as PW4.

[11] The evidence by both PW3 and PW5 is to the effect that the accused was brought before the Magistrate at about 1125 hours on 1 October 2009 and was duly warned by the Magistrate in the presence of the interpreter. No

one else was present in the Magistrate's office besides these three persons. Both PW5 and PW4 testified that the accused appeared terrified or afraid and very apprehensive. He was wide-eyed and his first words to the Magistrate were that he had come to apologise for what he had done. He also told the magistrate that he had not been coerced or compelled to make the statement to him and that neither promise nor threat had been made to induce him to make the statement. The interpreter, PW5 stated that the accused walked very slowly as he, PW5, led him from the police motor vehicle to the Magistrate's office. PW3 and PW5 testified that the accused was trembling as he narrated his story to the Magistrate. PW5 said that this was, however, not unusual as people often exhibited such timidity or lack of composure under such circumstances. Both PW3 and PW5 did not observe any injuries on the accused person, nor did the accused reveal to PW3 that he had been assaulted by anyone.

[12] The accused was, according to him and PW4 arrested at his home on 30 September 2009. He was arrested in the morning of that day. There were members of the local community present when he was arrested and taken to the Police Station at Pigg's Peak.

[13] PW4 testified that the accused was never tortured or assaulted at anytime after his arrest. It was the evidence of this witness that the accused was cooperative during the police investigation and he freely made certain statements to the police. One of such statements was written down by the accused on police form RSP 218. PW4 told the court that after making the said statements, he, PW4, asked the accused if he could or would be willing to make the same statements to a Magistrate, and the accused said he would. It was after this response that PW4 handed the accused to the General Duty Department at the said police station to facilitate or arrange for the accused to meet the Magistrate in order to repeat to him the statement he had made to him. PW4 testified that the accused was not compelled or in anyway unduly influenced to take this course.

[14] PW4 denied that he or anyone else had assaulted or told the accused what to say before the Magistrate.

[15] The accused on the other hand, testified that he was tortured and tied onto a bench at the police station by the police and was told he had killed a woman.

He said whilst tied with a rope to the bench and made to face upwards, PW4 intermittedly strangled or throttled him and accused him of having killed an old woman. The accused testified further that after the torture aforesaid he was given a written statement and ordered by the police to copy it onto another blank piece of paper. He was ordered to memorize it so that he would repeat or regurgitate it before the Magistrate. Basically, he was told or taught everything that he had to say before the Magistrate and this is what he did.

[16] The accused also informed the court that PW4 informed him that should he say anything else other than that which he had been taught by the police, the police would know about this and he would be subjected to further acts of torture and assault. He said, it was this torture, assault and threats of further assault that induced him to go to the Magistrate and make the statement in question. In a nutshell, he says the statement was not freely and voluntarily made by him.

[17] There was a dispute between the accused and PW4 on where exactly the accused was arrested at his home. The accused said he was arrested in his

own room whilst PW4 said he was arrested in the cooking hut or house. In my view nothing turns on this dispute for purposes of this ruling.

[18] The accused told the court that the only thing he could remember from the statement he was made to write and recite at the police station and before the Magistrate respectively, is that he had killed the old woman because she was bewitching him and she also had a baboon which she used in her witchcraft practices. The accused informed the court that he could not speak clearly or loudly before PW3 due to the fact that his throat was sore or painful as a result of the strangulation by PW4. Neither PW3 nor PW5 noticed this, however.

[19] The accused was not seriously cross-examined on the actual contents of either RSP 218 or the statement that he made before PW3. RSP 218 was not exhibited in court either.

[20] The crown bears the burden or onus to establish that the statement or confession that it seeks to have admitted in evidence is admissible. It must

establish or prove that it was freely and voluntarily made by the accused whilst in his sound and sober senses and was not unduly influenced to do so. This, the crown must prove beyond a reasonable doubt. Where there exists some reasonable doubt, the crown, it follows, must fail in its endeavours to have the statement admitted in evidence. Vide *MZINYONI MZUNGU DLAMINI V R 1982 – 1986 (1) SLR 23 and Fanose Nkonyane v R (Null) [1997] SZSC 4 (01 January 1997*) where the court had this to say:

> 'How is one to approach the question whether the volition of the Appellant was unduly influenced and what test does one apply when doing so. **HOFFMAN AND ZEFFERT SOUTH AFRICAN LAW OF EVIDENCE** contend that the approach must be to conjoin the two requirements of voluntariness and undue influence. They say the following at page 217 of the 4th edition:
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> 'it is, indeed, artificial when discussion of the appropriate test, to separate the requirement that a confession must be voluntary from the requirement that it must be made without undue influence. As Oglvie Thomson JA pointed out in *S v RADEBE AND ANOTHER*, the overall inquiry is whether the words of the section have been satisfied. The question is, therefore: was the confession freely and voluntarily made without the accused having been unduly influenced to make it?

> Although "undue influence" and "voluntariness" have separate meanings, this is no doubt what Van den Heever JA meant in *R v KUZWAYO* when he said that those terms are "plainly concepts ejusdem generis and relate to factors which are calculated to negative the exercise of free will."

However that may be, I do agree with the contention advanced by the learned authors op cit when they say:

> "The words "without having been unduly influenced thereto" tend to be widely interpreted to include all cases in which external influence have operated to negative the accused's freedom of volition. Innes CJ in *S V BARLIN* said that they are elastic and may operate to enlarge in some degree the area of exclusion."
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> What is of fundamental importance is whether or not the fairness of the hearing could be impugned by the admission of the statement which is challenged. Thus e.g. Holmes JA, said in *S V Lwane 1966(2)SA 443 (A)* At 444 that:
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> "the pragmatist may say that the guilty should be punished and that if the accused has previously confessed as a witness it is in the interest

> of society that he be convicted. The answer is that between the individual and the day of judicial reckoning there are interposed certain checks and balances in the interest of a fair trial and the due administration of justice. The rule of practice to which I have referred is one of them, and it is important that it be not eroded. According to the high judicial traditions of this country it is not in the interests of society that an accused should be convicted unless he has had a fair trial in accordance with accepted tenets of adjudication."

See also generally the seminal discussion in CROSS ON EVIDENCE 6TH ED. 533 – 555. SEE particularly the author's comments concerning the origins of the exclusionary rule as formulated in *R V WARWICKSHALL, 1783 1 LEACH CCC 263 @264* where the reason for exclusion is because – "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it and therefore it is to be rejected." See also *Rex v Dlamini and 2 others (296/11) [2013] SZHC 50 (02 February 2013) and Simelane v Rex (13/2011) [2012] SZSC 54 (30 November 2012)*

[21] In *S v Lebone 1965 (2) SA 837 (A)* the court held that the requirements that the confession must be proved to have been freely and voluntarily made and without undue influence, were distinct and each has to be complied with as pre-requisite to the question and issue of admissibility. *Du Toit et al* Commentary on the Criminal Procedure Act at 24-55 states that -

> 'it is clear now, that there are two separate yet, potentially, related inquiries that have to be carried out in determining the admissibility of a confession or admission; first, whether the requirements of, respectively, ss 217 and 219A have been satisfied and secondly, whether in all the circumstances the accused has had a fair trial.'(See also *Hlayisani Chauke v The State (70/12) [2012] ZASCA 143 (28 September 2012).)*

[22] As was pointed out by the court in *Fanose (supra)* the rationale for the rule or rules on admissibility of extra-curial confessions of statements made by an accused person is to protect an accused person against self – incrimination, against abuse by police whilst the accused is in custody and being interrogated and, most importantly, to avoid the determination of the

guilt or otherwise of an accused based on potentially unreliable or outright false evidence that has been unduly extracted from an accused person.

[23] I have set out above the essential parts of the evidence pertinent to this inquiry, i.e. the admissibility or otherwise of the statement by the accused. The challenge or impropriety that has been alleged and argued by the accused relates to what occurred to him at the police station. What took place before the magistrate was, so to speak, the result or culmination of what was done and said to him at the police station. On this score, it is his word against that of PW4. Accepting that the court in dealing with such inquiry or any trial for that matter, does not count the number of witnesses for or against each litigant, but rather weighs the relevant evidence proffered before it, where the evidence admits of a reasonable doubt, in the case of a criminal trial, that doubt must accrue to the benefit of the accused.

[24] It must be emphasized that whilst the objection is centred in this case on what took place at the police station, the evidence relating to what was said and what took place before the Magistrate, may in an appropriate case provide the decisive or determining answer to the inquiry. In the present

case, the evidence is that when the accused appeared before PW3, he could not move freely. He was frightened, trembling and wide-eyed. He said this was due to the fear that had been instilled in him by the police. He said he had to tell a story that incriminated him and which was false. This is of course denied by the police. But if indeed the accused was cooperating with the police in their investigation, and consequently freely and voluntarily offered to record the confession, there is no explanation why he was caused to record the said confession a day after his arrest. It has to be remembered that he was arrested in the morning of the 30th day of September 2009 and recorded the statement after 11 of the clock on the next day. Additionally, his failure to move freely and his trembling and appearance of being frightened, have not been sufficiently explained or dispelled by the crown. Whether or not his blind fear was induced by the police or he was simply overwhelmed by the experience or spectre of appearing before the Magistrate, is not clear. Further, Goodwill Dlamini did not explain to this court or the Accused why he asked the Accused if he wanted to repeat the statement he had related to him to a magistrate.

[25] I accept, entirely, that it would be easy to make an allegation of torture and intimidation such as those made by the accused herein against the police, but

the caveat is always that each case must ultimately be decided or determined on its own particular or peculiar facts. On the facts of this particular case or inquiry, there exists a reasonable doubt in my mind whether the statement by the accused was freely and voluntarily made by him, without him having been unduly influenced thereto. How and why he appeared before PW3 has not been adequately explained by the Crown to dispel such doubt.

[26] As a general rule, an accused may not be cross – examined on the contents of a statement made by him before a Magistrate before that statement has been admitted in evidence by the court. However, where as in the present matter, the contents of that statement are put in issue by the accused, e.g. by claiming that the statement was taught to him by the police, he may be cross – examined on such contents. Such cross – examination may, for instance, show that certain details in the statement could never have been known by or come from the police.

[27] Accordingly, I hold that the statement made by the accused before PW3 on the 01st day of October, 2009, is inadmissible in these proceedings.

MAMBA J

FOR THE CROWN: MR. B. NGWENYA

FOR THE DEFENCE: MR. S.K. DLAMINI