In the matter between:

FANOSE NKONYANE

VS

REX

CORAM

: STEYN JA

: SCHREINER JA

: LEON JA

FOR APPELLANT : MR. MAMBA

FOR CROWN : NGARUA

JUDGMENT

Steyn JA:

The Crown has quite rightly conceded that there is only one issue to be decided in this case; that is, was the confession made by the Appellant admissable or not? If it was - so the defence also quite rightly conceded - the appeal must fail. If it was not, the appeal must be upheld.

The above issue has been even further refined. On the evidence before it, the court a quo had to determine only whether the Crown had proved that Appellant's confession was not induced by any "undue influence" that may have been brought to bear upon him. The relevant provision is Section 226(I) of the CRIMINAL PROCEDURE AND EVIDENCE ACT 67 OF 1938 which provides as follows:

"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;"

It is not necessary for the purposes of this case to set out the facts in any detail . I proceed therefore only to relate facts that are relevant for the purposes of determining whether or not in the circumstances of this case the Crown has proved beyond a reasonable doubt that Appellant's confession was made freely and voluntarily and without the Appellant having been unduly influenced to make it.

The Appellant is alleged to have committed the crime of murder. According to the indictment he did so on the 10th November 1995 by shooting the deceased - who he believed to be a witch. He pleaded not guilty but was found guilty - principally upon the contents of a statement Appellant made to a Magistrate on the 7th December 1995.

It is perhaps relevant to record that Appellant was traced by the police in the Republic of South Africa

and was brought back by them to Swaziland without any extradition proceedings being conducted. He made a statement to the police which was reduced to writing. According to the investigating officer (PW1) he then "...asked him that concerning what he wanted to give us, the statement, how about going to give (a or the) statement to someone who is not a police officer,

2

a Magistrate for example." His response according to PW1 was, "He said he could go to the Magistrate." He was asked whether anything else was said and he replied, "I do not remember such occurring." He conceded in cross-examination however that he did suggest to the Appellant that he should make a statement to a Magistrate.

However that may be, it is common cause that when the Appellant appeared before the Magistrate the following day and is asked by the Magistrate, "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?", he replied: "I was not coerced but they (presumable the police) said that if I talk this later may help me during the trial."

The Magistrate who recorded the statement did not pursue the matter or enquire further during his interview with the Appellant. He confirms that his understanding of what the Appellant was trying to say was that he was not threatened, but that he was advised by the police that it would be to his advantage at his trial if he made a statement.

Whilst another police officer, PW3, denied that any such suggestion was made, the Appellant did under oath confirm that he was told, "... that when I made the statement (to the police) that would help me in Court during the trial."

Crown Counsel correctly conceded that in the light of the evidence as a whole, the Court was obliged to accept that the Appellant had been told by the police that if he made a statement to the Magistrate doing so might help him at his trial. He also conceded - correctly in my view - that this may indeed have influenced the Appellant to make a statement to the Magistrate. However, he urged us to find that such influence was not "undue"

3

He pointed to the fact that the Appellant himself said that he did not believe the police when they told him that it would help him at the trial (if he made a statement to the Magistrate). This was indeed the basis on which the learned trial Judge (Matsebula J) held the confession to be admissable in evidence. This approach, i.e. that simply because Appellant made this statement in evidence that he had not believed the police, he was not unduly influenced, was in my opinion correctly, challenged by Mr. Mamba on behalf of the Appellant. The question still has to be answered whether it was proved beyond a reasonable doubt that the inducement did not impact significantly on his free will.

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:

'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 Olgivie Thompson 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's 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 these terms are "plainly concepts ejusdem generis and relate to factors which are calculated to negative the exercise of free will."

4

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 influences 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."

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:

"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 interests 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 interests 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 authors comments concerning the origins of the exclusionary rule as formulated in R V WARWICKSHALL, 1783,1 LEACH CC 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."

5

As to the importance of the preservation of a fair trial, see the comments of Lord Salmon in SANG 1980 A.C. 402 @445 cited by Cross op cit @537. See also generally SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOL. V.870 - 871 and the cases cited there.

In assessing the validity of Counsel for the Crown's argument that Appellant, although possibly influenced by the police officers statement - such influence was not "undue" - both the policy considerations referred to above as well as certain subjective factors need to be considered.

As to the latter - Appellant is a young man. He said he was born in 1997 (I assume it was 1977 or alternatively 1979). He never went to school. He was arrested across the border and brought back into Swaziland by the police and was told that either it could or would, help him at his trial if he made a statement to a Magistrate. The onus is on the Crown to prove beyond a reasonable doubt that he was not unduly influenced to make a statement by the promise (unspecific as it might have been).

He says he was. However, in fairness to the Crown it is clear that not much weight can be attached to his evidence given at his trial. Indeed he was a poor and unreliable witness. What is of the greatest significance, however, is what this illiterate youth says in response to the question as to whether any undue influence was brought to bear upon him. His reply that he was not coerced but that he was told by the police that an unspecified advantage would (or could) accrue to him should he make a statement.

The policy considerations outlined by CROSS and in the SOUTH AFRICAN LAW OF

6

EVIDENCE cited above are important. Confessions as proof of commission of a crime are the resort of the indolent police officer. Extracting confessions were (and still are) the tools of authoritarian regimes all over the world. They are questionable means of proving guilt when no other proof can be found. The risks of contaminating fairness are therefore always present when self-incrimination

becomes the only arrow in the state's quiver.

Taking into account the subjective factors mentioned above, the incidence of the onus as well as the policy considerations, it is my view that the Crown failed to prove that the statement in question was not made without undue influence being brought to bear on the Appellant. It was accordingly wrongly admitted in evidence.

It follows that because, as indicated above, had the confession been excluded, the Crown conceded that it had no case, the Appellant was wrongly convicted.

The appeal is upheld and the conviction and sentence are set aside.

STEYN J A

I agree :

SCHREINER J A

I agree :

LEON J A

Delivered on this.....day of September 1997