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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: CC280/05

DATE: 2007-08-23

In the matter between

THE STATE

And

SAMUEL TSHOKOLO MASAKALE 1st Accused

LETTA REFILOE MAREDI 2nd Accused

J U D G M E N T

LABE, J:

[1] During the cross-examination of Mohonoe Mr Krause applied to cross-examine him on what he said in the trial within the trial.

[2] In *S v De Vries* 1989 (1) SALR 228 (AD) *Nicholas, JA* set out the considerations which apply to evidence given in a trial within the trial. He said this at 233A-233I.

"The rule of the English common law had by 1830 become well established and was of long standing. (See *Gumede's* case *supra* at 413 *in fin.)* It was described by Innes CJ in *R v Barlin* 1926 AD 459 at 462:

> '…(T)he common law allows no statement by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any threat or promise proceeding from a person in authority.'

The rule is a rule of policy. In *Gumede's* case *supra* at 413 Feetham JA quoted from the judgment of Lord Sumner in *Ibrahim v R [1914] AC 599 at 610:*

> *'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 evidence of guilt, that no credit ought to be given to it.* Rex v Warwickshall (1783, 1 Leach 263). It is not that the law presumes such statements to be untrue, but, from the danger of receiving such evidence, Judges have thought it better to reject it for the due administration of justice. *Rex v Baldry* (1852 2 Den Cr C 430, at 445).'

If the policy is to be effectuated, it is of primary importance that an

accused person should feel completely free to give evidence of any improper methods by which he alleges a confession or admission has been extracted from him. Unless he gives evidence himself he can rarely challenge its admissibility. (Cf *R v Brophy* [1982] AC 476 at 481.) See the judgment of Lord Hailsham of St Marylebone in the Privy Council case of *R v Wong Kam-ming* [1980] AC 247 (PC) at 261B-C:

> '…(A)ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the defendant should be able and <u>feel free either by his own testimony or by other means to challenge the voluntary character of the</u>

tendered statement.' (my underlining)

It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. In England the enquiry into voluntariness is made at 'a trial on the *voir dire'* or, simply, the *voir dire,* which is held in the absence of the jury. In South Africa it is made at a so-called 'trial within the trial'. Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt. (See *R v Dunga* 1934 AD 223 at 226.)"

[3] *De Vries's* case was followed in *S v Sithebe* 1992 (1)SACR 347 (AD) at 349a-351d where *Nienaber, JA* had this to say:

"That challenge resulted in a trial within the trial. The appellant testified. He alleged that he had been assaulted and tortured until he eventually agreed to confess in terms he was instructed to memorise. A host of witnesses, in excess of 20, contradicted him. Because of his explanation that the police, and not he, was the source of the contents of the confession, the merits of the charges against him were to some extent also traversed. (*S v Lebone* 1965 (2) SA 837 (A) at 841H-842B; *S v Khuzwayo* 1990 (1) SACR

365 (A) at 371g-374d.) The Court below disbelieved the appellant. His confession was admitted in evidence. The trial then proceeded. Some of the witnesses who testified at the trial within the trial were recalled by the State and repeated their evidence on the merits. The prosecution followed that course because of what was declared by this Court in *S v De Vries* 1989 (1) SA 228 (A) at 233H-234B."

[4] Both *De Vries's* case and *Sithebe's* case left open the question whether an accused who gives evidence on the merits could be cross-examined on what he said in the trial within the trial.

[5] In this case it is a witness who gave evidence in the trial within the trial and on the merits who was sought to be cross-examined on what he said in the trial within the trial.

[6] It is clear from what was said in *Sithebe's* case that evidence given on behalf of the accused at a trial within the trial should not be referred to in the main trial. See also *De Vries's* case at 238G.

[7] As was pointed out by *Schutz, J* as he then was in *S v Mutjindi* 2000 (2) SACR 313 (WLD) at 316B-C the protection given to an accused is not a licence to him to lie, nor is it a licence to a witness called by him to lie.

[8] *S v Kaguma and Others* (2) 1994 (2) SACR 182 (C), the state sought leave to cross-examine a witness called in the main trial on what he had said in the trial within the trial. *Ackerman, J* allowed the cross-

examination in relation to discrepancies between the evidence given by the witness in the main trial and the evidence given by him in the trial within the trial.

[9] *S v* Sabisa 1993 (2) SACR 525 (T) also deals with the cross-examination of a defence witness who had given evidence both in the trial within the trial and on the merits. This was said at 529b-g

> "It is wrong for the prosecution to cross-examine an accused person during a trial within a trial on the merits of the main case in order to establish that the accused is not a credible witness. In *De Vries (supra)* such cross-examination was held to be irregular. Where however, as happened in this case, the accused chooses once again to lead evidence during the trial on the merits, which he led during the trial within a trial, he may lay himself open to cross-examination in order to establish credibility or otherwise.
>
> The objection to questions put to first appellant by Mr *Botma* during the main trial was based solely on the fact that such questions related to evidence adduced during the trial within a trial.
>
> The Judge *a quo* overruled the objection because it was the defence that once again brought issues of admissibility into the main trial. There was also no prejudice to the appellants because the assessor was present in Court during the trial within a trial. The important point is that once the defence brings admissibility

issues into the main trial there must be opportunity given to the State to meet the issues raised. However this procedure lays open an accused person to further cross-examination. In *S v Mkwanazi* 1966 (1) SA 736 (A) at 743F-G, Williamson, JA said:

> 'Once the statement is ruled admissible, all that is required is that it be duly tendered in evidence; it could probably then be handed in by consent. If it be decided that it is in the interests of an accused to raise again issues which were placed before the Judge sitting alone - issues which were possibly determined against him and in respect of which he may have been found to be untruthful - then it should be left to the defence to do so. If they are so raised, there must of course usually be an opportunity afforded the State to meet such issues.'

That is what happened in the instant case. The learned Judge *a quo* was correct in allowing the State to cross-examine first appellant on issues raised in the trial within a trial because those issues had been raised in the main trial by the defence."

[10] I think the principle to be distilled from the above cases is that where a defence witness gives evidence in a trial within the trial and then in the evidence which he gives on the merits refers to matters on which he testified in the trial within the trial he may be cross-examined in relation to inconsistencies between his evidence in the trial within the trial and the

evidence given by him on the merits. The principle must be applied in such a way as to be fair both to the accused and to the state.

[11] Mohonoe in his evidence in the main trial testified about matters about which he had given evidence in the trial within the trial. My learned assessor with the consent of the parties heard the evidence given in the trial within the trial. In my opinion it would be unjust were the state not to be able to cross-examine the witness on discrepancies between the evidence given by him in the trial within the trial and the evidence given by him in the main trial.

[12] I am indebted to Mr Krause for the written heads which he put up which were of great assistance to me in dealing with this question.

[13] I rule that the state may cross-examine Mohonoe in relation to inconsistencies between the evidence given by him in the trial within the trial and the evidence given by him in the main trial.