**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: A102/2013**

**DATE OF HEARING: 16 APRIL 2014**

21/5/2014

(1) REPORTABLE: YES / ~~NO~~ Reportable
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

21/5/2014
DATE

SIGNATURE

In the matter between:

**KHOMOTSO DONALD MASHENGOANE** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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**J U D G M E N T**

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**MAKHOBA AJ:**

## 1. THE APPEAL

This appeal raises the perennial legal question concerning the admissibility of a statement made by the Appellant in terms of section 217 (1)(b) Act 51 of 1977.

The Appellant was charged before Makhafola J in the North Gauteng Circuit Court, sitting in Polokwane on charges of murder, attempted murder, unlawful possession of firearm, unlawful possession of ammunition and malicious damage of property.

At the beginning of the trial there were three accused persons including the appellant. At the end of the state case all other accused persons were discharged in terms of section 174 Act 51 of 1977 except the Appellant. The trial proceeded and Appellant was eventually convicted and sentenced to an effective term of twenty years imprisonment.

## 2. GROUNDS OF APPEAL

The appeal is based on the admissibility of the statement by the Appellant. The essence of the attack on the admissibility of the statement is that it was not made freely and voluntarily due to the assault on Appellant by the police officers who arrested him. The second attack is that Appellant informed the magistrate that he was

threatened with assault should he refuse to make the statement before the magistrate. The third attack is that the magistrate despite recording the Appellant's injuries on the statement proceeded to take down the statement.

In addressing this court, counsel for the Appellant informed us that during the trial in the court *a quo* he did bring to the attention of state counsel that the statement in question was flawed, and he pointed out the discrepancies in the statement. However counsel for the state insisted to nevertheless request the court *a quo* to admit the statement as evidence against the Appellant.

Counsel for the state who argued the appeal before us conceded to us that the statement was not properly handled by all parties in the court *a quo* and it was improperly admitted as evidence.

## 3. THE FACTS

The facts are in brief as follows:

On the night of the 18th November 2005 whilst some members of the Moila family were preparing to sleep the state alleges that Appellant and other people with him unexpectantly invaded the Moila's premises, shouting and swearing at the members of the Moila family who were inside the shack. The assailants demanded that the door to the shack be opened by the occupants of the shack. No one in the shack

responded. Thereupon a hail of bullets was fired into the shack. The deceased in this case and another person were struck by the bullets. The deceased died on the scene. The injured person was taken to hospital. The Appellant and three other persons were arrested for killing the deceased and injuring another person as well as damaging the shack.

Appellant was taken to the magistrate to make a statement (confession) which statement is the subject of this appeal. During the trial within a trial the statement marked exhibit "F" (the confession) was admitted by the court *a quo* as evidence against the Appellant. The Statement Exhibit "F" read as follows on page 2 Paragraph 9(a): "*Have you been threatened with assault or any other prejudice. Should you inform me of assault or threats against you prior to you being brought here?"*
Reply: *"Certain police men said they were coming to spray me with a substance if I fail to make a statement".*
Paragraph 10(a) on page 3 of Exhibit "F" reads as follows:
10(a) *"Have you been assaulted by the police or anyone else?" Reply: "I was sprayed with a substance and kicked on my body and private parts"*
Paragraph 11(c) *Magistrate observations of the accused injuries: "Scratch marks on both legs, chest and face. There are also scratch marks on the fingers".* The magistrate who took the statement and the Appellant did not testify in the trial within a trial.

In the main trial Appellant testified that he was assaulted and forced to

make the statement marked exhibit "F" (confession).

In his evaluation of the evidence the learned judge rejected the Appellant's version as false and ruled that the statement exhibit "F" is an admission and not a confession. The learned judge convicted the Appellant on all counts as charged. There is no other evidence implicating the Appellant except the statement in question.

## 4. THE LAW

The crisp issue in this appeal is whether the learned judge was correct in admitting the statement by Appellant to the magistrate despite the magistrate being told by the Appellant that he was threatened to be assaulted further should he refuse to make the statement. Furthermore notwithstanding the fact that the magistrate noted the injuries he observed from the Appellant in the statement he proceeded to take the statement. Counsel for the Appellant submitted to us that the entire statement should have been excluded by the learned Judge. In the result this would mean that the allegations against the Appellant are not supported by any evidence. It follows, so it was argued, that the Appellant should have been acquitted on all counts.

Section 217 (1)(a) act 51 of 1977 reads as follows: "(1) Evidence of any confession made by any person in relation to the commission of any offence shall if such confession is proved to have been freely and voluntarily made by such a person in his sound and sober senses and without having been unduly influenced thereto be admissible in

evidence against such person at criminal proceedings relating to such offences".

Section 219A Act 51 of 1977 reads as follows: "Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained (a) be admissible in evidence against such person..."

Section 35(1) of the constitution reads as follows: "everyone who is arrested for allegedly committing an offence has the right – (c) not to be compelled to make any confession or admission that could be used in evidence against that person."

Section 35 (1) of the Constitution provides as follows: "everyone who is arrested for allegedly committing an offence has the right - (j) not to be compelled to give self-incriminating evidence."

It is clear therefore that the Constitution and the Criminal Procedure Act

51 of 1977 guarantee the right to remain silent and not to be forced to make a statement. It is immaterial whether the statement is a confession or admission. In S v Zuma and others 1995 (4) BCLR 401 (CC) the Constitutional Court held that the common law rules with respect to the burden of proving that a confession was made freely and voluntarily were an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be compellable witness against oneself.

In S v Mangena and another 2012 (2) SACR 170 (GSJ) at paragraph 48 Spilg J said the following: "No statement by an accused may be used in evidence against him unless it is proved beyond reasonable doubt that it was freely and voluntarily made".

In Matlou and another v S 2011 (1) BCLR 54 (SCA) the court stated that if the magistrate or person taking the statement from a suspect notice injuries, the statement should not be taken. In paragraph 20 Bosielo JA says: "I find the learned Judge erred in accepting the evidence of the pointing out by the first Appellant, I agree with the Appellant's counsel that the fact that when the first Appellant made a confession to the magistrate on 26 March 2002 he still had injuries which appeared to be fresh suggests strongly that the assault meted out to him must have been serious.... To my mind, it makes perfect sense and accords with logic that the first Appellant could have been assaulted by the police before the pointing out in order to coerce him to do so. Undoubtedly,

such evidence would have been obtained in contravention of the first Appellant's rights ensconced in section 35 (1)(a), (b) and (c) of the constitution."

In S v Lebone 1965 (2) SA 837 (A) at 884 the court said: "freely and voluntarily" and without "undue influence", in relation to section 217 were distinct, each of which had to be complied with as a prerequisite to admissibility."

In Chauke and another v S [2012] JOL 29536 (SCA) paragraph 21 the court said: "the admissibility of a statement has to be carefully and consciously considered and ruled upon, particularly where the statements in question are the only evidence upon which a conviction is sought to be premised."

It is therefore my view that the learned Judge in the court *a quo* should have been extremely careful in admitting the statement (Exhibit "F") particularly when it was clear to him that this was the only evidence incriminating the Appellant in this case. It is immaterial whether the learned judge considered this statement as a confession or an admission. Moreover the magistrate did not testify in either the trial within a trial or the main trial. The statement in my view was not proved to have been made freely and voluntarily.

Before concluding, there is one more issue to address. As I have

mentioned, in the court *a quo* counsel for the State was constrained to concede at the outset to the court *a quo* and Appellant's counsel that there are serious shortcomings in the statement. This was despite counsel for Appellant having pointed out this to the State Counsel. In S v Jija and other 1991 (2) SA 52 (E) at page68 Erasmus J said the following: "A prosecutor, however, stands in a special relation to the court. His paramount duty is not to procure a conviction but to assist the court in ascertaining the truth".

In Chauke and another v S supra at paragraph 26 the court said the following: "Accordingly it goes without saying that when it is manifest that a conviction cannot be sustained on appeal it is expected of counsel for the state not to defend what is by all account indefensible".

It was therefore incumbent upon counsel for the State in the court *a quo* to immediately draw the learned judge's attention to the shortcomings in the statement in question. It is also incumbent upon the magistrate not to readily take a statement where the suspect has injuries and complain about threats of further assaults if the statement is not taken.

## 5. CONCLUSION

In this matter before us it is clear that the learned Judge failed to carefully and consciously consider and rule properly upon the statement made by the Appellant to the magistrate (Exhibit "F") particularly when the magistrate did not testify in the trial within a trial.

Furthermore the Appellant informed the magistrate that he was threatened with further assault should he not make the statement to the magistrate but the magistrate proceeded to take the statement.

It is unfortunate that the learned Judge never considered the statement properly and erred in not considering the applicability of section 35(1) read with section 35 (5) of the Constitution and their impact on the admissibility of the impugned evidence.

There is no suggestion that the statement would have been made without the assault and threats of assault. I am of the view that the statement was irredeemably tainted by the assault, threats of further assaults, injuries and scratch marks on the body of the applicant.

I have no doubt that admitting such evidence would not only render the trial unfair but would also, as Cachalia JA quoted Lord Hoffman's remarks in S v Mthembu 2008 (2) SACR 407 (SCA) at paragraph 36: "...it is tantamount to involving the judicial process in moral defilement'. This would compromise the integrity of the judicial process and dishonour the administration of justice.

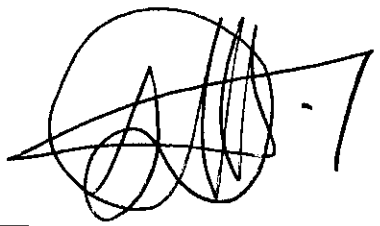
I therefore conclude that the statement (exhibit "F") should not have been admitted by the learned Judge as it is inadmissible. The state failed to prove beyond reasonable doubt the elements of the offences against the Appellant.

## 1. ORDER

In the result the following order is proposed:

1) The appeal against the convictions on all counts is upheld

2) The sentences are set aside



MAKHOBA AJ
JUDGE OF THE HIGH
COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

I agree

RAULINGA J
JUDGE OF THE HIGH
COURT OF SOUTH
AFRICA, GAUTENG
DIVISION, PRETORIA

I agree and it is so ordered.

KOLLAPEN J
JUDGE OF THE HIGH
COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

**Representation for the Applicant:**

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| Counsel | Mr Mogashoa |
| Instructed by | Legal Aid South Africa, Polokwane |

**Representation for respondent**

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| Counsel | Adv: Ngcobo |
| Instructed by: | National Director of Public Prosecution |