13/84

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SETH MPUMELELO GABA APPELLANT

and

THE STATE RESPONDENT

CORAM : RABIE, CJ, JANSEN, VILJOEN, HOEXTER,

HEFER, JJA

HEARD : 20 MAY 1985

DELIVERED : 12 SEPTEMBER 1985

JUDGMENT

VILJOEN JA

The appellant was accused 3 in the Court

a quo. Together with one Patrick Ntobeko Maqubela

(accused 1)/

2.

(accused l) and Mboniswa De Villiers Richard Maqhutyana (accused 2) he stood arraigned on a number of charges. In addition each accused separately faced one or more charges. Count 1 contains a charge of high treason. This count was regarded by the State as the main charge. There were alternative charges alleging contraventions of the Terrorism Act, No 83 of 1967, of sabotage in contravention of the General Law Amendment Act, No 76 of 1962,and various other charges which I need not specify.

The appellant was arrested at his place of employment near East London on 25 November 1981. It is and was at all material times common cause that he was born in Cape Town of a father born in Transkei and a mother born in Ciskei and that his parents were domiciled in Transkei at the time of his birth. According to a travel document found in his room when he was arrested he is a Transkeian citizen. On this document is an endorsement dated 8 December 1980 authorising him to proceed to Johannesburg to pursue a study course of two years at the Technikon in Bedfordview. Although the endorsement suggests that he intended to absent himself from Transkei for two years counsel for-the State conceded in the Court a quo that from information he had received the appellant was employed and was residing in Umtata at the time an explosion in Field Street, Durban, took place on Saturday morning of 7 February 1981. It was formally admitted by the defence that appellant was employed by L T

A (a building construction firm) and that he resided in Mndantsane, a Black township near East London which now falls in Ciskei, from 1 May 1981 until the day of his arrest on 25 November 1981. Ciskei became independent on 4 December 1981. Count 1 (high treason) was based on a conspiracy to overthrow the State alleged to have existed between the ANC, the appellant, the two other accused and certain other people mentioned in the indictment. The Court aquo found on the facts, on count 1, that the residence of accused 1 and 2 in the Republic was of sufficient permanence throughout the whole period covered by the indictment (October 1980 to November 1981) and that of the appellant during the period 1 May 1981 to 24 November 1981, for them to have owed a debt of allegiance to the Republic during those periods. The judgment in this regard in so far as it relates to the appellant reads as follows:

"Some of the acts committed by Accused No. 3 in furtherance of the objectives of the conspiracy were committed before he took up residence and owed allegiance to the Republic. When he visited Swaziland the first time and when he caused the Field Street explosion he was not resident in the Republic, This complicates his position somewhat. It however still leaves him as a member of the conspiracy and does not reduce his actual participation as the Court has found in the conspiracy nor does it in any way affect the hostile intent with which the court has found he committed those acta. The conspiracy continued right through the period of the indictment and always with the same objectives and so did Accused No.3's membership thereof and participation therein continue right through that period. It is only after he became resident in the Republic that his membership of the conspiracy is relevant in regard to the charge of high treason and his first visit to Swaziland in October 1980 and his act of causing the explosion in Field Street can accordingly not form part of the offence of high treason as far as he is concerned. The explosion in Field Street is covered by Count 2 which charges the accused with the contravention of Section 2(1)(a) read with certain other sections of the Terrorism Act. This charge is based on the same principle as alleged in Count 1. This offence can be committed by a person who does not owe allegiance to the Republic. The act of explosion committed by Accused No. 3 which took place in Durban in the Republic certainly had or was likely to have the results set out in paragraphs (b), (c), (e), (f), (g), (h), (i), (k) and (1) of Section 2(2) of the Terrorism Act and it follows that, there being no proof to the contrary. Accused No. 3 committed this act with intent to endanger the maintenance of law and order in the Republic.

The end result is perhaps not any different as far as all three accused are concerned for as was

stated in S v Mange 1980(4) SA 613 (AD) at page 619 this is terrorism in any language but in common law, if committed by persons owing allegiance to the State, it is also high treason." The Court a quo convicted the other two accused and the appellant of high treason on count 1 and convicted the appellant on count 2 in regard to the explosion in Field Street. It sentenced the appellant and the other two accused to serve a sentence of 20 years imprisonment each. With the leave of this Court, leave having been refused him by the Court a quo, the appellant now appeals against his conviction.

Mr Wentzel, counsel who appeared before the Court a quo, prepared a set of heads of argument. In these heads an attack was made on the validity of a certificate issued by the Minister of Justice in terms of s 111(1) of the Criminal Procedure Act 51 of 1977, the contention being that, as the majority of the offences alleged against the appellant were committed in the present Ciskei, the Courts of the Republic of South Africa had no jurisdiction after Ciskei became independent and the certificate was, consequently a nullity; since it affected the offences alleged to have been committed outside Ciskei, the appellant was seriously prejudiced. A further submission was that the Court a quo wrongly convicted the appellant of high treason, because the appellant was neither a citizen of the Republic of South Africa, nor did he reside in the Republic at the time of the Field Street explosion. In all the circumstances the appellant was not shown to have that quality of allegiance which is an essential ingredient of the crime of high treason, it was contended. It was submitted, thirdly, that a confession made by the appellant before a magistrate should not have been admitted by the Court a quo.

Mr Bizos who appeared for the appellant before this Court submitted supplementary heads of argument on the issue of the admissibility of the confession only and informed the Court that, while not abandoning the submissions of his predecessor on the issues of the validity of the certificate issued by the Minister and the allegiance the appellant owed to the Republic, he did not propose to address the Court thereon. Mr Bizos was as good as his word and contented himself with assailing the finding of the court a quo that the confession was admissible. It was contended, both in the first set of heads of argument as well as by Mr Bizos, that if the confession were wrongly admitted the conviction cannot stand. Mr Slabbert for the State, on the other hand, submitted that even if the confession were held to have been wrongly admitted, there was sufficient other evidence for a conviction. There is certainly a considerable amount of evidence corroborating that which appears in the confession but whether such evidence is, standing alone, sufficient to support a conviction I need not, in the view I take of the matter, consider. Since Mr Bizos has not abandoned the contentions

relating to the validity of the Minister's notice and the allegiance owed by the appellant to the I Republic of South Africa, I shall consider these submissions before proceeding to deal with the contention that the confession was wrongly admitted.

Section 111 of Act 51 of 1977 provides that where the Minister deems it in the interests of the administration of justice that an offence committed within the area of jurisdiction of one attorney-general be tried within the area of jurisdiction of another attorney-general, he may in writing direct that criminal proceedings in respect of such offence be commenced in a court at a place within the jurisdiction of such other attorney-general. The offences in respect of which the Minister issued the certificate were all alleged to have been committed in Mndantsane township, East London, within the jurisdiction of the attorney-general of the Eastern Cape Provincial Division of the Supreme Court. These offences were specified in an annexure to the notice as follows: participation in terroristic activities in contravention of s 2(l)(c), read with certain other sections of Act 83 of 1967; possession of explosives in contravention of s 28 read with s 1 of Act 26 of 1956; possession of a fire-arm being a Makarov pistol in contravention of s 2 read with s 1 and other sections of Act 75 of 1969; possession of ammunition in contravention of s 36 read with certain s 1 and other sections of Act 75 of 1969 and possession of hand grenades in contravention of s 32 (l)(b) read with other sections of Act 75 of 1969.

The appellant was not convicted of any of these offences. In the heads of argument submitted by Mr Wentzel it was contended that as the offences were alleged to have been committed in Mndantsane, now in Ciskei, the appellant was not amenable. to the jurisdiction of the Natal Provincial Division. Jurisdiction, the argument proceeded, ordinarily is territorial unless there is a statutory exemption, for example the Terrorism Act; accordingly the certificate given by the Minister was of no force and effect. It follows, in counsel's submission, that an irregularity occurred in charging the appellant with matters which concerned offences allegedly committed outside the jurisdiction of the court in which he was tried and concerned matters highly prejudicial to him as far as the charge of high treason was concerned, and gravely prejudiced him in the result. If the issue to be determined was whether or not the appellant caused the Field Street explosion, the finding on that must be, in some measure, tainted by the evidence concerning the appellant's illegal possession of the Makarov pistol. I do not deem it necessary to consider whether the independence of Ciskei deprived courts of the Republic of South Africa of jurisdiction in respect of offences committed in Ciskei before it became independent. Since the appellant was not convicted of any of the offences specified in the Minister's notice, the only prejudice that could be and was relied upon was that the

evidence concerning the Field Street explosion was in some measure tainted by the evidence concerning the pistol and explosives. In my view there is no connection whatsoever between the Field Street explosion and the Makarov pistol. It has not been found that this pistol was used in the explosion. It is true that the trial Court held that evidence of a pointing out of an arms cache in Ciskei to the police by one Mpilo Taho who refused to give evidence is relevant to what the appellant mentioned in his confession, and that that was taken into account, as was the appellant's possession of the Makarov pistol, as circumstantial evidence on the count of high treason.

I agree, however, with Mr Slabbert, counsel for the State, who contended in this regard that evidence relating to the appellant's possession of arms and explosives, even if charges against him of having committed the substantive offences of possession of the items in question would have failed, was clearly admissible on the count of high treason. For instance, argued Mr Slabbert, there may be evidence that an accused had been placed in possession of arms and explosives in say, Botswana, Lesotho or Swaziland and was seen to possess these items just beyond the border with South Africa whilst he was proceeding to South Africa. Such evidence would be admissible, he submitted. I fully agree.

The argument that the appellant owed no allegiance to the Republic of South Africa must likewise be rejected. When the appellant resided in Mndantsane, it was situated in the Republic of South Africa, the sovereign state which possessed majestas and to which the appellant owed allegiance. It was towards this state that the appellant's hostile acts were directed. In my view the fact that Ciskei (which included Mndantsane) subsequently became independent is irrelevant. The appellant had worked and resided in Mndantsane for a considerable period before his arrest. Even though he was not a citizen of South Africa and may not have had the intention to reside here permanently, his stay in South Africa was in my view of sufficient permanence for the requisite of his owing allegiance to the Republic of South Africa to be satisfied.

See Hunt Common Law Crimes Volume II 21 and Snyman Strafreg 274.

I proceed to deal with the contention that the Court a quo wrongly admitted the confession.

The learned trial Judge, sitting without his assessors, heard evidence on the issue of the admissibility of the confession. In view of the nature of certain replies by the appellant to preliminary questions put to him by the magistrate suggesting that the statement might have been induced by an assault or threats of an assault upon him by the police the State did not rely on the presumption of voluntariness contained in s 217(1) (b) (ii) of the Criminal Procedure Act, 51 of 1977, but accepted the onus of proving that the statement was made

freely and voluntarily by the accused in his sound and sober senses without having been unduly influenced thereto. The State adduced the evidence of the magistrate who took the confession, of the interpreter who officiated at the taking thereof, of the doctor who examined the appellant that same afternoon after the appellant had made the confession and of those police officials who were involved either in the arrest of the accused or his interrogation after his arrest. The appellant gave evidence on his own behalf.

The first witness for the State was the magistrate. The statement which he took down was handed to him and he was led on the questions he put to the appellant through the interpreter and the answers he received from the latter. The magistrate read the following questions and answers:

"Besef u dat u in die teenwoordigheid van 'n Landdros is? Ja. Begryp u die waarskuwing wat aan u gegee is? Ja. Verlang u om desnieteenstaande 'n verklaring te maak? Ja.

is u deur enige persoon aangemoedig of beinvloed om 'n verklaring te maak? Nee

Is enige beloftes deur enige persoon aan u gemaak om n verklaring af te le? Nee.

Verwag u enige voordele as u 'n verklaring maak? Ek hoop om nie verder geslaan te word en gevra word om die waarheid te praat nie.

Het u vantevore 'n verklaring van dieselfde aard gemaak? Nee.

Indian wel, wanneer en aan wie? N.V.T.

Waarom verlang u dan om die verklaring te herhaal? N.V.T.

Wanneer is u in hegtenis geneem? Vandag 25.11.1981.

Wat is die datum van die misdryf in verband waarmee u die verklaring wil aflê? Oktober 1980 en tot datum.

Is u deur enigiemand aangerand of gedreig en indien wel, wanneer en deur wie? Ek is geslaan maar is nie baie geslaan nie - twee keer -maar is nie gedreig om 'n verklaring te kom maak nie.

Het u enige beserings van enige aard? Geen.

Wie het u na hierdie kantoor gebring? Polisie.

Hoe het dit gebeur dat u na hierdie kantoor gebring is? Ek was gevra om h verklaring te maak voor ‘n landdros en ek het ingewillig.

Is die verklaring wat u gaan maak aangaande dinge wat u self ondervind of gesien het, of is dit dinge wat die Polisie aan u voorgese het om aan my te kom vertel? Eie waarnemings.

Is u deur enigeen (die Polisie ingesluit) met geweld of aanranding gedreig as u nie die verklaring sou maak nie? Nee.

Is dit wat u in die verklaring gaan se die waarheid volgens u persoonlike kennis en wete? Ja."

Counsel for the State thereupon informed the learned Judge that he would not at that stage require the contents of the statement to be read out. The learned Judge regarded the contents to be important, however, and ruled, as appears from the following extract from the evidence, that the entire confession be read out:

"U Edele, ek sal nie vra dat die inhoud nou voorgelees word nie. Ek verstaan van my geleerde vriende dat indien u Edele uiteindelik sou bevind dat die bekentenis wel toelaatbaar is dan kan dit by wyse van ooreenkoms ingaan. Die Landdros sal nie teruggeroep hoef te word om weer voor te lees nie.

VAN HEERDEN R: Ja maar die ding is, is die inhoud nie een van wesenlike belang?

MNR SLABBERT: U Edele, ek het dit juis aan my geleerde vriend so gestel ingeval die beskuldigde sou getuig en ek dan vir horn moontlik ondervra oor die inhoud van die verklaring. Ek weet nie wat presies die houding daar is nie.

VAN HEERDEN R: Mnr Slabbert, ek weet nie wat gaan kom nie. Ek sit hier om te verhoor wat voor my gesit is maar my ondervinding in die laaste 17 jaar is dat dit van wesenlike belang is -

die inhoud/

24.

die inhoud van 'n verklaring.

MNR SLABBER?: Dit is my ondervinding, U Edele. VAN HEERDEN R: Ja, laat horn dit lees."

Without any objection from defending counsel, the magistrate proceeded to read the contents of the confession.

The evidence of the policemen relating to the circumstances surrounding the appellant's arrest, the search of his room, his interrogation thereafter and the making of the confession was summarised by the learned trial Judge as follows:

"The factual background to this issue is that at approximately 9.30am on 25th November 1981 the accused was arrested at his place of employment with a building construction company outside East London by Constable (now Sergeant) Bellingan of the Security Police accompanied by Constable van Jaarsveld also of the Security Police. These two officials were stationed in Pretoria at the time and were on that day in East London on some other matter unconnected with this case. The arrest was carried out by them on the instructions of Lieutenant van Wyk and Warrant Officer Naude who are members of the security police in East London as they were not known in East London. After the arrest they handed the accused over to Lieutenant van Wyk and Warrant Officer Naude who had been waiting in a

vehicle some distance away. The accused was thereafter taken.to his room in the Mndantsane Township by Warrant Officer Naude and Constable van Jaarsveld, where they obtained the key of the room from a relative of his. The room which is apparently not big was searched by Warrant Officer Naude while Constable van Jaarsveld armed with his rifle stood guard inside the door with the accused, his hands handcuffed in front of him, standing next to van Jaarsveld. It is common cause that in a suit inside the wardrobe Warrant Officer I Naude found a document which he took possession of and a Makarov pistol of Russian make was found in the pillow cover. The accused's version of how the pistol was found differs somewhat from that of the two policemen. According to the latter whilst Warrant Officer Naude was searching the bed and when he lifted the top end of the bed the pillow shifted or rolled to the bottom near to where van Jaarsveld and the accused were standing. The accused made three movements towards the pillow and was on each occasion ordered by Warrant Officer Naude to stand back and told by Warrant Officer Naude that he would do the searching. On the third occasion Naude slapped the accused with his open hand twice on the sides of his face. Van Jaarsveld went to and discovered the pistol in the pillow case. The accused's version is that the search had already been completed and when they said that they were taking him away he asked for and was granted permission to take some of his belongings with him. He took his toothbrush and a pair of trousers and when he moved forward to take his pyjamas which was lying on the pillow the policeman noticed the pistol. It was then, he said, that Naude struck him once with the open hand on the left side of the face on the ear. The accused was thereafter taken to the Cambridge police headquarters where, according to Warrant Officer Naude, they arrived at about 11 o'clock. He was interrogated in an office on the first floor and at about 12 o'clock, according to Warrant Officer Naude, the accused expressed his willingness to make a statement to a Magistrate. The Magistrate was not immediately available and it was only at 2.55pm that the accused made his statement. During the intervening period the accused was taken to various places in connection with the investigation. It was during his interrogation, the accused maintains, that he was assaulted to make a statement and that he was threatened with assault if he did not make one and because he feared for his life, he said,, he agreed to make a statement to the Magistrate. It is common cause that when he was interrogated and also when he made his statement to the Magistrate the accused's left arm was handcuffed to a chair."

In his judgment on the admisibility of the confession the learned Judge referred to the general submission by counsel for the defence that the Court should be particularly careful in a case concerning a confession before finding that it had been freely and voluntarily made. Counsel

submitted, said the learned Judge that, even if a Court should disbelieve an accused the Court still had to be satisfied beyond a reasonable doubt that a confession was freely and voluntarily made. counsel further submitted, said the Judge, that the probabilities were against a person of his own free will confessing to a serious crime carrying a severe penalty and that it was also hardly likely that a person would co-operate with the police to the extent of voluntarily making a confession only to contest its admissibility at a later stage. In the view of the learned trial Judge these submissions tended to over-simplify the matter somewhat. Experience has taught, he said, that people do confess to crimes, even serious ones carrying heavy penalties, and do for reasons of their own later try to extricate themselves from the predicament they had placed themselves in by making the confessions.
He dealt with the "broad attack" of counsel on the manner the police had set about interrogating the appellant. This attack included a submission that if the appellant had been arrested in terms of s 50 of the Criminal Procedure Act, 1977, as was testified by one of the witnesses, the police should have warned him in terms of the Judges' rules that he was not obliged to make a statement. That they never did, nor did they inform him what his rights were. In the opinion of the learned Judge this was no doubt a matter which could not be ignored, but he referred to what van den Heever JA said in R v Kuzwayo 1949(3) SA 761 (A) to the effect that these rules did not have the force of law; they only constituted administrative directives for the guidance of the police force. It remained, according to van den Heever JA, a question of fact whether a statement had been made voluntarily or not. The evidence, said the learned Judge, makes it abundantly clear that from the beginning it had always been the intention of the police to detain the accused (the appellant) in terms of section 22 of the General Law Amendment Act, 62 of 1966, which empowers a police officer above the rank of lieutenant-colonel, for reasons therein set out, to cause a person to be arrested and detained for interrogation for up to fourteen days. The learned Judge considered counsel's submission that being detained under s 22 was hardly conducive to voluntariness, the more so as the appellant whilst making his statement was handcuffed to a chair. He rejected this argument on the ground that the appellant never at any time maintained that his detention in itself or the fact that he was handcuffed influenced him in any way to make the statement to the magistrate. The only reasons advanced by him for making the statement, the learned Judge pointed out, were the assaults and threats of further assaults upon him. In the learned Judge's view the issue accordingly narrowed down really to the question whether the State had discharged the onus resting upon it that no such assaults had been committed upon or threats thereof made to the appellant. This in turn, said the learned Judge, basically

boiled down to a finding of credibility on the evidence and the impression the various witnesses made.

The various police witnesses denied, he said, that the accused had either been assaulted to make or had been threatened with assault if he did not make a statement. The evidence was that the appellant co-operated with them in their investigation of the case and that he expressed a willingness to make a statement before a magistrate. In the learned Judge's view there would seem to-be nothing improbable in this. He said:

"It was fairly shortly after his arrest and arrival at the police quarters that, according to the State evidence, the accused expressed a willingness to make a statement to a Magistrate. There was here no all-night interrogation as was referred to in Christie's case. A pistol of Russian make was found in his room and the document was found in a suit in a wardrobe. I was not told what was in the document but it was apparently important enough to be taken possession of by the police. The accused might very well in the face of these findings have decided to co-operate with the police and to make a statement in which it turned out he mentioned the names of certain people. Sub-sequent reflection might well have led him to feel that he had let the team down hence his desire to resile from his statement. The Court does not know what the reasons for his conduct from time to time were but experience has taught that accused persons do sometimes act in this manner. There would therefore appear to be nothing improbable, according to the general submission earlier referred to, in the accused first making a statement voluntarily and later wanting to resile from it."

The learned Judge also had regard to the evidence of Dr Wingreen who examined the appellant later that afternoon. This examination commenced at approximately 17h45. He summarised the doctor's evidence as follows:

"The doctor found the accused's blood pressure and pulse regular and no other abnormalities. Examining the accused with his clothes removed he found no visible injuries nor any areas of tenderness and according to the doctor the chances were almost nil that there could, have been underlying injuries with no external signs thereof without any tenderness. The doctor said that when he left the accused after the examination he had no doubt in his mind that the accused had not been assaulted and gave as his reasons that he found no injuries on him nor any areas of tenderness, the accused had told him he had no injuries, he saw the accused walk and talk using his muscles, the accused went through tests, stood before him moving all his limbs, his abdominal and chest muscles, got up from a chair, took off his clothes and put them down free from pain and during all this time he could observe nothing wrong with the accused. The doctor conceded in cross-examination that he would have no reason to

disbelieve the accused if he were to say that he had been assaulted but not severely. The doctor added that if the accused was in a state of distress and anxiety he would have expected to find a rapid pulse and a look of fear in his face but this was not so and he was perfectly normal."

The police witnesses impressed the learned Judge as being truthful. In his view there were no discrepancies or contradictions in their evidence - in any event no material ones. The evidence of the accused (appellant) on the other hand was utterly unsatisfactory and full of contradictions and discrepancies,, he said. It was in his view quite clear that the appellant was fabricating his evidence as he went along and especially so when he found himself pushed in a corner. He proceeded to deal fairly extensively with the evidence of the police witnesses and the appellant as to what happened in the appellant's room where he was taken after he had been arrested and said he was satisfied that the version of the State witnesses was the correct one and that the appellant was trying to put what appears to be an innocent complexion on his move towards where he knew the pistol was.

The evidence by the appellant of the assaults upon him by the police and his explanation why it does not appear from the preliminary part of the confession that, as he testified, he told the magistrate that he had thus been assaulted, were rejected by the learned Judge for the following reasons:

"According to the accused he did not give the Magistrate a full description of the assault upon him as he was threatened by Warrant Officer Naude not to tell the Magistrate. It was never put to Warrant Officer Naude that he had threatened the accused should he tell the Magistrate of the assault. It was also never put to Captain Naude that he had threatened the accused with electric shocks. It was clear that the accused was adding to the alleged assaults and threats of assaults suffered as his evidence progressed. When questioned why, if he was afraid that if he told the Magistrate of the assaults and threats of assaults it would come to the notice of the police, he nevertheless told the Magistrate that he had been hit twice his reply was that he had in fact asked the Magistrate not to write that down. When further questioned why he did not tell the Magistrate about the other alleged assaults with the similar request that it should not be written down he said that he did not think of it. According to the accused he only later discovered from what Warrant Officer Naude told him that the Magistrate had written down what he had in fact requested him not to write down. When it was pointed out to him that his statement was read over to him and that he had thereafter signed it he replied that he did not pay attention when the questions and answers were read over. it was never put to the Magistrate and the interpreter that the accused had requested that the information about the

assaults should not be written down. This entailed the recall of the Magistrate and the interpreter all the way from East London to where they had already returned after giving evidence. The interpreter denied that such a request was ever made by the accused and the Magistrate denied that such request was ever interpreted to him by the interpreter. I have no doubt that they were both truthful and am satisfied that the accused was obviously lying to get himself out of the spot he had landed himself by saying that he would get into trouble if he informed the Magistrate of the assaults and threats of assault."

The appellant's evidence in regard to his examination by the doctor was, in the learned Judge's view, equally unsatisfactory, self-contradictory and untruthful. In this regard the judgment reads as follows:

"He regarded the doctor as one of the police and as an enemy although he admitted that the doctor was not hostile to him. He was still, he said, in an emotional state and panicking when he was examined and when it was put to him that his blood pressure and pulse were found to be normal he said that it did not surprise him that the doctor had said that. He said that the doctor did not touch his neck which was still painful when he himself touched it. At one stage he said that he did not tell the doctor of the pain in the neck as the doctor would have wanted to know what happened. At another stage he said he did tell the doctor about it and could not explain why the doctor had not noted down the pain in the neck in his report, Exhibit U. At another stage he said that what he told the doctor was not that he had a pain in the neck at that moment but that he sometimes got a pain in the neck. During the course of the examination he asked, as was indeed noted down by the doctor, to speak to the doctor in private. Two policemen who were working at a table in the same room were then asked to leave the room. He however never told the doctor anything that could be classified as private or to have had anything to do with assault. Instead he informed the doctor that he suffered from severe headaches, apparently from smoking dagga before 1977, and that he got cramps in the head and jaw lock when he slept at night. These, he said, were not true but he told the doctor that in the hope that the doctor would tell the police not to assault him. I am unable to accept this as the true reason and am satisfied that he was telling the doctor what was the matter with him. I also have no reason to disbelieve the doctor. He impressed me as a truthful witness. The doctor said that he was not even aware that the accused had made a statement to the Magistrate."

What appears in the last sentence is not correct. As appears from his evidence the doctor was aware, when he examined the appellant, that he had made a statement to the magistrate. What he was not aware of was the appellant's statement to the magistrate that he had been assaulted

by the police. This is, in my view, a trifling misdirection which does not affect the appellant prejudicially.

The learned Judge said he was satisfied that the appellant was an untruthful witness and that he was making up his evidence as he went along to suit his own purposes. He found that when the appellant mentioned an assault to the magistrate he was and could only have been referring to the time in the room when he was slapped twice in the face. In the learned Judge's view this had nothing to do with the making of the statement and was not claimed to have induced him to make it. He accepted the evidence of the State witnesses that the accused was neither assaulted nor threatened with assault to make a statement and found that the State had discharged the onus of proving that the statement had been made freely and voluntarily and without inducement. He ruled, accordingly, that the statement was admissible.

It was submitted, on behalf of the appellant, that the Judge a quo erred in (a) requiring the magistrate who took the appellant's statement to read the contents to him before determining that it had been made freely and voluntarily; (b) not taking into account probabilities favouring the appellant's version that the statement was not freely and voluntarily made, regard being had, particularly, to the answers he gave when the magistrate took down his statement and his evidence regarding the assaults upon him; and (c) emphasizing unduly the demerits of the appellant as a witness and uncritically accepting the evidence of the policemen. Elaborating his first submission Mr Bizos directed this Court's attention to the passage from the evidence cited above to the effect that the learned trial Judge ruled that the magistrate's evidence should be received on the contents of the confession which, counsel submitted, was an irregularity which was compounded when prosecuting counsel, while he was cross-examining the appellant, asked him whether the statement was the truth, which the appellant admitted. After this admission there were certain exchanges between counsel and the Judge. Mr Wentzel indicated that it was not part of the defence case that the statement did not contain the truth. He informed the learned Judge that it was deliberately not made part of the case to challenge the contents and in such circumstances it is ordinarily the ruling of the court that there should be no cross-examination on the contents because of the prejudice inherent in that line of cross-examination. Prosecuting counsel replied that it was a credibility issue and intimated that if the appellant said it was the truth that was, as far as he was concerned, the end of the matter and he did not propose to cross-examine him further. The learned Judge intervened as follows:

"Yes Mr Slabbert, unless of course the witness has said that he was told by the police what to say ,"

and proceeded to ask the appellant whether what had been written down in his statement was his own version whereupon the appellant replied that the confession contained his own words "though there are also a few things that they wrote about because they had made mention of them to me." There was no further cross-examination in this regard.

The question arises: Was the ruling given by the learned trial Judge that the magistrate's evidence on the contents of the statement should be received an irregularity and, if so, what was the effect of the admission of the evidence? In S v Lebone 1965(2) SA 837(A), a matter decided when the previous Criminal Procedure Act, 56 of 1955, was still in force, it was held that when the admissibility of a confession was placed in issue on the ground that the accused had not made it freely and voluntarily, the truth of the contents was, generally speaking, irrelevant and not subject to cross-examination by the prosecutor. If, however, the accused averred that he had been forced to make the confession concerned and that the police had told him what to say the contents would become relevant and he could be cross-examined thereon for the purpose of proving that only he could have been the author of the confession Rumpff JA said at 841H - 842C:

"Die geskilpunt in die onderhawige saak was of voldoen is aan die bepalings van art 244(1) van die Strafkode en of die . appellant die bekentenis vrywillig en sonder onbéhoorlike belnvloeding afgelê het. Vir doeleindes van daardie ondersoek is die waarheid van die inhoud van die verklaring in die algemeen gesproke irrelevant en geen verhoorhof sal toelaat dat 'n aanklaer probeer om te bewys dat die inhoud waar is nie, 'n bewyslas wat hy juis probeer kwyt deur die bekentenis toegelaat te kry. Kruisverhoor van 'n beskuldigde deur die Staatsaanklaer oor die waarheid van die inhoud van die bekentenis is derhalwe in die algemeen gesproke, nie tersaaklik nie en sal nie toegelaat word nie. Anders is die geval egter wanneer die beskuldigde self beweer dat die inhoud van sy bekentenis vals is en deur die Polisie ingegee is en hierdie feit gebruik word as deel van sy saak dat hy deur die Polisie gedwing is om 'n verklaring te maak. In so 'n geval moet die aanklaer die reg he om die beskuldigde onder kruisverhoor te neem oor die inhoud van die bekentenis om aan te toon dat die beskuldigde self die bron van die inhoud is en nie die Polisie nie, soos deur die beskuldigde beweer. Die kruisverhoor word dan gedoen met die doel om die geloofwaar-digheid van die beskuldigde aan te tas, 'n relevante onderwerp, en nie om te bewys dat die inhoud waar is nie. Die inhoud van 'n bekentenis kan dus relevant word, in sekere omstandighede, in verband met die vraag of die verklaring vrywillig afgelê is en dan sal kruisverhoor oor die inhoud toegelaat word vir sover dit deur die omstandighede geregverdig is."

From this extract it appears that Rumpff JA did not express the view that the contents should be withheld from the judicial officer concerned, but in view of the requirement that a confession should be feely and voluntarily made, the issue (if and when it becomes an issue)whether this requirement has been met should be decided before the contents of the confession are placed before the Court. I agree with respect with the admonition by Ramsbottom J in R v Samuel Maloi (TPD Justice Summary of Decided Cases 174 31 July 1942) that prosecutors ought to use the greatest care in leading evidence of confessions. Subject to what I shall presently have to say on the question of the onus 'I also agree with the following dictum from the learned Judge's judgment (which is, in any event, because the State accepted the onus of proving the requirement referred to, apposite in the present case): "The legislature has laid down a condition precedent to the admission of a confession, and there is no reason at all why prosecutors, whose duty it is to present evidence to the Court, should not take care to prove the facts which are a conditon precedent to the admission of the evidence. These facts should in every case be proved before evidence of the confession is tendered."

The practice followed by some Courts (see, for instance, S v Mahlala and Others 1967(2) SA 401 (W) at 403B) not to have regard to the contents of the confession before the issue referred to has been decided, seems, therefore, to be a salutary one because there is always the danger that if this is not done the accused may be prejudiced in some way or another, particularly when the presiding judge does not, in terms of s 145 (4) (D) of Act 51 of 1977, deem it necessary, in the interests of justice, to sit alone. True, it is not inconceivable that the contents may on some ground other than credibility become relevant. In the present case the trial Judge was dealing with the argument that it was improbable that an accused person would resile from a confession which he had made freely and voluntarily. In this context he took into account that the appellant implicated, by mentioning their names, certain people as his co-conspirators. The learned Judge reasoned, as appears from the extract from his judgment quoted above, that the appellant might very well, in view of what the police found in his room, have decided to co-operate with the police and to make a confession - a decision which he might have regretted upon subsequent reflection when he realised that he had let the team down; hence his attempt to resile from his statement. The contents were therefore, relevant. It seems to me, however, that even though the learned Judge did not improperly take into account the contents of the confession because he derived some support therefrom to substantiate his reasoning, he improperly ruled that it should be handed in before it became clear that the contents were or would become relevant.

A provision which, at first blush, might seem to militate against a practice to withhold the confession from the Court until after a decision that it was made freely and voluntarily, is s 217(1) of the present Criminal Procedure and Evidence Act 51 of 1977, in terms of which a confession which on the face of it has been freely and voluntarily made is presumed to be such and may be handed in without further proof.

The onus would then be on the accused, if he contests the confession, to prove the contrary. The entire confession consisting of the preliminary part and the confession itself would then, at the commencement of the proceedings relating to the admissibility of the confession, be before the judicial officer concerned.

I do not, however, read the section as indicating that the entire confession must be handed in before the issue whether it was made freely and voluntarily is embarked upon. The only difference from the position which obtained previously is that the onus has now shifted to the accused if on the face of it, of which the Court may be advised by the prosecutor with the concurrence of the representative of the accused, the confession has been freely and voluntarily made; or the prosecutor may hand in the preliminary part from which this would appear.

The issue can thereupon be decided without the contents of the confession being before the Court.

To sum up therefore I consider that the learned Judge, prematurely and irregularly received evidence of the contents of the confession; and that such irregularity entailed at least potential prejudice for the appellant. But potential prejudice is not enough for success on appeal. The final question to be decided in this regard is not whether the learned trial Judge committed an irregularity which might have led to a failure of justice; it is whether a failure of justice has in fact resulted from the learned Judge's ruling. See s 322(1)(a) of the Criminal Procedure and Evidence Act, 51 of 1977. The test is whether the appellant was prejudiced. See R v Sassin 1919 AD/ 55 1919 AD 485 at 487; R v Rose 1937 AD 467 at 475 - 477.

Mr Bizos argued that the learned Judge's reference in his judgment to certain people who were mentioned by name by the appellant in his statement constitutes prejudice which is shown by the learned Judge having had regard to the contents believing such to be true. I do not read the judgment as Mr Bizos wishes us to construe it. It is true that by the time the learned Judge held the "trial within a trial" certain evidence had been led implicating certain persons, but the remark of the learned Judge was not made in the context of linking up the details of the confession with the names already mentioned in evidence. There is, furthermore, nothing to indicate that the learned Judge had at that stage already decided that

the evidence which had been led was the truth. He merely referred to the fact that the appellant had implicated certain people who prima facie appeared to be his co-conspirators and that, as a matter of probability, his reason for wishing to resile from the contract was because he had let the team down'. In any event, the issue which the learned Judge had to decide was whether the confession had been freely and voluntarily made and not whether the contents were the truth. There is nothing in his judgment which even remotely suggests' that he was influenced by the admission made by the appellant that the contents were the truth to find that the confession had been freely and voluntarily made. In my view the submission that the appellant was prejudiced by any reliance by the learned Judge on the contents of the confession cannot be sustained.

The submission that the appellant was prejudiced by State counsel's question whether the contents of the confession were the truth and his reply that they were, can similarly not be upheld. As appears ,from Lebone's case, supra, the truth of the contents of a confession would, generally speaking, not be relevant and no cross-examination thereon should be allowed. I point out, though, that in the present case no cross-examination on the details of the contents was in fact allowed. The question put by prosecuting counsel was exploratory only. He was, presumably, unaware of the fact that the truth was not in issue. I deduce that from his remark: "Ek weet nie wat presies die houding daar is nie." It was, in my view, a question which could legitimately have been asked even if the confession were not before the Judge. Under the circumstances of his being unaware of defending counsel's attitude his purpose obviously was to obtain clarity and, if need be, to join issue with the defence. Had the appellant said that it was not the truth, prosecuting counsel would presumably, have followed it up by asking who the author of the false statement was. If the reply were that it was the police, cross-examination on the contents would have been permissible. From the point of view of possible prejudice to the appellant counsel could have framed his question differently by, for instance, asking the appellant whether he maintained that the police had told him what to say. Even if his answer were in the negative that would not rule out the possibility that the statement might still be false. It might have been fabricated by the appellant himself. His reply would make it clear, though, that the contents of the confession were not relevant to the enquiry.

I am satisfied that no prejudice in the trial within a trial resulted to the accused. The question was asked and the reply received before the Judge could intervene but he did intervene and no further cross-examination on this point ensued.

Developing his second contention Mr Bizos referred to the two answers given in reply to the following questions put by the magistrate:

"Verwag u enige voordele as u 'n verklaring maak? Ek hoop om nie verder geslaan te word en gevra word om die waarheid te praat nie."

Is u deur enigiemand aangerand of gedreig en indien wel, wanneer en deur wie? Ek is geslaan maar is nie baie geslaan nie — twee keer—maar is nie gedreig om 'n verklaring te maak nie."

The reply to the first question above clearly indicates, in counsel's submission, with reference to R v Nhleko 1960(4) SA 712(A) at 720 C-D, that in the appellant's mind the violence had both induced the tendency to speak and that such inducement was still present when he made the statement. It was not, it was contended, the slaps in the face which were dealt the appellant in his room at Mndantsane (as found by the learned Judge) to which he was referring; he clearly referred to an assault coupled to an exhortation to speak the truth.

What the appellant wished, through the interpreter, to convey to the magistrate is not at all clear. Had the magistrate troubled to enquire further what he meant the obscurity might have been cleared up. It is common cause that he had been slapped in his room in Mndantsane but his evidence of the assaults upon him included much more than only two slaps or blows. He testified that he was repeatedly knocked on the side and back of the head where the blows would leave no marks and that these blows were dealt him by the policeman who, while interrogating him, was seated across the table from him. When questioned how this official, sitting in that position, managed to hit him behind the head, he proffered the unlikely explanation that the official concerned stood up each time he hit him. Save for telling the magistrate that he had been hit- not much-twice only- his replies reflect a total voluntariness on his part to make the confession. He stated that he was hit (geslaan) twice but that he was not threatened to make a statement and to the specific question whether he had been threatened by anyone (including the police) with violence or assault if he failed to make a statement, his answer was in the negative. What went on in the appellant's mind when he gave the answers relied upon cannot be conclusively determined by construing the answers given by him, particularly not when they appear to be in conflict with other answers which tend to suggest that he made the statement completely freely and voluntarily. The preliminary questions put to the appellant by the magistrate and the answers thereto should not be regarded, in my view, as an end in itself. It is merely a means to an end, as appears clearly from the following dictum from the judgment of Ogilvie Thompson AJA in R v Mtabela 1958.(1) SA 264(A) at 268 G-E:

"As is well known, a comprehensive set of departmental instructions in relation to these matters, together with a specific form containing the various questions to be asked has, as a result of Gumede's case, been in existence for some time; Salutary though this rule is, it remains an administrative rule only, the mere non-observance of which will not necessarily render the statement inadmissible. The question remains one of fact : has it been established in the particular instance that the statement was voluntary? (R v Kuzwayo, 1949(3) SA 761 (AD) at 768; R v Jacobs, 1954(2) SA 320 (AD) at p 327)."

The reference to Gumede's case is 1942 A D 398.

In the present case the magistrate cannot be accused of total non-observance of the departmental instructions. He observed them imperfectly, though. Magistrates should always' be meticulous in making the appropriate preliminary enquiries of persons brought before them for the purpose of recording a statement or confession, as Ogilvie Thompson JA pointed out in Mtabela's case, supra at 268 G H. The availability of the specific form which has been devised for their guidance does not require them, as magistrates sometimes seem to think, to follow the procedure suggested slavishly and not to venture beyond the questions appearing on the form or be satisfied with answers which require elucidation. In every case in which the statement or confession is contested on the ground of not having been freely and voluntarily made the State should by way of introduction specifically lead evidence of such preliminary enquiries having been made. (See Mtabele's case supra at 268 i_n fine). The answers taken down by the magistrate must assist the trial court in deciding the issue. But, as appears from the passage from Mtabele's case, supra, it remains a question of fact whether the statement was made freely and voluntarily. The appellant's evidence of the assaults upon him and his efforts to make such evidence fit in with the answers furnished by him to the magistrate were, in my view, entirely unconvincing. Considerable argument was addressed to this Court on the possible effect the following factors had upon the appellant: the interrogation of the appellant, his detention under s 22 of the General Law Amendment Act, 62 of 1966, his having been handcuffed to a chair while he was being interrogated and when he made the confession to the magistrate and his having been examined by the doctor in an office where there were, at the commencement of the examination and until they were requested by the doctor to leave the office, policemen present. But as the learned trial Judge pointed out, the only reason advanced by the appellant for making the statement was the assaults upon him and threats of further assaults. In R v Ananias 1963(3) SA 486(SR) Beadle CJ dealt with an argument that persistent questioning negatived the accused's freedom of volition. In the course of his judgment he quoted, with approval, at 488 B-D the following extract from a judgment of

Clayden CJ:

"The main submission was that the persistent questioning to which the appellant was subjected indicated that prior to the making of the statement he had been overawed by the police. This was coupled with the contention that the purpose of the questioning was not to obtain information in regard to the crime but to get the appellant to admit that what Chidzero had said was the truth But there is a lot of evidence to show that the appellant, despite the nature of the questioning, was not overawed. He is an intelligent person, and the evidence indicates that, throughout the evening, he seemed to be well aware of what he was saying and doing, and appeared to be on good terms with his questioners .... But the final answer to the contention, as indeed it is to several of the other contentions is that the argument is not supported by the appellant's evidence. He complained of the form of the questioning; he said, falsely, that he complained of it to Coetzee; but so far from saying that it made him talk he denies that he made a statement at all. The argument is in reality the hypothetical one that a person who was questioned in this way would have been overawed. That has little force when that person does not say that that was so.".

I fully agree. What applies to the question of interrogation applies equally to the other arguments based upon hypothetical considerations.

Mr Bizos' final argument also falls to be rejected. The learned Judge did emphasize the demerits of the appellant as a witness but not, in my view, unduly so. There were discrepancies in the evidence given by the policemen but I agree with the learned Judge that they were not serious. The evidence of the policemen does not stand alone, however. Dr Wingreen's evidence was important. As the learned trial Judge pointed out, the doctor conceded in cross-examination that he would have no reason to disbelieve the accused (the appellant) if he were to say he had been assaulted but not severely. The doctor added, however, said the learned Judge, that if the accused was in a state of distress and anxiety he would have expected to find a rapid pulse and a look of fear in his face but this was not so and he was perfectly normal. What is more, when the doctor made this concession the appellant had not yet testified and his unsatisfactory evidence in this regard referred to above had not yet been heard. His unacceptable evidence destroyed much of the effect of the concession made by by the doctor.

I have perused the evidence given in the trial within a trial carefully. I have also studied the detailed judgment of the learned Judge a quo in which he stated his views on the demeanour of the witnesses and made certain findings on credibility. He took into account both the demeanour of the police witnesses and the appellant and dealt fully with the probabilities. I

am not persuaded that, save in the respect dealt with me above, he misdirected himself either on the law or the facts. The appeal is dismissed.

JUDGE OF //APPEAL
RABIE, CJ)
JANSEN JA)
- concur
HOEXTER JA)
HEFER JA)