REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, EASTERN CIRCUIT, MIDDELBURG)

CASE NUMBER: CC 73/15

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
(4)

30/07/2015
.....

In the matter between:

THE STATE

versus

PHUMLANE FORTUNE NGWENYA

JUDGMENT: REASONS FOR ADMISSION OF CONFESSION

LAMPRECHT, AJ (30/07/2015)

Introduction

[1] The accused is charged with murder, rape and defeating the ends of justice. During the course of the trial, Mr Coetzer, for the state, indicated that the

state wants to present evidence of an extra-curial confession that accused made to a magistrate. Ms Fraser, for the accused, indicated that the voluntariness of the statement is placed in issue; and, upon enquiry from the court, further indicated that some of the contents of the statement is also placed in issue, averring that the magistrate maliciously recorded certain facts that the accused did not convey to him. A so-called trial-within-a-trial was then held after which I ruled that the confession statement is admissible and, accordingly ordered that it be admitted into evidence. At the time, I did not provide any reasons for my decision. These are my reasons.

The law and legal questions that arose during the trial-within-a-trial

[2] Section 217 (1) of the Criminal Procedure Act 51 of 1977 (CPA) provides as follows:

> "(1) Evidence of any confession made by any accused person in relation to the commission of any offence shall, if 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, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided–
>
> (a) that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to

exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or a justice; and

(b) that where the confession 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 confession shall, upon the mere production thereof at the proceedings in question –

(i) be admissible in the evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) ..."[1]

[1] Although sub-paragraph (ii) of this provision still appears on the Statute Book, the Constitutional Court in *S v Zuma and Others* 1995 (1) SCAR 568 (CC) found section 217(1)(b)(ii) of the CPA unconstitutional because it was in conflict with sections 25(2) and 15(3)(c) and (d) of the Interim Constitution. The implicated provision provides for a so-called 'reverse onus' to be placed on the accused to prove, on a balance of probabilities, that it was not freely and voluntarily made by the accused person in his sound and sober senses and without having been unduly influenced thereto, which is in conflict with the presumption of innocence. The provision is therefore not quoted.

[3] Section 35(1) of the Constitution of the Republic of South Africa, 1996, (Constitution) *inter alia* provides:

> (1) Everyone who is arrested for allegedly committing an offence has the right–
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> (a) to remain silent;
>
> (b) to be informed promptly–
>
> (i) of the right to remain silent; and
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> (ii) of the consequences of not remaining silent;
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> (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
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> (d) to be brought before a court as soon as reasonably possible, but not later than–
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> (i) 48 hours after the arrest; or
>
> (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
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> (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
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> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.[2]

[2] Paragraphs (d) to (f) contain and amplify the so-called *habeas corpus* provisions at common law and is also provided for and further amplified in section 50 of the CPA.

[4] A few things become clear from a reading of these provisions of the Constitution and the law.

4.1 Firstly, an extra-curial confession made by an accused person is admissible as evidence against that accused person at his trial for the offence confessed to, provided that

(a) it has been made freely and voluntarily by the accused, while in his sound and sober senses and without having been unduly influenced thereto; and, further that

(b) it has not been made to a police official, correctional official or a peace officer referred to in section 334 of the CPA who is not "a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963)",[3] unless it has been confirmed and reduced into writing before a magistrate or a justice of the peace.[4]

A confession made to a private person would therefore be perfectly admissible provided that the other requirements of section 217(91)(a) of the CPA have been met, namely, that it has been freely and voluntarily made, by the accused person in his sound and sober senses and without having been unduly influenced thereto.

4.2 Secondly, a confession made to any person besides the persons excluded in section 217(1)(a) of the CPA need not be reduced into writing before it would

[3] Section 1 of the CPA. All 'Commissioned Officers' of the SAPS, in other words, Lt, Capt., Major, Col or higher are 'Commissioned Officers' and, therefore, *ex officio* justices of the peace.
[4] Section 217(1)(a) of the CPA.

be admissible into evidence.[5] However, where it has been reduced into writing by, or confirmed and reduced into writing in the presence of a magistrate (not a 'justice of the peace'), the document in which the confession is contained may be admitted into evidence by the mere production thereof, provided that, it contains a name of the declarant which corresponds to that of the accused person; and further that, where an interpreter was used, the interpreter has completed and signed what has become known as the "interpreter's certificate".[6] What Counsels for the state and defence and presiding officers commonplace seem to forget is that only the so-called 'reverse-onus' provision contained in section 217(1)(b)(ii) of the CPA has hitherto been declared unconstitutional,[7] and that section 217(1)(b)(i) has remained unscathed. Therefore, where a magistrate took a confession statement, it is usually unnecessary that the magistrate and / or interpreter be called as witnesses to determine the admissibility of the confession, unless their evidence are deemed necessary to prove that the other requirements of section 217(1)(a) of the CPA have been met or, where the contents of the statement are in dispute. In this matter, as we have seen,[8] the contents of the confession have pertinently been placed in dispute and the magistrate accordingly had to be called as a witness to prove the correctness of the contents of the confession statement.

[5] E.g., see A Kruger *Hiemstra's Criminal Procedure* (Loose-leaf annotated) 24-57 last paragraph.
[6] Section 217(1)(b)(i) of the CPA.
[7] *Supra* fan (1).
[8] *Supra* paragraph [1].

[5] Another aspect of the law that surfaced during the trial-within-a-trial and which produced uncertainty among Counsels for the state and defence, was whether the contents of the confession could or should be disclosed to the court before the court has ruled on its admissibility. The concerns raised by Ms Fraser were that the presiding officer might be influenced by the contents of the statement, which he has not yet ruled admissible; and, that it may potentially be prejudicial to the accused if the court takes cognisance of the contents of a statement that may later prove to be inadmissible evidence. Therefore, Counsel for the state agreed to hide (or cover) the contents of the statement until such time that I ruled on the admissibility thereof. I however questioned this practice at the outset as, to my mind, the law does not require such approach. After I was addressed on this issue during the evidence of the magistrate, I ruled, without the supply of reasons, that the contents of the confession may be disclosed during the trial-within-a-trial. My reasons are as follows:

5.1 There are divergent views as to whether the presiding officer may read through the confession statement before having ruled on its admissibility. Some courts hold the view that the confession may not be perused by the presiding officer before a decision on its admissibility has been given.[9] Others have taken the view that if the accused alleges that the contents have been dictated to him by someone in a position of power, the court may examine the contents of the statement to determine whether the statement is fictitious.[10] The matter is

[9] E.g., *S v Machala* 1967 (2) SA 401 (W) at 403B.
[10] E.g., *S v Leone* 1965 (2) SA 837 (A) at 842C.

therefore still largely unsettled. In the light of what follows, I am of the view that there is nothing that prohibits a presiding judicial officer to take cognisance of the contents of a statement, even if it may later appear to be inadmissible as evidence against a particular accused person.

5.2 Generally speaking, the truth of the contents of the confession is irrelevant to the question of admissibility thereof, and the prosecutor is usually not entitled to cross-examine the accused about the truth of the contents thereof. In some instances, however, it is necessary to determine whether the contents of a confession are the truth, because an untrue confession can never be reliable. An expression often found in English common law decisions to refer to what has in South Africa become known as a 'trial-within-a-trial' is the French expression ***voir dire***. The word ***voir***, in this combination, comes from Old French and derives from the Latin ***verum*** ('that which is true'). The word ***dire*** is Old French which derives from the Latin ***dicere*** ('to say / tell'). In its usual meaning, the phrase is often used in Anglo-American jurisprudence to denote '**a preliminary investigation to determine the competency of a witness or a juror to be able to tell the truth or to base a finding on the truth**'. Bearing in mind that the verb ***dire*** appears in this combination in one of the past tense configurations of the French language, the phrase can denote '**a preliminary investigation to determine the truth of something that has been said at some point in the past or to determine whether an earlier statement was intended to convey the truth**'. To avoid a lay-jury being influenced by the contents of an extra-curial statement by an accused person when otherwise it should in terms of judicial policy be regarded as inadmissible evidence, it has become customary at common law for a Judge to sit in the absence of the Jury when determining the admissibility of evidence concerning an extra-judicial confession by an accused person; and, to enquire into whether it is admissible into evidence in order to allow the Jury to rely on it during its determination of the truth – this was called a ***voir dire***. There was never any question as to whether the presiding judge could

take cognisance of the contents of the statement before ruling on its admissibility. This is more or less what the modern 'trial-within-a-trial' envisages in South African Law of Criminal Procedure and Evidence. The main object of a trial-within-a-trial is therefore to determine whether the self-incriminating extra-curial statement by an accused person can reliably be regarded as a true statement by the accused of what happened; or, whether the statement has been induced through duress and, therefore, unreliable or, at least, unjustly obtained, so that it should be excluded as evidence as a matter of judicial policy. It would appear that the rationale for the exclusion of improperly obtained confessions (or, admissions, which are not confessions) in terms of judicial policy at common law, as entrenched in the Constitution and the CPA, is threefold:

1.) First and foremost, the potential unreliability of such a confession;
2.) Second, to protect an accused person's privilege against self-incrimination; and,
3.) Last, but not least, to underscore the importance of proper behaviour by the police to those in custody.[11]

The reason why the admissibility of a confession statement was usually determined in the absence of the jury or, in modern times, assessors, especially in the lower courts where the courts sit with 'lay-assessors' was so that the laypeople of the court could not be unduly influenced by evidence which has not yet proven to be admissible. The presiding officers, who are trained judicial officers that know when and how to exclude inadmissible evidence without being influenced thereby, could however in the absence of the laypeople of the court take cognisance of the contents of a confession in order to determine its admissibility. In this regard A Kruger *Hiemstra's Criminal Procedure*[12] states as follows:[13]

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[11] See *Lam Chi-Ming v R* [1991] 2 AC 212 (PC) at 220 {[1991] 3 All ER 172 at 178c-d/e}; *S v Khan* (308/96) [1997] ZASKAR 74, 18 September 1997 at p 26 of the pad version {[1997] 4 All SA 435 (A)}.
[12] *Supra* footnote 5.
[13] At 24-60 – last paragraph.

> "It may become necessary to call to the witness stand the magistrate or interpreter who took the confession, and provision has to be made by the presiding officer for this. ***It was previously the practice to exclude assessors from the trial-within-a-trial so that, if the confession should appear to be inadmissible, they would not be aware of the contents thereof.*** This procedure in high courts [but not the lower courts] has been changed, as appears from the commentary under section 145."[14]

It would therefore appear that it has always been the view that judges and modern-day magistrates, trained judicial officers, are deemed to be competent to exclude and not take into account inadmissible evidence, even though they might have inadvertently taken cognisance of the contents thereof.

5.3 It is also of paramount importance for the court to determine whether the statement by an accused person, the admissibility of which is disputed, amounts to a confession in the true sense of the word or to only an admission or an exculpatory statement. For the former the admissibility requirements of section 217(1) need to be met before the confession will be admitted. An admission can be admitted into evidence once it is proven that it has been freely and voluntarily made by the accused person to whatever person, even a police officer who is not a justice of the peace.[15] Subject to the rule against hearsay evidence, an exculpatory statement need not meet any requirements for its admission into evidence. A confession is regarded as an unequivocal admission of guilt, with no defence remaining open to the accused person.[16] An admission is something less than a confession, containing an admission of only one or more of the elements of a crime charged, but it does not amount to an unequivocal admission of guilt, which is akin to a guilty plea. In an admission, a defence of some kind is still open to the accused person. An exculpatory statement does not contain any

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[14] Accentuation added.
[15] Section 219A of the CPA.
[16] See *S v Msweli* 1980 (3) SA 1161 (D) at 1162E-F; *S v Yende* 1987 (3) SA 367 (A) at 372D, 374C-F, 375B-D; *S v Eiseb* 1991 (1) SACR 650 (Nm).

admission by the accused person of any of the elements of the crimes charged. It may however contain something that is relevant to the determination of the credibility of an accused person on a crucial point of a case, such as an alibi or an admission that he was at the scene of the crime as a witness and, if he later denies it, the statement can be proven to discredit his version. Thus, in order to determine what regime governs the admission of a particular statement, the court has to determine what kind of a statement it is. Furthermore, the court cannot simply rely on the say-so of a prosecutor or a defence lawyer to determine in which category a statement falls, since experience has shown that all too often they are mistaken. It is something that is for the presiding officer to judge, not for the prosecution or the defence; and, in the end, it will be the presiding officer's judgment that is taken on appeal if necessary, not that of the prosecution or the defence.

5.4 Magistrates are extremely busy people and should as a rule not be called to give evidence in matters before another court. This is exactly the reason why section 217(1)(b)(i) provides that the confession statement (including the contents thereof) may be proven upon mere production thereof at the proceedings. However, where in a case, such as the current, it is averred that the contents of the statement are false, more especially that the contents of the statement have been made up by the magistrate and / or interpreter and that something has been recorded which the accused did not say, it is necessary that the magistrate and interpreter be called to testify to refute those averments. It is especially then that the court has to take cognisance of the contents of the statement and compare the accused's averments to the magistrate's and interpreter's responses to determine who is speaking the truth.[17]

[6] A further proposition which has been explored by Ms Fraser in cross-examination of the state's witnesses is whether the confession should be ruled

[17] *S v Leone supra loc cit* footnote 10.

inadmissible when there is doubt as to whether the accused person had been properly informed of his rights or whether he properly understood them; or, where the confession was obtained in violation of the accused person's other constitutional rights, for example the right to be brought before a court and charged within 48 hours after arrest – the so-called *habeas corpus* concept. The fact that evidence of an extra-curial statement has been obtained in violation of an accused person's rights in the Bill does however not mean that such evidence must be excluded *per se*. Section 35(5) of the Constitution does not contain a constitutional imperative that all evidence obtained in violation of the Bill of Rights must be excluded and that the court has no discretion whatsoever to allow such evidence. Section 35(5) reads

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded ***if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.***"[18]

This much has been confirmed by the Constitutional Court under the Interim Constitution, 1993, in ***Key v Attorney-General, Cape Provincial Division, and Another***: [19]

> "At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."[20]

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[18] Accentuation added.

[19] 1996 (2) SACR 113 (CC) {1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC)} at paragraph [13].

[20] See also *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) at paragraphs [153], [186]; *S v Khan* (308/96) [1997] ZASCA 74, 18 September 1997, at p 16 of the pdf version) {[1997] 4 All SA 435 (A)}; *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) at paragraph [37]. Note that the *Viljoen* decision overruled the earlier decision of the same case in the Transvaal Provincial Division of the High Court in *S v Viljoen* 2003 (1) SACR 450 (T) [in which case it was held that the court has no discretion but to exclude unconstitutionally obtained confessions]. Therefore, by implication, *S v Mkhize* 2011(1) SACR 554 (KZD), which relied heavily on *S v Viljoen* has been wrongly decided for failing to take cognizance of reigning precedent emanating from the SCA. The recent SCA decision in *Magwaza v S* (20169/2014) [2015] ZASCA 36 (25 March 2015) available at www.saflii.org.za should best be read against the background of *Key* and *Viljoen* as decided in the same court and should not be seen as precedent that all unconstitutionally obtained confessions must necessarily

[7] The last legal issue that cropped up during the trial-within-a-trial arose at the end of the accused's own evidence. Towards the end of his evidence in re-examination he referred to an entry in his diary that he had opened a case of assault against the police involved in his arrest and the circumstances surrounding his confession to the magistrate. He even produced a CAS number of the docket that was opened and the name of the investigating officer. Before closing the defence case in the trial-within-a-trial, Ms Fraser requested an adjournment of the matter to investigate the issue whether such a case had indeed been opened and whether that fact should be introduced into evidence to determine the veracity of accused's version of duress and torture to induce confession. Without supplying reasons at the time, I curtly dismissed the application because such a statement can normally not be used to corroborate the accused's version that he had been assaulted and placed under duress to induce him to confess. I nevertheless granted an adjournment for an early lunch so that Ms Fraser can, for her own peace of mind, make enquiries to determine whether such a case had been opened and what the status thereof was, but indicated that, in my view it amounts to nothing but a fishing expedition and a waste of time that will unnecessarily delay the matter's finalisation and, probably, result in the matter having to be postponed part-heard, which is to be avoided at all costs by an acting judge on Circuit. At resumption, the defence abandoned the application for a further adjournment because the docket had reportedly been closed as the Director of Public Prosecutions declined to prosecute. I would nevertheless have refused the adjournment simply because it would in any event have been inadmissible for the defence to prove the existence of a previous consistent statement in support of the veracity of the accused's version. Ashworth[21] explains that in terms of English Common Law there is a rule that a

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be excluded. The test remains whether the admission of the evidence of a confession, albeit unconstitutionally obtained, would render the trial unfair or would otherwise be detrimental to the administration of justice.

[21] Ashworth 'Corroboration and Self-Corroboration' in 1978 *Justice of the Peace* 266 at 267.

witness cannot corroborate himself save for "one carefully circumscribed set of circumstances where self-corroboration is possible by means of the victim's distressed condition after the alleged incident". Of course, in such a case, the court must be satisfied that the emotional condition is not simulated and, if genuine, that it was indeed the result of the fact that the witness was the victim.[22] Thus, it would have been inadmissible for the defence to prove that the accused, some months after the alleged incident,[23] opened a case of assault against certain police officers, if the only reason for presenting such evidence was to prove that the accused consistently averred that he had been assaulted and placed under duress in order to confess.

The facts

[8] The state's case in the trial-within-a-trial through the evidence of nine witnesses, can be summarised as follows. Shortly after the accused had reported to the police the find of a dead body in a sewer manhole on the premises of his parental home and after clothing suspected to belong to the deceased had been found inside his room, including a T-shirt draped over human faeces; and after he could not provide an acceptable explanation to the police, he was arrested for murder and promptly informed of his rights as required by the Constitution. This happened on Friday 31 January 2014 before 11h00. During an interview afterwards, he informed the investigating officer that he was willing to confess before a magistrate, after which arrangements were made that he be taken to the magistrate at Bethal for confession on Monday 3 February 2014. He was indeed taken to confession on that date between 11h50 and 13h50 when he was booked back into the cells. Unfortunately he was not taken to court for his first appearance before close of business on that Monday and he was only taken for

[22] See also Steph van der Merwe "Sexual Offences, Corroboration, Self-corroboration and the Probative Value of the Victim's Report" in 2014 Vol 1 *Criminal Law Review* at 7 *et seq*; *S v Bergh* 1976 (4) SA 857 (A) at 865-868.

[23] According to the CAS no (22/11/2014) that the accused gave during re-examination, the docket was opened in November 2014, while the confession that he made to the magistrate was taken on the 4th of February 2014,

court appearance on Tuesday 4 February 2015, meaning that his constitutional right to be brought before court within 48 hours has been violated. This however had no bearing on the accused confessing to the magistrate and it cannot be said that the confession was therefore obtained in a manner that violated his constitutional rights justifying an enquiry into whether the confession should be excluded for having been obtained unconstitutionally. Furthermore, the investigating officer gave an acceptable explanation for this state of affairs, namely that he thought that the officer who took the accused to confession would have taken him for his first court appearance at the same time and that he only found out after court hours that it had not been done.

[9] According to magistrate CF Nieuwoudt of Bethal and the interpreter Ms BA Mafuse, after having been questioned and informed of his rights to silence and legal representation, the accused confessed, ostensibly freely and voluntarily and without having been unduly influenced thereto[24] while being of sound and sober senses in the following fashion. On a Sunday, two weeks before the date of the confession, he and his girlfriend, Ayanda the deceased, met in the presence of the latter's sister, Thando. They had visited him at his parental place because he had promised the deceased R250 should she come and visit him. He did not give her the R250 as promised, but he did give her R150 to go and buy clothes. She however squandered the money on alcohol. When he confronted her about the clothes, she told him that she would poison him if he continues questioning her in that way. The two of them spent the next two nights at his parental home because they were afraid that their aunt would fight with them should they return home. The Tuesday after he came back from work, he found them still there. When he confronted them, the deceased told him that they did go home and that the aunt they were afraid of was not there, so they decided to

[24] Although he said that he was assaulted by the arresting police officers when he refused to go into the cells after arrest, this did not influence him in his decision to confess. Furthermore, the only injury he had, namely a swollen knee, was explained by the accused as having been caused during an accident at work and it also did not have any influence on his decision to confess.

come back to him. She again threatened to poison him should he not want them there. He lost his temper at this threat and started throttling the deceased and he kept on doing so until she died. In the process she defecated herself. He then placed her in the sewer manhole behind his parental home on the same premises. At that stage, Thando had already left and did not witness the incident. The Wednesday he went to work, where his knee got injured. The Thursday he went to the hospital with his knee. The Friday, after he had thought the whole thing through, he decided to go and report the matter to the police. The police accompanied him home and retrieved the body of the deceased from the sewer manhole. In his room they found the faeces and the T-shirt draped over it as well as some other clothes belonging to the deceased. They then arrested him and, when he refused to go into the cells, they assaulted him. When he killed the deceased he was of sound and sober senses and he throttled her to death because he was angry at her for having said that she would poison him. Therefore, the murder took place on the Tuesday before Friday 31 January 2014 when the body was pointed out to the police. It is clear that this was a complete confession to the crime of murder with which accused was charged and that the requirements of section 217(1) of the CPA have to be met before the confession can be allowed into evidence.

[10] Every one of the five police witnesses implicated by the accused as having assaulted and tortured him with a view to extract a confession, vehemently denied in their evidence that any of them maltreated the accused. They, and the station commander, more pertinently denied in their evidence that accused was booked out of the cells the same Friday night after his arrest and that they took him to the station commander who instructed them to take him to a place where they were to beat a confession out of him. They further denied that they severely assaulted and tortured him by dunking him in a dam so as to drown him, and that they told him that, if he did not confess to the magistrate, he will be further tortured. The relevant state witnesses all said that they were working day

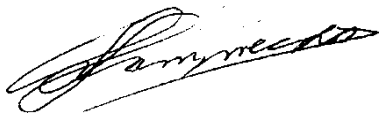
shift and that they were not on duty at night time when the alleged assault took place. According to the magistrate, the accused never informed him of such assault and torture and, had that been the case, he would not have taken the confession. The magistrate also vehemently denied the averment that the part in the confession statement dealing with the deceased having defecated herself and the faeces found by the police was not told to him by the accused and that he had actually sucked that information out of his own thumb.

[11] When the accused took the stand he was an appalling witness. At the outset during his testimony in chief, he contradicted his instructions to Counsel, saying that he was already assaulted by the police in the Charge Office directly after his arrest and after he dared ask them what he was arrested for and when he demanded that his rights be observed. He further testified contrary to what was put to the state's witnesses that, when he was assaulted the Friday night, he was not told to go and confess before the magistrate. After he was assaulted, so he said, did one of the policemen say that 'this one will confess'. He said that the Saturday he was left alone, but on Sunday, he was again assaulted and tortured in the cells. This time by unknown police officials but, as in the case of the others, they did not induce him to go and confess. When a police officer came to the cells and asked who was to be taken to the magistrate for confession, he merely accepted that it must be him and he accompanied the policeman to the magistrate for that purpose. Moreover, the accused testified that the part of the confession relating to the deceased having defecated herself and the faeces found by the police did in fact come from his own mouth, not from the magistrate's pen; but, so he said for the first time during his evidence, the whole confession was dictated to him by the investigating officer. During cross examination he contradicted himself even further pertaining to all these issues and about the time and the contents of the alleged dictation. Importantly though, during cross-examination he boldly stated that he knew about his rights to silence and against self-incrimination and to legal representation, even before he was

arrested. It would therefore have made no difference had the police explained or not explained his rights as required in terms of the Constitution. He also affirmed that the magistrate had properly explained his rights in this regard before he confessed. he cold however not explain why his proposition that the investigating officer had dictated the whole confession to him was never put to any of the state's witnesses during cross-examination and conceded that he did not tell his Counsel thereof.

[12] During argument, Ms Fraser conceded that all the state's witnesses were good, credible, witnesses and that the accused was an untrustworthy witness who severely contradicted himself. She actually conceded that the version of the accused was to be rejected as false and that the confession statement could be allowed into evidence. These concessions were well and wisely made. The state's witnesses and their evidence came across as credible and trustworthy and I do not think that even a reasonable possibility exists that they might have been untruthful. The accused, to the contrary, clearly concocted his story of duress.

[13] I was at the time of my ruling and, I still am, of the opinion that the state had succeeded in establishing that the confession was made freely and voluntarily by the accused, while in his sound and sober senses and without having been unduly influenced thereto and that he confessed, apparently reliably, that he murdered the deceased in the way alleged in the indictment and in the post mortem report which was admitted to be correct during plea. I accordingly allowed the confession into evidence and, as I was not swayed during further evidence or argument to come to a contrary conclusion, the interlocutory ruling to admit the confession became a final ruling and the confession will be assessed together with all the other evidence on the merits.



A A LAMPRECHT
ACTING JUDGE GAUTENG
DIVISION OF THE HIGH COURT

Representation for the state:

Counsel	Adv PW Coetzer

Representation for the accused

Counsel	Adv L Fraser (Ms)
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