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S. v. MOTLOUNG.

(TRANSVAAL PROVINCIAL DIVISION.)

1970. *January* 2. TRENGOVE and STEYN, JJ.

Criminal procedure. — Evidence. — Confession. — What constitutes. — Charge of unlawful sale of dagga.—Admission by accused that he was involved in the sale.—Not mentioned that sale took place without licence.—Such admission a confession.

After the police had previously explained to the accused that the charge which was being investigated was that he had been involved in the sale of dagga without a permit or licence, the accused had stated that he admitted that he had been involved in the sale and had given no further explanation of his conduct.

Held, that the accused, by implication, had admitted not only that he was involved in the sale of dagga, but also that it was a sale without the necessary permit or licence.

Held, accordingly, that his statement was a confession, and because the requirements of section 244 (1) of Act 56 of 1955, as amended, had not been complied with, that it was inadmissible.

R. v. *Xulu,* 1956 (2) S.A. 288 (A.D.), distinguished.

Argument on review.

TRENGOVE, J.: This is a case on review. The four accused were convicted in the magistrate's court at Fochville of a contravention of sec. 61 (1) (*c*) of Act 13 of 1928, viz., that they unlawfully possessed 5 ounces of dagga for the purpose of sale or supply.

When the case originally came up before my learned Brother THERON he altered the conviction in the case of accused No. 1 and No. 2 to one of unlawful possession of dagga and consequently the sentences in both cases were reduced to a fine of R10 or 14 days' imprisonment. In the case of accused No. 3 the conviction and sentence were confirmed. As for accused No. 4, it appeared that the State mainly relied on a statement which the accused allegedly made to the police. The admissibility of the statement was questioned and THERON, J., referred the case on this point for argument.

He formulated the point which had to be argued as follows:

I quote:

"Did the magistrate err in admitting the statement by the accused as evidence, to the prejudice of the accused?"

Before considering this particular question, it is perhaps expedient first to refer to the background of the statement.

Accused No. 4 is the husband of accused No. 3. On 28th July, 1969, two detectives, viz. Detective-Sergeants Smalman and Grimbeek met accused No. 1 in the vicinity of Kraalkop. Without disclosing their official capacity to him, they requested accused No. 1 to take them to a place where they could purchase dagga. They agreed to meet accused No. 1 on the same spot again. In consequence of the agreement the detectives again met accused No. 1 on the evening of 31st July, 1969. On this occasion he was accompanied by accused No. 2. The detective then gave one R5 note to accused No. 1 to purchase dagga with. The two accused then left for a certain native village. Twenty minutes later they returned with 45 dagga pills. Then the detectives disclosed their true identity and arrested the two accused. Afterwards these two accused pointed out accused No. 3 as the person from whom they had purchased the dagga. The detectives found certain articles in her house, linking her with the sale of the dagga. Then accused No. 3 was also arrested. A few days later accused No. 4 reported at the police station at Fochville and after interrogation he was also arrested. After he was interrogated for some time in connection with the sale of the dagga, accused No. 4 made the statement in question. The statement reads as follows:

"I, Solomon Mothlong, P.N. 1590579.

I am an adult Bantu male residing at c/o J. Freislick, Kraalkop, Fochville.

I was informed by Detective-Sergeant Grimbeek that he is a peace officer and that he is investigating an allegation of dealing in dagga and that he wants to know anything I can disclose concerning this, that this is a serious case and that I must be careful of what I say.

It is alleged that I sold dagga on the evening of 31/7/69 without the necessary permit or licence.

I was warned that I was not compelled to say anything and that anything I say will be written down and that it can be used as evidence in the Court. I am sober and in possession of all my faculties and understand the position.

Potchefstroom (Signed) Solomon Motloung."
4/8/69.

Then follows the statement.

"In answer to the above read to me and signed by me, I wish to state the following:

Master I only want to speak the truth. They purchased it from me. Then I went away. When I returned I heard that the masters were there and they are looking for me. Then I left for Khutsong—Friday I went to work."

Accused No. 4 made and signed the statement before Detective-Sergeant Grimbeek and Detective-Sergeant Smalman signed it as a witness.

If the statement is a confession, it is inadmissible because the requirements of the proviso to sec. 244 (1) of the Criminal Code have not been complied with. The statement was made before a peace officer, but the peace officer was not a magistrate or a justice of the

peace. If the statement is not a confession the provision is of course not relevant here. The essence of the problem is therefore whether or not the statement in question is a confession.

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A confession is an unequivocal admission of guilt which would amount to a plea of guilty if it were to be made in a court. The question is whether or not this present statement is such an unequivocal admission of guilt. The accused admitted that he sold the dagga, but did not admit unequivocally that he did not have a permit to sell it. In the well-known case of *R.* v. *Xulu,* 1956 (2) S.A. 288 (A.D.), the appeal Court decided that the statement mentioned there could not be considered as a confession because, although the accused admitted that he had sold dagga, he did not admit that he did not have a permit. It appears clearly from the judgment, however, that in each specific case the Court must look at the statement as a whole and must interpret it as a whole. (See also *S.* v. *Gumede,* 1963 (2) S.A. 349 (N) at p. 350).

The evidence in the present case is that the police explained to the accused beforehand that the charge which was being investigated was that he was involved in the sale of dagga without a permit or licence. This also appears clearly from the statement itself. Thereupon the accused stated that he admitted that he had been involved in the sale and gave no further explanation of his conduct. In my opinion the accused by implication admitted not only that he was involved in the sale of dagga, but also that it was a sale without the necessary permit or licence. On these grounds I am therefore of the opinion that the statement in question is in fact a confession. Consequently it is inadmissible.

Now the question arises whether or not the conviction nevertheless ought to be upheld. Where evidence against an accused must not be taken into consideration because it must be considered as being inadmissible, the Court must decide on appeal whether a reasonable court would nevertheless have been satisfied on the remaining evidence that the accused's guilt has been proved beyond reasonable doubt. In the present case the only evidence linking accused No. 4 with the offence is that of accused No. 1 and No. 2. Their evidence is unsatisfactory for the following reasons:

There are quite a lot of contradictions in their evidence, which in my opinion, cast doubt on their reliability and credibility. Besides, it does not appear from the record that the magistrate, as far as accused No. 4 is concerned, sufficiently informed himself as to the dangers of accepting the evidence of accomplices. He may in fact have done so, but it does not appear from the record. There is nothing to indicate that he considered whether there is sufficient corroboration of their evidence. In the present case the State, as far as accused No. 4 is concerned, does of course not rely on the evidence of a single accomplice, because the evidence of the one accomplice, viz. accused No. 1, is confirmed to a

certain extent by the evidence of the other accomplice, accused No. 2. This is indeed so, but owing to the contradictions, it is in my opinion nevertheless dangerous and undesirable to base a conviction solely on their evidence.

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There is an additional fact which could possibly implicate accused No. 4. The bag in which the dagga was sold, was identified as the property of accused No. 4. The value of this evidence is very little, however, because it is a fact that the actual seller of the dagga, accused No. 3, is the wife of accused No. 4. In these circumstances it is quite possible that she could have used the bag, belonging to No. 4, without him necessarily knowing it or without him having been implicated in the sale itself.

In all the circumstances it seems to me that although there is a strong suspicion that accused No. 4 was also implicated in the sale, the case against him has nevertheless not been proved beyond all reasonable doubt. Consequently the conviction and the sentence in his case ought to be set aside.

F. S. STEYN, J., concurred.

Accused's Attorneys: *Venter, Mosdell and Blom,* Carletonville.