



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 338/13

In the matter between:

THE KING

V

VUSI PHINEAS DLAMINI

Neutral citation: *The King vs Vusi Phineas Dlamini [338/13] [2020] SZHC 71*

(29th April, 2020)

Coram: FAKUDZE, J

Heard: 8/3/2017; 9/03/2017; 15/03/2017; 23/03/2017; 27/03/2017;

01/08/2017; 26/09/2017; 28/02/2018; 13/08/2019

Delivered: 29th April, 2020

Summary: *Criminal Procedure – Procedure to be followed in a trial – within a trial to determine admissibility or otherwise of*

*confession made before a Magistrate – Crown bears onus to prove admissibility of confession and first to lead evidence.
Evidence – confession made by an accused before a Magistrate - admissibility thereof as per Section 226(1) of the Criminal Procedure and Evidence Act, 67 of 1938 (as amended) – Test – proof beyond a reasonable doubt.*

JUDGMENT

BACKGROUND

- [1] The accused person stands charged with eight (8) counts of murder and five (5) counts of rape. Upon being arraigned the accused pleaded not guilty to the charges.
- [2] During the initial stage of the trial, the accused person indicated that he was challenging the admissibility of the statement he made before judicial officer on the 1st July, 2009. The court then ordered that a trial within trial be conducted to determine the admissibility of the statement made before the judicial officer.

The Law

- [3] The relevant provision in the Criminal Procedure and Evidence Act, 1938 that deals with confessions is Section 226. It provides as follows:

“Any confession of the commission of an offence shall, if such confession is proved by competent evidence to have been made by any

person accused of such offence whether before or after his apprehension and whether on a judicial examination after commitment and reduced into writing or not be admissible in evidence against such person:

Provided that 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:

Provided further that if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this Section unless it was confirmed and reduced to writing in the presence of a Magistrate or any justice who is not a public officer,.....”

- [4] **In Rex V Fana Shongwe [276/2010] [2018] SZHC 191** it was held at paragraph 20 that “[20] *The Crown bears the burden or onus to establish that the statement or confession that it seeks to have admitted in evidence is admissible. It must establish or prove that it was freely and voluntarily made by the accused whilst in his sound mind and sober senses and was not unduly influenced to do so. This, the Crown must prove beyond reasonable doubt.*”

The Parties’ Contention

The Crown

- [5] In its quest to prove its case, the Crown paraded seven witnesses. PW 56, Her Worship Florence Msibi (The Judicial Officer who recorded the confession) stated that the accused was brought to her on 1st July, 2009 and she warned the accused that the only people in her office are Herself, the Interpreter (PW 57) and the accused himself. PW 56 stated that it was at

08.30 A.M. when Vusi Dlamini the accused was brought into her office by 5338 Constable N. Mbhamali of Lobamba Police Station. After he had been brought, PW 56 ensured that no one was in the vicinity of the office except the interpreter. The interpreter was Philisiwe Simelane. PW 56 closed the door and then informed Vusi Dlamini, the accused that she was a judicial officer. She further informed him that he was not obliged to say anything and that whatever he says will be used as evidence against him in the trial. She told him that there was nothing to fear and that he can repeat openly whatever he wanted to say. PW 56 filled the proforma document and the accused made a statement. PW 57 was interpreting.

[6] PW 56 finally stated that the accused's demeanor showed that he was free and that PW 57 was interpreting when the confession was recorded. It was read back to the accused before same was signed. This happened even after the accused had been warned that he was not obliged to answer, to make a statement that would incriminate himself and that whatever said would be used as evidence against him but he continued to record the statement and that alone shows that he was free.

[7] If the accused chooses to record the statement after having been warned by the judicial officer such statement or confession is admissible because the accused has become aware about all the implications involved in recording the incriminating statement. When the accused recorded the statement after being warned by the judicial officer such statement met the requirements that an accused must record a confession freely and voluntarily.

- [8] PW 58 Mkhuzweni Kunene, the Investigating Officer denies that the accused person was assaulted nor suffocated with a tube by the Investigating Officer. He stated that he was duty on the 21st June, 2009 when he noticed that the accused had injuries and when asked what happened, he said that he had been assaulted on the day of his arrest. The accused refused to go to hospital when he was requested to do so by the police.
- [9] PW 66, His Worship Siphosini Dlamini, states that the accused appeared before him on the 23rd June, 2009 charged with malicious damage to property. The accused had bruises and a swollen face. His worship asked the accused what had happened and his response was that he had been beaten by community members on the day of his arrest. His clothes also had stains of blood. During the accused's 2nd appearance on the 2nd July, 2009 the injuries were no longer there. The accused was told of his legal right to representation including the right to apply for bail at the High Court. PW 66 further stated that when the accused appeared the Crown made an application to have him remanded in custody for 72 hours to enable further investigations. Accused was asked if he was objecting to the application and replied in the negative.
- [10] As far as the proforma is concerned, it shows that whatever was recorded before the judicial officer was not challenged by the accused. He even told the judicial officer that the police told the accused not to change what he the accused told the police. This means that there was something that the accused told the police and the police saw that this was a confession. The police then advised the accused to go and tell the judicial officer what the accused was telling the police.

[11] As far as the date of the assault is concerned, the accused in cross examination, stated that the assault started on the 20th whereas it had been put to PW 58, Mkhuzeni Kunene, that the assault started on the 23rd. The accused therefore testified contrary to what was put to the PW 58. This shows that he is an incredible witness. The Crown has proven that the statement made by the accused by way of confession was free and voluntary.

On Defence

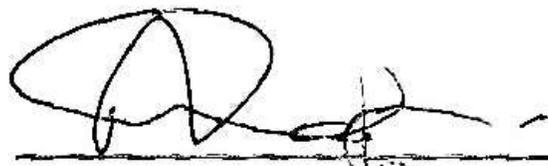
[12] The defence states that when the accused was asked questions by the Magistrate based on the proforma, the accused informed her that it was the investigating officers who told him to go and make a confession. He was told what to say and further threatened the police officers thus inducing him to make the statement. The accused further told the Magistrate that he was assaulted by the police and was suffocated using a car tube. This happened on various occasions and in various places. As a result of the torture, he was injured on the left arm, the ring finger and the neck. These injuries were visible. He says that despite all these allegations, the Judicial Officer went ahead and recorded the statement. This statement was not freely and voluntarily made by the accused.

[13] The accused did not freely and voluntarily make the confession because it was induced by a threat or disadvantage by the police officers who allegedly threatened the accused with death if he failed to make the confession before the Magistrate. It is the defence's case that the Crown failed to challenge the accused's evidence. Therefore the statement should not be admitted.

COURT'S OBSERVATION

- [14] Part of the evidence adduced by the Crown established that the accused was assaulted on the 20th June, 2009 all over the body. He was assaulted when he tried to break into a house next to Satellite at Ezulwini area. The evidence of Pius Mandla Thwala coupled with that of the police officers who accompanied Thwala and his relative to the scene of crime confirm this point. There was further evidence of Superintendent Mkhuzeni Kunene that on the following day of the arrest, they suggested to the accused that he be taken to hospital because he was not looking well. The accused refused.
- [15] On the 23rd June, 2009, the accused appeared before His Worship Siphosini Dlamini in the Mbabane Magistrate's Court to face the malicious damage to property charge. The accused's clothes had some blood stains and his face was swollen. There were also bruises. The Magistrate asked him what had happened. He responded by saying that he had been assaulted by the community police. When the accused appeared on the 2nd July, 2009, now facing a murder charge there was nothing that suggested that he had been further assaulted. This was stated by His Worship Siphosini Dlamini. On the day the accused appeared before Her Worship Florence Msibi, to make a confession, the Magistrate says that he saw no signs on the accused body that suggested that he had been assaulted. The accused only mentioned the issue of the police assaulting him when the proforma was being filled in. The accused merely mentioned that he had been assaulted by the police without giving details of the assault. This was after he had been accordingly cautioned by the Magistrate.

- [16] The main reason why the accused does not want the confession to be admitted as evidence against him is that he did not make it freely and voluntarily because the police allegedly assaulted him. In **Mzwandile Dlamini** (Supra), the court stated that *“A free and voluntary confession is deserving of the highest credit because it is premised to flow from the strongest sense of guilt but a confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape that no credit ought to be given to it and therefore it is rejected.”*
- [17] The court’s analysis is that the Crown has successfully established that the confession by the accused was freely and voluntarily made. He was in his sound mind and sober senses and was not unduly influenced to do so. The confession is therefore admissible.

A handwritten signature in black ink, appearing to be 'FAKUDZE J.', written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT