IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS50/99

DATE: 8-7-1999

In the matter of:

THE STATE

versus

1. GIOVANNI KANNEMEYER

2. RICARDO VAN VUUREN

J U D G M E N T

IMMERMAN, AJ: Mr Tarental, for the State, in calling his next witness to testify in this matter, namely police Inspector Adolf Johannes Jonker, very correctly and properly, in accordance with his duty as prosecutor, warned the Court that he was about to introduce through this witness evidence of the making to this witness of a statement by accused number 2 and that it was the contention of the State that the statement constituted an admission by accused number 2.

At this juncture Mr Newton, counsel for accused number 2, objected to the admission of the statement as evidence against accused 2 on the grounds that the statement constituted a confession which was inadmissible by reason of the operation of the provisions of section 217(1)(a) of the Criminal Procedure Act No. 51 of 1977. It therefore appears that the statement in question may amount, on the one hand, to an admission as contended by the State or, on the other hand, a confession, as contended on behalf of accused 2. During the course of argument on the matter it was made clear to me by both prosecuting and defence counsel that it is common cause between them:

1. That police Inspector Jonker, to whom the statement was made, is a Peace Officer within the meaning of section 217 of the abovementioned Act.
2. That police Inspector Jonker is neither a magistrate nor justice within the meaning of section 217 of that Act.
3. That the statement was not confirmed and reduced to writing in the presence of a magistrate or justice.

It follows therefore that if the statement in question is a confession, it is, pursuant to the provisions of section 217(1)(a) of the said Act, not admissible in evidence. In objecting to the admission of the statement as evidence against accused 2 in this trial, Mr Newton, on behalf of accused 2, also indicated that it was his client's case that the statement was not freely and voluntarily made and that certain portions of the written document containing the statement did not correctly record what accused number 2 had stated to police Inspector Jonker.

In the light of the aforegoing Mr Tarental, on behalf of the State, in his able argument, contended that the correct procedure to be adopted with regard to the written document was to determine, in a trial-within-a-trial, the admissibility of the document in accordance with whether or not the statement was freely and voluntarily made by accused 2 while in his sound and sober senses and without having been unduly influenced to make the statement, and whether or not it was correctly recorded. Only if the document is found within such trial-within-a-trial to be so admissible, so he argues, would the document be receivable by the Court

and only then would it be the correct occasion for the determination to be made as to whether or not it constitutes an admission or a confession.

The trial-within-a-trial procedure is, of course, one designed to cater for the accused's right to a fair trial in order to ensure that questions of admissibility and of guilt are distinguished from each other and decided separately. At the end of the State case an accused is entitled to know exactly what evidence will be put into the scale against him, albeit that he is not entitled to know the weight the Court would attach to the evidence. An accused needs to have the freedom to decide whether he wants to testify on the merits in the main trial and the only mechanism which affords an accused the opportunity to limit his evidence as to questions of admissibility is a trial-within-a-trial (see S v Mhlakaza en Andere 1996(2) SACR 187 (C).) In his argument that the trial-within-a-trial procedure is the procedure to which resort has in the first instance to be had in this case, that is before determination as to whether or not the document constitutes a confession which is inadmissible, Mr Tarental did not refer the Court to any direct authority on the matter but argued as he did by analogy on the strength of the decisions in S v Yolelo 1981(1) SA 1002 (AD); S v Dhlamini en Andere 1981(3) SA 1105 (W); S v Dlamini 1988(3) SA 784 (AD) and S v Potwana & Others 1994(1) SACR 159 (AD). He also relied on the text in the first paragraph on page 565 of Hiemstra Suid-Afrikaanse Strafproses 5th ed.

Mr Newton, on behalf of accused 2, has argued that it is the correct procedure in the circumstances of this matter and in fact the wish of accused 2 that the Court investigate

and determine first whether the statement is an inadmissible confession or not and that the Court do so by sitting without the assessors and receiving and considering the content of the statement in question. I should mention that it was made clear during argument by both prosecuting and defence counsel that it is determinable from the document alone whether or not its content constitutes a confession or an admission and that neither counsel wished to lead any evidence with regard to the construction of the document. In support of his argument Mr Newton relied on direct authority in the form of the decision in S v Bontsi 1985(4) SA 544 (BGD). In that case the Court was concerned with a statement to a policeman which, if it constituted a confession, would be inadmissible by reason of the operation of section 217(1)(a) of the Criminal Procedure Act. At page 547B-F of the judgment His Lordship Stewart, JP stated as follows:

> "The duties of a prosecutor and a judicial officer when the prosecutor wishes to lead evidence of a statement made by an accused which may amount to a confession or an admission are set out in Hiemstra Suid-Afrikaans Strafproses, 3rd ed. at 463. It is the duty of the prosecutor first to investigate the circumstances under which the statement was made and to establish whether it may amount to a confession or whether it is an admission which is coupled to an inadmissible confession. If the prosecutor is in doubt it is his duty when raising the issue in open court to warn the presiding judicial officer in regard to what he is about to do. The judicial officer

must then investigate firstly, whether or not the accused made the statement and if so, whether it is a confession or not. If it is a confession then it is not admissible for any purpose by the prosecution unless there has been compliance with the proviso set out in section 217. If it is an admission then it is only admissible if the prosecution first proves that it has been voluntarily made unless there has been compliance with the proviso set out in section 219A. In the present case accused 3 admitted that she had made a statement to the police but said that she had done so because she was afraid. The prosecutor did not indicate whether the statement was a confession or an admission and the magistrate did not enquire. This was wrong. The prosecutor should have indicated to the magistrate what his views were and the magistrate should have established whether the statement was or was not an inadmissible confession. If, after proper enquiry, he was satisfied that the statement was not a confession but an admission, he should have established whether or not it was freely or voluntarily made."

Bontsi's case in this regard is cited with apparent approval in Du Toit & Others Commentary on the Criminal Procedure Act at page 24.51. Hiemstra in the latest edition of his work Suid-Afrikaanse Strafproses 5th ed., while not referring to Bontsi's case, expresses at page 553 a view which is essentially the same as that enunciated in the Bontsi case, namely:

"Dit is die plig van 'n aanklaer in gevalle waar hy 'n erkenning van die beskuldigde wil aanvoer en daar volgens sy inligting 'n moontlikheid is dat so 'n erkenning deel vorm van 'n ontoelaatbare bekentenis om die omringende omstandighede te ondersoek en te bepaal of hy die erkenning mag gebruik. As dit twyfelagtig is, moet hy die voorsittende beampte op sy hoede stel. Wanneer 'n erkenning sonder meer bewys word, moet die Hof kan aanvaar dat die erkenning nie gekoppel is aan 'n ontoelaatbare bekentenis nie. Die aanklaer moet dit nie aan die Hof oorlaat om 'n ondersoek te open ten einde vas te stel of die erkenning nie miskien deel is van 'n ontoelaatbare bekentenis nie. Dit bly nietemin die oorkoepelende plig van die voorsittende beampte om hom te vergewis dat 'n erkenning behoorlik toelaatbaar is voordat hy dit as deel van die bewyse aanvaar."

S v Nkosi 1980(3) SA 829 (A) 844-845.

S v Nkosi supra provides further support for the proposition that the Court has first to be satisfied that the statement which the State wishes to tender as an admission is not an inadmissible confession or part of an inadmissible confession at 844H-845:

"It seems to me that it is the duty of prosecuting counsel in a case where evidence is available of an admission made by an accused and where there is any possibility flowing from information at counsel's disposal that such admission was part of an inadmissible confession, for example where the admission accompanied a pointing out following

upon a report to the police to investigate the surrounding circumstances in order to satisfy himself of the propriety of proving the admission before he tenders evidence in that regard. If the matter is doubtful and arguable, counsel should convey that to the trial judge in order to alert him to the necessity of an enquiry into the relevant circumstances, this is particularly important when the judge is sitting with assessors. When evidence of an accused is tendered without more the presiding judge should be entitled to assume that counsel for the State has satisfied himself that there was no reason for thinking that the admission was linked to an inadmissible confession in such a way that the admission itself was inadmissible. In no case should counsel leave it to the trial judge himself to initiate an enquiry into the circumstances surrounding the making of an admission when it appears that it may have been part of an inadmissible confession. Ultimately, however, whether or not counsel for the State follows the correct procedure it remains the overriding duty of the trial judge to satisfy himself that an admission was properly established to have been admissible in evidence before reliance is placed upon it in convicting the accused."

It is a trite principle of our law that the prosecution is not entitled to question a witness about an inadmissible confession (see S v Sebejan & Others 1997(1) SACR 626 (W) at 630C and cases there cited). Mr Newton also relied upon

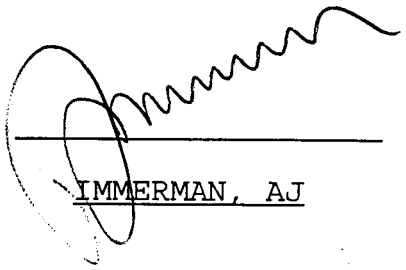
this principle in arguing against the procedure contended for by the State inasmuch as he submitted that there was a risk, which was likely to eventuate in this case, that in a trial-within-a-trial cross-examination of accused 2 would be permitted, in accordance with the exceptions enunciated in cases such as S v Gxokwe & Others 1992(2) SACR 355 (C) at 357G-J on the content of the document, with regard to the question as to whether it correctly recorded what accused 2 had stated to the policeman with a view to testing the accused's credibility thereon. He contended that this would be irregular and highly prejudicial to the accused if the document was in fact an inadmissible confession. It therefore had, so he argued, to be determined first whether or not the document is or is not a confession.

There is force and merit in the submissions of Mr Newton and I am persuaded thereby.

On an analysis of the abovementioned decisions relied upon by Mr Tarental for the State, it is clear that the Court in each of those cases was dealing with a situation in which the status of the document there, either as being a confession or an admission as the case might be, was not an issue. These cases are therefore distinguishable from the present one. Nor does it appear on analysis of the text in Hiemstra's work at page 545, which was relied upon by Mr Tarental, that the learned author is there dealing with the procedural question which presently concerns this Court.

The ruling which I make therefore is that in the circumstances of this matter, the determination should first be made as to whether the document constitutes a confession or not. I accede therefore to the request made on behalf of accused 2 in this regard.

Having heard counsel for accused 2 I am further persuaded that in the circumstances of this case I should sit at this stage alone, without the presence of the assessors, in determining whether or not the document constitutes a confession.



IMMERMAN, AJ

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