THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref No: 141178

Kuilsriver Case No: B325/2013

Magistrate's Serial No: 79/2014

In the matter of:

THE STATE

and

SONGEZO MINI	**FIRST ACCUSED**
MZIWETHU SOBOYISI	**SECOND ACCUSED**
ZAMIKHAYA APRIL	**THIRD ACCUSED**
ANELE MADOLO	**FOURTH ACCUSED**
SPENATHI TONO	**FIFTH ACCUSED**

Coram: LE GRANGE & ROGERS JJ

Delivered: 30 APRIL 2015

JUDGMENT

ROGERS J (LE GRANGE concurring):

[1] This matter comes before court by way of automatic review. The accused were charged in the Kuilsrivier Magistrate's Court with the theft of two bags of chickens from County Fair, the one bag containing five chickens the other six. They chose to conduct their own defences. They pleaded not guilty. Each testified in his own defence. The magistrate convicted accused Nos 1, 2 and 4 of the theft of the bag containing five chickens and convicted accused Nos 3 and 5 of the theft of the bag containing six chickens. The magistrate considered there to be insufficient evidence to link all of the accused to the theft of both bags.

[2] None of the accused had previous convictions. Nos 1, 3 and 5 were sentenced to a fine of R2000 or ten months' imprisonment, suspended for five years. Nos 2 and 4 was sentenced to a fine of R1500 or six months' imprisonment suspended for five years. The distinction in sentencing was based on the fact that the accused Nos 1, 3 and 5 were employees of County Fair whereas accused Nos 2 and 4 were not.

[3] The automatic review initially came before Van Staden AJ. He directed an enquiry to the magistrate regarding assaults apparently perpetrated on No 1, 2 and 4 by security officers of County Fair. He asked whether the voluntariness of statements made by these accused had been sufficiently examined. Since the statements made by Nos 2 and 4 led to the apprehension and questioning of No 1, and since the statements made by No 1 following his apprehension and questioning led to the identification and arrest of Nos 3 and 5, Van Staden AJ asked whether – if the said statements were excluded as having been coerced – Nos 1, 3 and 5 should not have been discharged at the end of the State's case.

[4] The magistrate has provided a detailed response, for which she is thanked.

[5] The State called two witnesses, Mr Komandisi, the County Fair Farm Manager, and Mr Tembela, the County Fair Foreman. Their evidence can be summarised thus. Tembela saw someone on the inside of the County Fair fence pass a bag to two people on the other side of the fence. He phoned Komandisi who

came to the scene. Nos 2 and 4 were the two people on the outer side of the fence. Komandisi saw No 2 and then No 4 dragging the bag. They were apprehended. Five dead chickens were found in the bag. Upon being questioned by Komandisi, Nos 2 and 4 said that No 1 had phoned them to come and collect something from him at County Fair. Komandisi instructed Tembela to fetch No 1. Upon their return, Komandisi questioned No 1. The latter said that the chickens in the bag were his and that Komandisi should let Nos 2 and 4 go. Komandisi did not agree. All three of them were handcuffed by County Fair security officers.

[6] Komandisi and Tembela found another bag at the fence, this one containing six dead chickens. Upon questioning, No 1 said that he had seen Nos 3 and 5 taking this bag out through the County Fair gate. No 3 was fetched from the County Fair hostel. Upon being questioned he said that three of the chickens were his and three belonged to No 5. No 5, who was no longer at the County Fair premises, was arrested the next day.

[7] Since the accused were unrepresented, the magistrate was under a duty mero motu to discharge them at the end of the State's case if there was no prima facie case against them unless there was a basis for exercising the discretion described in *S v Lubaxa* 2001 (2) SACR 703 (SCA) paras 20-21 and *S v Nkosi & Another* 2011 (2) SACR 482 (SCA) paras 24-27 . That discretion exists where there is a reasonable basis for believing that an accused against whom there is a prima facie case might testify and incriminate his co-accused against whom there is no prima facie case. If the statements made by the accused at the scene were admissible, there was a sufficient basis not to discharge any of them. Nos 2 and 4 had been caught red-handed and there was thus a prima facie case against them even without their statements to Komandisi. No 1, upon being questioned, made a confession, as did No 3. There were reasonable grounds for thinking that if No 1 or 3 testified they would implicate No 5.

[8] Matters stand differently if the statements made by No 1 to 4 were inadmissible as having been coerced by violence. The evidence of Komandisi and Tembela would still have been sufficient as against Nos 2 and 4, because they were seen in possession of one stolen bag of chickens. However, it was only because of

their statements to Komandisi that No 1 was identified for questioning and only because of Komandisi's questioning of No 1 that a confession from the latter was extracted. By the end of the State's case there was no evidence against No 1 apart from his confession. There was also no basis, apart from the statements made at the scene by Nos 2 and 4 and then by No 1, for thinking that Nos 2 and 4 would implicate No 1. Neither No 2 nor No 4 put to Komandisi or Tembela during their very brief cross-examination that No 1 had been involved. A trial court, excluding from its mind the admissions and confessions made by Nos 1, 2 and 4, would thus in my view have been bound to discharge No 1 at the end of the State's case.

[9] In the case of Nos 3 and 5, they were only identified because of the statements made at the scene by No 1. It might be said that the subsequent answers given by No 3 in response to Komandisi's questioning should not be excluded as 'fruit of the poisoned tree'. However, if No 3's confession were itself excluded as having been coerced, there was no basis at the end of the State's case for believing that any of the accused would implicate Nos 3 and 5. No 1, in his cross-examination of the State witnesses, did not make any suggestion regarding the involvement of Nos 3 and 5.

[10] I turn thus to the admissibility of the admissions and confessions made by Nos 1 to 4. In terms of ss 217 and 219A of the Criminal Procedure Act 51 of 1977 evidence of a confession or admission is only admissible if it is proved to have been made voluntarily. The State must prove such voluntariness beyond reasonable doubt. Because the accused in the present case were unrepresented, they did not object to the admissibility of the confessions and admissions. The magistrate did not mero motu embark upon a trial within a trial to establish the admissibility of the material in question. The result is that some of the evidence bearing on the question of admissibility only emerged during the evidence of the accused. In my view, basic fairness and the standards imposed by s 35(3) of the Constitution require that if, having regard to all the evidence relevant to admissibility, it is concluded that the confessions and admissions were inadmissible, the question of discharge at the end of the State's case should be assessed as if these confessions and admissions had already at that stage been found to be inadmissible (as would have occurred had there been a trial within a trial). In other words, the accused should not be

disadvantaged by evidence they tendered and admissions they made during oral testimony in circumstances where they would have been entitled to a discharge had there been a timeous investigation into and ruling on the confessions and admissions.

[11] The present case differs from the situation often encountered where there is a factual dispute as to whether the suspect was assaulted or threatened. It is common cause that Nos 1, 2 and 4 were assaulted by County Fair security officers. And No 5, when asked in oral evidence why No 3 had implicated him, said that it was because No 3 had been assaulted.

[12] The magistrate, in response to Van Staden AJ's query, said that on her view of the evidence Nos 2 and 4 were only assaulted after making their statements and implicating No 1 and that No 1 in turn was only assaulted after confessing his involvement in the theft of the one bag and identifying Nos 3 and 5 as the thieves in respect of the other bag. Having carefully read the evidence, I do not believe that this conclusion is justified beyond reasonable doubt.

[13] As I have said, the fact that County Fair security officers resorted to assaulting the suspects is regrettably not in dispute. When No 1, in his cross-examination of Komandisi, asked what the security officials had done to them (the accused) that day, he replied that the security officers had handcuffed them but had not done anything else to them. No 1 then put to Komandisi that when he (No 1) was brought to the scene, Nos 2 and 4 were already bleeding at the wrists and that the security officers then began hitting him with a baton. It was only because of being assaulted that he decided to say that the chickens were his. The magistrate asked Komandisi whether he had seen Nos 1, 2 and 4 being assaulted. He replied affirmatively but added that this occurred only after they had been handcuffed. His evidence as a whole was to the effect that the accused were only handcuffed after they had made their statements. The magistrate then said to No 1 (in Afrikaans), 'Next question'. The cross-examination by the accused was in general perfunctory, which is not surprising given that they were unrepresented. No 4, for example, initially said that he had no questions for Komandisi. When the magistrate asked whether he had listened to the testimony and whether he really had no questions,

No 4 said (I translate), ‘All that I know is that Komandisi arrested us and called the security officers and we were assaulted. And it helped that the police arrived because they were assaulting us continually.’ No other questions regarding the assaults were put to Komandisi by the accused, the prosecutor or the magistrate.

[14] On Komandisi’s evidence, Tembela was present when the assaults occurred. Despite this fact, Tembela was asked no questions about the assaults and their timing in relation to the statements made by the various accused.

[15] The five accused proceeded to give evidence. No 1 testified that upon his arrival at the scene he could see that Nos 2 and 4 had been assaulted. He himself was immediately handcuffed and told to tell the truth. The security officers struck him on top of the handcuffs with a baton. His skin was broken open. He only made a confession because of the assault.

[16] No 2 did not in chief refer to the assault. However, in cross-examination by the prosecutor he said that he and No 4 had been assaulted after being handcuffed. He also said that they were only questioned after being handcuffed. The prosecutor asked whether they had been assaulted by the time No 1 arrived. He said yes. Unfortunately the prosecutor did not ask whether they had been assaulted before implicating No 1 and the magistrate did not clarify the matter.

[17] It is convenient to deal next with No 4’s evidence. He said that after they were accosted by Komandisi, he and No 2 were handcuffed and repeatedly hit and told to tell the truth. After they implicated No 1, the latter was also assaulted with a baton. He described a scene of ongoing assault until the police arrived. On No 4’s evidence, they only identified No 1 after being hit.

[18] If the assaulting of Nos 1, 2 and 4 occurred before they made their respective admissions and confessions, it is self-evident that the admissions and confessions would be in inadmissible. If one confines one’s attention to the evidence relevant to admissibility (as would have occurred if admissibility had been tested in a trial within a trial), I do not think it is possible to reject as false beyond reasonable doubt the evidence of No 4 that he and No 2 were assaulted before identifying No 1 or the

evidence of the latter that he was assaulted before confessing and identifying Nos 3 and 5. The evidence that they were assaulted was not a fabrication. The timing of the assaults in relation to the admissions and confessions was not fully canvassed with Komandisi and not raised at all with Tembela. The evidence of No 2 regarding the timing of the assaults was likewise not clarified by the prosecutor or the magistrate. It is possible that the security officers assaulted the accused only after they had confessed, as a sort of extra-curial punishment (which is what the magistrate seems to have thought). But if the security officers were willing to resort to assaulting suspects (as is unfortunately the case), and if Komandisi and Tembela were willing to stand by while it happened (as is also the case), there is no reason to discount the possibility that the security officers used violence to extract information from the suspects.

[19] In my opinion, therefore, the evidence of the statements made by Nos 2 and 4 and then by No 1 were not admissible against themselves or against each other. At the end of the State's case there was other admissible evidence against Nos 2 and 4 but not against No 1. The only basis for thinking that Nos 2 and 4 would, if they testified, incriminate No 1 were their inadmissible statements. Since no regard could permissibly be had to those statements, No 1 should have been discharged.

[20] Apart from the inadmissible statement made by No 1, the only evidence at the end of the State's case regarding Nos 3 and 5 was the confession made by No 3. He was only identified as a suspect because of information supplied by No 1, information which, for reasons I have explained, could reasonably possibly have been extracted from No 1 by unlawful coercion. It could thus be said that No 3 was only brought to the scene and questioned because of information inadmissibly extracted from No 1 and that No 3's confession was therefore 'fruit of the poisoned tree' and itself inadmissible. Section 35(5) of the Constitution states that 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. The extracting of information from suspects by physical violence is something which the courts abhor and which is fundamentally detrimental to the administration of justice. Such evidence stands on an entirely different footing from evidence obtained, for example, pursuant to the

bona fide execution of an invalid search warrant. In *S v Pillay & Others* 2004 (2) SACR 419 (SCA) Scott JA said that the admission of derivative evidence obtained in circumstances involving some form of compulsion or as a result of torture 'however relevant and vital for ascertaining the truth, would be undeniably detrimental to the administration of justice' (para 9 and 11). In *S v Tandwa & Others* 2008 (1) SACR 613 (SCA) evidence of a coerced pointing-out and real evidence discovered in consequence of the pointing-out of (a buried bucket of money) were held to be inadmissible because the accused were assaulted before making the pointing-out (paras 87-89 and 113-121; and see also *S v Mthembu* 2008 (2) SACR 407 (SCA)).

[21] If there was satisfactory evidence that No 3's confession was freely and voluntarily made, there might be a case for saying that the inadmissibility of No 1's statement should not be allowed to taint No 3's confession. However, I do not feel confident on that score. It is true that No 3 did not say that he had been assaulted. On the other hand, he was not asked the question. Since the accused were unrepresented and unsophisticated, they probably did not appreciate the legal significance of coercion. No 2, for example, only mentioned the assaults after being cross-examined by the prosecutor. If No 3 was not assaulted, he would have been the only one of the four questioned on that day to have escaped violence. No 5, who denied any involvement in theft, was asked why No 3 had implicated him. He replied that No 3's explanation to him had been that he had been assaulted. Even if No 3 was not assaulted, he was brought to the scene at a time when Nos 1, 2 and 4 had already been assaulted. It is entirely plausible that he saw their condition and the conduct of the security officers. This would have been such as to instil in him an apprehension for his own safety. The circumstances of the case as a whole called for further investigation into the confession made by No 3. The State witnesses and No 3 should have been recalled and questions should have been directed to this particular issue.

[22] Since this was not done, and since there was no other admissible evidence against Nos 3 and 5 of the end of the State's case, I think they should have been discharged. Their convictions, based on what No 3 thereafter said under oath, cannot in the interests of justice be allowed to stand.

[23] In the result, the convictions of Nos 1, 3 and 5 must be set aside. The convictions of No 2 and 4 are justified by admissible evidence and will thus stand.

[24] This judgment will hopefully serve as a reminder to persons involved in investigating crime, whether from the public or private sector, that the courts will not tolerate the extraction of information by violence or threats of violence. As the present case illustrates, the use of unlawful coercion at an early stage of investigation may taint information which might otherwise have been elicited by more careful and restrained means and may make it very difficult for the State to secure convictions. In *Tandwa* supra the court made the following observation (para 121):

'We accept that the public flinches when courts exclude evidence indicating guilt…. But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order…'

And in *Mthembu* supra Cachalia JA added (para 26):

' … Public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution…'

[25] The following order is made:

(a) The convictions and sentences imposed on the first, third and fifth accused are set aside.

(b) The convictions and sentences imposed on the second and fourth accused are confirmed.

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LE GRANGE J

ROGERS J