



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 127/13
Not Reportable

In the matter between:

BONGANI GAMA

Appellant

and

THE STATE

Respondent

Neutral citation: *Gama v State* (127/13) [2013] ZASCA132 (27/09/ 2013)

Coram: MALAN, THERON, MAJIEDT, SALDULKER JJA and VAN DER MERWE AJA

Heard: 9 September 2013

Delivered: 27 September 2013

Summary: **Criminal Law and Procedure: Section 217(1) of the Criminal Procedure Act 51 of 1977 – whether confession made by a suspect to undercover policeman, a captain in the SAPS, in regard to an offence is admissible against an accused without a trial within a trial.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Du Plessis and Louw JJ, sitting as court of appeal):

1. The appeal is upheld
2. The order of the court below is set aside and substituted with the following:
 - ‘(a) The appeal succeeds.
 - (b) The appellant’s convictions and sentences are set aside.’

JUDGMENT

SALDULKER JA(MALAN, THERON, MAJIEDT JJA and VAN DER MERWE AJA concurring):

[1] The appellant, Mr Bongani Gama, and his co-accused (accused two), were convicted on 17 February 2006 in the Regional Court, Benoni, on one count of housebreaking with the intent to commit a crime unknown to the State (count 1), four counts of robbery with aggravating circumstances (counts 2 to 5), one count of unlawful possession of firearms (count 6) and one count of unlawful possession of ammunition (count 7). They were each sentenced to five years’ imprisonment on count 1, fifteen years’ imprisonment on counts 2 to 5 (taken together for the purpose of sentencing), and five years’ imprisonment on counts 6 and 7 (taken together for the purpose of sentencing).

[2] The appellant’s appeal to the North Gauteng High Court (Du Plessis and Louw JJ) on 9 March 2009 was partially successful in that the convictions and sentences on counts 6 and 7 were set aside. The effective sentence of 25 years’ imprisonment imposed by the Regional Court was reduced to 20 years’ imprisonment. On 6 December 2011 the appellant was granted leave to appeal by the North Gauteng High Court against the convictions and sentences on counts 1 to 5.

The facts

[3] The issue in this appeal is whether the evidence alleging that a confession had been made to an undercover operative, being a captain in the South African Police Service (SAPS), should have been tested by way of a trial within a trial to determine its admissibility. The salient features relevant to this appeal are as follows. On the evening of 3 April 2005, at the business premises of Sparta Foods, Benoni, four security guards were overpowered by masked robbers and robbed of personal belongings as well as property belonging to the business. An office on the premises was broken into and cash and cheques were removed from a safe. The robbers were able to open a drawer in the drop safe from which they managed to 'fish' out cheques and money, that is, they extracted them by using a wire or similar object.

[4] The most important incriminating evidence against the appellant was adduced by Touch, a captain in the SAPS, who was an undercover agent investigating a drug syndicate at the time. That evidence concerned an alleged oral confession made to him by the appellant. Touch testified that he met accused two and they developed regular telephonic contact with each other. On 6 April 2005, accused two contacted him in connection with a 'job', and informed Touch that the appellant would also be involved. A meeting was arranged with accused two and the appellant. At that meeting, cheques to the value of some R70000 were shown to him, and their origin divulged by the appellant. As a result of the information imparted to him by the appellant, Touch carried out his own investigation. He found out that a business, Sparta Foods, had, in fact, been robbed on 3 April. He contacted Inspector Zwane, the investigating officer in that matter, and made arrangements to bring the appellant and accused two to a pre-arranged meeting place where the appellant and his co-accused were arrested by Inspector Zwane and his men. Both the appellant and his co-accused denied knowledge of the stolen cheques and the firearms, blaming the policemen for conspiring against them.

[5] During the trial, there were discrepancies in the testimony of the police officers regarding in whose possession the stolen cheques were found. The trial court dealt with them, correctly preferring the evidence of Inspector Zwane that the stolen items

were found in the possession of accused two and not the appellant. They were, however, both implicated in their possession, and the trial court found the appellant guilty on the basis of the doctrine of recent possession. It is of some significance that the trial court did not place any reliance on the confession allegedly made to Touch by the appellant.

[6] However, when the matter came before the North Gauteng High Court on appeal, Du Plessis J (Louw J concurring) found that the appellant had been erroneously convicted on the basis of the doctrine of recent possession, and held that the conviction of the appellant was completely dependent on the truth of the confession that he had made to Touch. The court below confirmed the conviction of the appellant on the housebreaking and robbery counts on the basis that the confession made by the appellant to Touch, *ex officio* a justice of the peace, was admissible as it was freely and voluntarily made, and corroborated the evidence of the State witnesses as to the events during the robbery. It is necessary to record at the outset that the State did not alert the trial court at all that it would be tendering evidence which may amount to a confession. This was a fundamental miscarriage of justice. While the high court was correct in finding that the appellant had been wrongly convicted on the basis of the doctrine of recent possession, it also erred in confirming the conviction on the basis of the appellant's confession. If there had been any doubt as to whether the appellant's statement amounted to a confession, the prosecutor was duty bound to inform the trial court accordingly. The magistrate should in those circumstances have conducted the preliminary inquiry to determine firstly whether the appellant had made the statement and, if so, the nature thereof. If the finding was that it did amount to a confession, a trial within a trial had to be held to determine its admissibility.¹ If the proper procedure had been followed, the State would have had to prove the admissibility requirements, which is the aspect that I turn to next.

Admissibility of confession

[7] The principles underlying the admissibility of a confession are set out in s 217 of the Criminal Procedure Act 51 of 1977 (the Act), which provides that:

‘(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such

¹ See: E du Toit, FJ de Jager, A Paizes, A St Quintin Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (2013) at 24-51; *S v Nkosi* 1980 (3) SA 829 (A) at 844F-845B.

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 justice;. . .'(My emphasis.)

[8] Thus, a confession made to a magistrate or justice does not fall within the scope of the proviso and is therefore admissible provided the requirements of s 217(1) relating to voluntariness are satisfied. A 'peace officer' is defined in s 1, as including 'any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959). . .' A commissioned officer of the SAPS is a member holding the rank of lieutenant or higher, and in terms of s 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963² read with the First Schedule to that Act, *ex officio* a justice of the peace and therefore entitled to take a confession. The underlying rationale of s 217(1) is based on the fundamental principle that no inducement or coercion be brought to bear on an accused person to confess. The confession made by the appellant to Touch raises the issue whether it was properly obtained.

The evidence

[9] No trial within a trial was held to determine the admissibility of the confession. Prior to leading evidence of the confession, the State informed the court that it was

²Section 4 of the Justices of the Peace and Commissioners of Oaths Act No 16 of 1963 provides as follows:

'4. *Ex officio* justices of the peace.-The holder of any office specified in the First Schedule shall be a justice of the peace for the Republic and shall possess all such powers and perform all such duties as are conferred or imposed on justices of the peace by any law.'

The First Schedule to that Act outlines that the following office-holders are *ex officio* justices of the peace: 'Any office mentioned in Column II of Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), any office of Deputy Director-General, Chief Director, Director, Deputy Director or Assistant Director of a department referred to in Column I of that Schedule and any office ... which corresponds with any of the said offices....

Chief of the South African National Defence Force....

Attorney-General, Deputy Attorney-General, Senior State Advocate and State Advocate.

Commissioned Officer of the South African Police Service.

Commissioned Officer of the Department of Correctional Services....'(My emphasis.)

presenting the evidence of an informer who was willing to testify on the basis that his real name not be used. No objection was raised against this. Without saying anything further, the State called Touch, who identified himself. The State commenced with his examination in chief by asking whether the accused knew at the time of their meeting that he was a police officer. He answered that they did not.

[10] The following further evidence emerged:

'Okay. So now how did it come about that you learnt about this case? - - On 04 April 2005 I received a call from Justice [accused 2].

Was there anything that gave, that led up to him giving you this call or was it just out of the blue?

-- He phoned me as we used to communicate, he just phoned me on that day, on 04 April 2005.

And you say you used to communicate, did you communicate with him often? - - Yes he was phoning me, and then I was phoning him sometimes, but mostly he was the one who was phoning me.

In your communications with him, did you ever tempt him or entice him regarding the commission of any crime? - - Not at all sir.

Regarding any crime which was already under way, did you ever egg (sic) him on to carry on with it or encourage him to be more involved than what he already was? - - No, I never encouraged him, but he is the one who told me what they have already done most of the time.

At any stage in your communication with him, did he ever indicate that he wants to withdraw from any participation in any crime? - - He never did so sir.

Okay, so he phoned you on the 04th you say? - -

Yes sir, on 04 April 2005.

What did he say? - - He told me that he has a job to be done and he wants me to be part of that job.

He said Bongani [the appellant] will also be part of that job.

Did you know who Bongani is? - - Yes, by that time I already met him.

Who is Bongani? - - He is the guy, it is accused 1, I am not sure, the other one on the other side.

And how did you meet Bongani? - - I met him when I was in Actonville, he came with Justice.

Did you ever entice Bongani to be involved in any crime? - - No I never enticed him.

Did you ever encourage him to be more involved than what he was in any way? - - I never even communicated with him except when I saw him with Justice.

Okay, he said that he has a job and Bongani will be a part, what else did he say, that is now Justice? - - He told me that we should set up an appointment if possible the following day, 05

April 2005 at 16:00. He told me that I should meet them at a shopping centre next to Actonville Hospital.

How did you know it was Justice you were talking to? - - I know the number that he was using, the cellular phone number, it was 0835266411.

Did you often communicate with him on this number? - - Yes I often, but other days he used to use a public phone.

Did he tell you what this meeting at the hospital was about? - - He did not tell me specifically what the meeting was about, but he only told me that, he also told me that he has cheques that they got of about R70 000.00. Then I told him that if possible he must bring them along the following day so that I can see them.

Did you meet him on the 05th? - - Yes I did meet Justice and Bongani on the 05th, it was round about 16:10 in the afternoon.

Were you alone with them? - - Yes I was alone.

And what happened at that meeting? - - Justice showed me the two cheques that he had.

Do you recall those cheques at all? - - Yes I do remember them. One cheque it was an ABSA cheque, it was ABC East Gate Vereeniging branch. The amount was written on the cheque, it was R35 967.71. The date on the cheque written it was 01 April 2005. The second cheque it was a Standard Bank cheque Fourways Crossing. The date on the cheque it was 31 March 2005. Both cheques were addressed to Sparta Foods Pty Ltd.

Why do you remember that? - - I remember that because I did write that information from a piece of paper, because I told them that I have got a contact who might cash the cheques.

Who were you talking to about the fact that you have this contact? - - It was both of them, I was just, because the aim when I told them they must bring them that I have got a contact, the aim was to see the information on those cheques so that I can see the origin of them.

Who is the one who possessed the cheques? - - It was Justice that had those cheques.

Why did they show you these cheques? - - Because I requested Justice the previous day to bring those cheques so that I can see them as my contact might be in a position to cash them.

Was anything else told to you about these cheques? - - Come again sir?

Was anything else told to you about these cheques? - - Eh, I will continue, then Bongani Khumalo said those they have got them at a certain shop in Petit.

Who said that? - - Bongani. He said on 03 April 2005 they went to rob that shop in Petit. They broke into a safe whereby they used a wire to pull out the money from the safe. These two cheques was part of the money that came out of that safe.

Did they tell you anything else about that robbery, any other details? - - Yes sir, Bongani further said that one of their friends took guard of the security guards whom they found at that shop. . . '(My emphasis.)

[11] Towards the end of Touch's examination in chief, when questioned in regard to the voluntariness of his statement, the following evidence emerged:

'Okay. Did they say that to you voluntarily? - -

Yes sir.

Was it a spontaneous statement or did you elicit this information from them? - - No, the one who told me what has happened, how did they got those cheques.

Is that all you asked them? - - Yes, it is what they told me.

Did you promise them anything if they should tell you this? - - Nothing at all sir.

Did they appear sober when they spoke to you? - -

They were sober sir.

Did you threaten them in any way? - - Not at all sir.

They did not know at that stage that you were employed in the police? - - They did not know.'(My emphasis.)

[12] It is apparent from Touch's testimony that neither the court nor the appellant's legal representative raised any objection to the evidence relating to the confession or suggested that its admissibility be dealt with in a trial within a trial. The appellant, in his own evidence, denied that he had made the confession.

[13] The admissibility of a confession where the question is whether it was freely and voluntarily made and where it is disputed on the ground that it was obtained in violation of other fundamental rights, and where the facts are not common cause between the parties, is to be adjudicated upon at a trial within a trial, an insulated enquiry where only the admissibility of a confession is determined independently of the question of guilt.³ The defence is entitled to lead evidence in rebuttal. It was for the prosecutor to inform the court and the defence that it intended to lead evidence of a confession made by the accused as part of the State's case. If the defence had raised an objection a trial within a trial would have had to follow. In admissibility challenges the State has the onus of proving that the evidence of the confession has been obtained in a constitutional manner, and that no pressure has been brought to bear on an accused person which will corrode his free will.⁴

[14] It is a disquieting feature of this case that the prosecution at no stage told the court that evidence would be led of the confession made by the appellant. As

³*Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) paras 40-41.

⁴*R v Dunga* 1934 AD 223 at 226-7; *S v de Vries* 1989 (1) SA 228 (A) at 233H-I.

demonstrated above, this constituted a fundamental miscarriage of justice on its own. No challenges were made by the appellant, nor was a trial within a trial held. In the absence of a trial within a trial it was improper for the State to lead evidence of a confession in the manner that it did. Although the trial court did not rely on the confession in convicting the appellant, the high court did and convicted him on that basis.

[15] In *Director of Public Prosecutions, Transvaal v Viljoen* 2005(1) SACR 505 (SCA) para 39 the following was said by Streicher JA:

‘A trial within-a-trial is, as the phrase indicates, a trial held while the main trial is in progress in order to determine a factual issue separately from the main issues. Such a procedure is not unfair to the accused. On the contrary, it is a procedure that evolved in the interests of justice and in fairness to the accused. In *R v Wong Kam-Ming* [1980] AC 247 (PC) [1979] 69 Cr App Rep 47; [1979] 1 All ER 939) at 261 B-C Lord Hailsham of St Marylebone said:

“(A)ny civilised system of criminal jurisprudence must accord to the Judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the defendant should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement.”

In *S v De Vries* [1989 (1) SACR 228 (A)] Nicholas AJA, after having referred to this passage, said:

“It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the enquiry into voluntariness in a compartment separate from the main trial . . . In South Africa (the enquiry) is made at a so-called “trial within the trial”. Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such a trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of guilt. (See *R v Dunga* 1934 AD 223 at 226.)”

An accused person has a right to a fair trial to be conducted in accordance with 'notions of basic fairness and justice'.⁵ The admission of a confession in the absence of a trial within a trial in the circumstances of this case offends against these notions.

[16] The criminal justice system is built on the tenets of justice and fairness. A fair trial requires an impartial judicial officer and a scrupulously fair prosecutor. The state prosecutor has a public duty to perform his or her duties impartially and fairly, with honesty and integrity, consistently performing his or her functions independently and objectively, with lawful authority, and at the same time upholding human rights and protecting human dignity. He or she cannot use irregular and improper means to secure a conviction. The injustice of placing before the trial court the confession of the appellant, without first alerting the court of this fact, the effect it would have, the undesirability of doing so and the potential prejudice to the appellant should have been plain to see. It follows that evidence of the confession should not have been admitted. It follows that the appeal must be upheld and the convictions and sentences set aside.

[17] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court below is set aside and substituted with the following:
 - '(a) The appeal succeeds.
 - (b) The appellant's convictions and sentences are set aside.'

H K SALDULKER
JUDGE OF APPEAL

⁵*S v Zuma & others* 1995 (1) SACR 568 (CC) para 16; *S v Marx & another* 1996 (2) SACR 140 (W) at 144b-145a.

APPEARANCES

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