

SOUTH AFRICA / JUDGMENT

S v Mapasa and Others (CC32/2024)
[2024] ZAECELLC 39 (26 August 2024)
[2024] ZAECELLC 39

COURT

Eastern Cape High Court, East London Local Court

BEFORE

N Molony

CASE / FILE NUMBER

CC32/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION-EAST LONDON)
Case No: CC 32/2024

In the matter between: THE STATE
 and
 SINDILE
 MAPASA
 Accused 1
 KHAYA
 GCINANI
 Accused 2
 LINDISWA
 MGQITHI
 Accused 3

JUDGMENT

(TRIAL-WITHIN-A-TRIAL)

MOLONY AJ:

[1] The three accused in this matter face charges of assault with intent to cause grievous bodily harm, kidnapping and murder.

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- [2] The trial was meant to commence on 23 July 2024 however, due to various unavoidable intervening factors, only commenced on 31 July 2024.
- [3] The state led the evidence of one witness, before the need arose to commence a trial-within-a-trial in regard to an admission made by accused 3.
- [4] It must be noted that the defence did not agree that the admission is in fact an admission, but nonetheless alleged that the statement which allegedly constituted an admission, was not made freely and voluntarily.
- [5] Out of an abundance of caution, and in order to avoid any potential prejudice to accused 3 by having sight of the statement in question, this court deemed it necessary for a trial-within-a-trial to be held in regard to the admissibility of the admission.
- [6] It then transpired that accused 1 was disputing the admissibility of a confession, and accused 2 was disputing the admissibility of a pointing out, and that there was some overlap in the evidence of some of the state witnesses in regard to all three accused.
- [7] The trial-within-a-trial accordingly dealt with the admissibility of accused 1's confession, accused 2's pointing out and accused 3's admission. This adjustment to the process required that two state witnesses needed to be recalled, however this proceeded without objection and was, in my view, appropriate under the circumstances.
- [8] The state led the evidence of ten (10) police officers, all of whom were experienced police officers.
- [9] The impugned confession, pointing out and admission documentation were provided to me by agreement, but the sections in issue were covered with blank pages, meaning that I had access to the pro-forma portions of the documentation, but not the sections dealing with the content which related to the merits of the matter.
- [10] Whilst there were one or two aspects which arose during the course of the trial-within-a-trial which may have best been dealt with by having sight of the covered portions of the documents, in my view those aspects were not sufficiently material to necessitate that occurring.
- [11] The three accused elected not to testify in the trial-within-a-trial.
- [12] Broadly stated, and based upon the versions put on their behalf to the state witnesses, accused 1 alleged that he had been physically assaulted and tortured in order for the police to obtain his confession, and that his confession was not obtained freely and voluntarily, and without undue influence. He furthermore alleged that his Constitutional rights had not been adequately explained to him.
- [13] Accused 2 alleged that his pointing out was not done freely and voluntarily, and without undue influence. He also disputed that his Constitutional rights had been adequately explained.

- [14] Accused 3 alleged that her admission was not made freely and voluntarily, and also that her Constitutional rights had not been adequately explained.
- [15] In order for the matter to be placed in the appropriate context, it must be noted that the charges in this matter emanated from two dockets, one opened at the Duncan Village police station, and the other at the Scenery Park police station. It appears that the scene where the body of the deceased was found fell under the purview of Scenery Park, whilst the assault GBH and kidnapping charges fell under the purview of the Duncan Village police station.
- [16] The alleged offences occurred in 2019. It appears that at some point charges were withdrawn (apparently due to delayed DNA results) and were only reinstated in 2024. All three accused were arrested in 2019, prior to charges being withdrawn. In 2019 there was a fourth accused, who could not be traced when charges were reinstated.
- [17] A summary of the material evidence led and the applicable legal position will be provided in what follows.
- [18] Captain Matiwane is a police officer stationed in East London who has 32 years of experience. He was the officer who recorded accused 3's admission in writing.
- [19] Captain Matiwane was, at the time, informed that accused 3 wished to make a confession, and so she was brought to Captain Matiwane for this purpose. It transpired, according to the state, that the contents of the document did not amount to a confession, but rather constituted an admission.
- [20] Captain Matiwane confirmed going through the requirements of the relevant pro-forma with accused 3, which included an extensive explanation of accused 3's Constitutional rights. Captain Matiwane conducted his engagement with accused 3 in isiXhosa, and had been satisfied that she had the necessary understanding of what was being explained to her. At no point did she raise concerns or objections about anything. Had any such concerns or objections been raised, he would have recorded such information and stopped the process.
- [21] Photographs were taken by Captain May (inter alia of accused 3 before and after giving her statement to Captain Matiwane) which demonstrated that accused 3 did not suffer any obvious physical injury. The photograph album in this regard was admitted as exhibit 'G'.
- [22] Neither Captain Matiwane nor Captain May were involved in any way in the investigation of this matter prior to the statement being taken.
- [23] Captain Matiwane explained to accused 3 that a charge of murder was involved, and the pro-forma confirms that it was explained to her that direct imprisonment could result if she was convicted in a serious case as a result of her statement.

- [24] It was put to Captain Matiwane in cross-examination that accused 3 had told him that she did not know why she was being brought to him, to which he had responded that he also did not know why she was brought to him, as she had already made a statement. Captain Matiwane denied this.
- [25] It was also put to Captain Matiwane during cross-examination that accused 3 had been told, prior to being brought to him, that she was going to him to make a statement.
- [26] Later it was put that she had been told she was going to his office to have photographs taken. It was also put to Captain Matiwane that accused 3 denied that her rights were read to her, and that she had just made a statement, she was not asked anything. Captain Matiwane reiterated that he had explained her rights to her as well as asked her all of the questions contained in the pro-forma.
- [27] Warrant Officer Vinqi, the current investigating officer in this matter, has twenty (20) years of police service.
- [28] He testified that he arrested accused 3, explained to her why she had been arrested and verbally informed her of her rights (in isiXhosa) – the rights he explained were contained in his pocket book which he carried at all times.
- [29] He specifically testified to informing her of the right to remain silent, that anything she said could be written down and used as evidence, that she had the right to consult a legal practitioner of her own choice, or if she did not have one, she could apply for one to be provided.
- [30] According to Warrant Officer Vinqi accused 3 then began to narrate to him what had occurred in regard to the offences in question. This was part of a conversation they had after her arrest (which he referred to as an interview).
- [31] He asked if she wanted what she was saying to be reduced to writing, as he did not have the authority to do so (meaning that he was not of sufficient rank to take a confession). Accused 3 said she wanted a statement to be recorded in writing. Warrant Officer Vinqi then made the necessary arrangements for a confession to be taken.
- [32] Warrant Officer Vinqi was referred, under cross-examination on behalf of accused 3, to his arrest statement in relation to all three accused. The statement in question was ultimately admitted as exhibit 'F'.
- [33] The statement was deposed to on 31 October 2019 at 15h50 in the afternoon. The statement, inter alia, confirmed that Warrant Officer Vinqi, when arresting accused 3, explained to her that he was arresting her for kidnapping and assault (it appears that at that point there were still 2 dockets), that he explained her rights to her verbally, and that she understood and agreed.

- [34] Much was made of the fact that reference was made to a prior statement made by accused 3 (labelled A6 in the docket), which, it was not in dispute, was deposed to on 31 October 2019 at 22h00 (i.e. sometime after exhibit 'F'). Warrant Officer Vinqi testified that he did not take the statement which was A6, but that it was already in the docket when he obtained it.
- [35] The statement labelled A6 was not sought to be admitted into evidence, and absent further evidence I can draw no conclusions from this discrepancy other than that there appears to be a discrepancy. It furthermore does not appear to be in dispute that accused 3 had in fact made two statements.
- [36] Warrant Officer Vinqi was furthermore criticised for the absence of an SAP14A statement (which contains an explanation of rights) in the docket. He testified that he had furnished them, but when he looked for them in the docket he could not find them. He then asked for the docket from the prosecutor at one point in his evidence in order to look through it for this purpose.
- [37] It was put to Warrant Officer Vinqi that no interview occurred with accused 3 and that after her arrest accused 3 was taken to the cells. About 2 or 3 days later she was taken from the cells and told she was going to make a statement (although later it was put that she was told she was going to make a statement and have photographs taken). No detail was given, and she was not told she was being taken to make a confession. This was denied by Warrant Officer Vinqi.
- [38] Warrant Officer Vinqi also, after accused 3 returned from making her confession to Captain Matiwane, caused her to sign a document called a 'Constitutional Warning' (which was admitted as exhibit 'E'), which inter alia, informed her of her rights. He did so in order to attach this document to the confession, and was adamant about this being appropriate procedure. The same occurred in regard to accused 2 (this document was admitted as exhibit 'K'). It is clear that this document is essentially superfluous, given the time when it was signed, however this does not invalidate the evidence of Warrant Officer Vinqi, Captain Matiwane, and later Colonel Middleton in regard to the prior occasions when accused 2 and 3's rights were explained.
- [39] Accused 2, as part of his narration of events to Warrant Officer Vinqi (and after his rights were verbally explained in isiXhosa), told Warrant Officer Vinqi that he, accused 2, could take him to where they left the person. This was how the pointing out came to be arranged.
- [40] Warrant Officer Vinqi testified that accused 2, in particular, only noted, after his rights were explained, that he did not have money for a legal representative, but said nothing in regard to the option of legal aid. Warrant Officer Vinqi was taken to task on this point by the legal representative for accused 2, as it was allegedly unlikely that accused 2 would have said this, since accused 2's legal representative was receiving payment for representing accused 2. In my view this aspect is neither here nor there in regard to probabilities, as no explanation was tendered at any point in regard to how accused 2 was funding his legal representation.

- [41] It was put on accused 2's behalf that Warrant Officer Vinqi had not explained accused 2's rights to him, which was disputed by Warrant Officer Vinqi.
- [42] In regard to accused 1 Warrant Officer Vinqi testified to having verbally explained the necessary rights (which were listed during his evidence) in isiXhosa to accused 1 prior to his confession being taken. It seems accused 1 initially denied any involvement in the offences, and only decided to give the full story after learning that the other accused had done so.
- [43] It was put to Warrant Officer Vinqi that he and a white police officer had assaulted and tortured accused 1 (by handcuffing his hands behind his back whilst he was in a chair, and placing a tube over his head which had been sprayed inside with pepper spray – this caused accused 1 to urinate himself). During this process accused 1 was exhorted to confess to the crimes (although it does not appear any detail was provided about the crimes to accused 1) by Warrant Officer Vinqi and the white police officer). It was also put that Warrant Officer Vinqi had not explained any rights to accused 1. Warrant Officer Vinqi disputed all of this.
- [44] Lieutenant Colonel Matshini was the officer who took accused 1's confession, and utilised the same pro-forma (which included the necessary explanation of rights) as that used in regard to accused 3's confession.
- [45] Lieutenant Colonel Matshini conducted the interview in isiXhosa, and was satisfied that he and accused 1 understood each other. The documentation in this regard was admitted as exhibit 'I', and the relevant photograph album (showing inter alia accused 1's appearance before and after the confession was taken) was admitted as exhibit 'H'.
- [46] Lieutenant Colonel Matshini testified that he was not involved in the investigation in this matter prior to the taking of accused 1's confession.
- [47] It was put to Lieutenant Colonel Matshini that there were things which accused 1 said to him which had not been written down, and that Lieutenant Colonel Matshini had written down certain things, both in the statement and in the answers to questions in the pro-forma, which accused 1 had not said. The exact problematic sentences were not disclosed. Lieutenant Colonel Matshini denied this. It was furthermore put that accused 1's rights were not explained, and that Lieutenant Colonel Matshini had told accused 1 that he was compelled to give a statement without a legal representative, upon accused 1 querying that aspect and showing reluctance. This was all denied by Lieutenant Colonel Matshini.
- [48] It was also put on accused 1's behalf that he had been tortured by Colonel Middleton (who conducted the pointing out involving accused 2) and Warrant Officer Vinqi, and that if Lieutenant Colonel Matshini had asked accused 1 if he had been assaulted or threatened in any way, he would have informed Lieutenant Colonel Matshini of this – but Lieutenant Colonel Matshini had never asked him this question. Lieutenant Colonel Matshini denied this.

- [49] Captain May (now Lt. Col. May), who took the photographs of accused 1 and 3, testified and confirmed the evidence of Captain Matiwane and Lieutenant Colonel Matshini in all material respects.
- [50] Colonel Middleton testified in regard to the pointing out conducted with accused 2. In this regard a pro-forma (admitted as exhibit 'J'), was once again utilised, which, inter alia, included an explanation of rights and extensive questioning to determine whether or not the pointing out was occurring inter alia freely and voluntarily, and without undue influence.
- [51] Colonel Middleton conducted the process in English, having ascertained from accused 2 that he was fluent in English and was content to conduct the process in English. An interpreter, Sergeant Nkosana, was on hand at all times and explained to accused 2, in isiXhosa, that he could ask for anything to be interpreted that he did not understand.
- [52] Accused 2 alleged that he was simply required to sign the pointing out documentation (he did not know which police officers filled it out) and was taken in a vehicle to the pointing out (he disputed two vehicles being used), but never pointed anything out. He was, prior to the pointing out, informed by an unidentified person at a police station to point out the place, and was threatened that he was facing life imprisonment. During argument it was suggested that it was Colonel Middleton and Warrant Officer Vinqi who had made such threats.
- [53] Colonel Middleton testified that he had completed the pointing out documentation appropriately and that accused 2 had participated in the pointing out. Two vehicles were utilised, one containing accused 2 and Colonel Middleton, and one containing the photographer (Warrant Officer George).
- [54] One aspect which required attention was the fact that the photograph reflecting the final odometer reading of the vehicle driven by Colonel Middleton reflected a reading which differed from that recorded by Colonel Middleton in the pointing out documentation, as the final reading upon return from the pointing out.
- [55] The difference was (upon calculation) one of some 16 kilometres. Colonel Middleton was at a loss to explain this as he stated he would need to see the contents of the covered portion of the pointing out documentation, as this listed the required information.
- [56] He was not cross-examined in this regard, nor was any detail provided on behalf of accused 2 (aside from saying he was taken to where the body was found) as to where he had been taken, how many times they had stopped, and for how long they may have travelled. In my view this aspect is therefore of no significance.
- [57] Sergeant Nkosana and Warrant Officer George testified and confirmed the evidence of Colonel Middleton in all material respects.
- [58] During the evidence of Colonel Middleton it emerged that he had been erroneously identified as the white police officer who had allegedly assaulted and tortured accused

1. Warrant Officer Vinqi was asked how many white police officers there were at the Duncan Village police station at the relevant time. He responded that there was only one, that being Captain Jackson.
- [59] Captain (now Colonel) Jackson later testified as well. He was not on the list of witnesses, but was called by the state (with no objection by accused 1) given what had emerged during Warrant Officer Vinqi's evidence.
- [60] Colonel Jackson denied any involvement in the investigation of this matter in 2019, denied any involvement in the arrest of any of the accused in 2019, and denied assaulting or torturing accused 1 with Warrant Officer Vinqi.
- [61] What he did confirm was that he, during 2024, had assisted the current investigating officer (Warrant Officer Mbambo, who fell under his command) to trace and notify the accused that this matter was being reinstated. This involved meeting with and introducing himself to accused 1.
- [62] Colonel Jackson was requested (for the first time during cross-examination) to obtain his diary from 2019, presumably in order to trace his whereabouts inter alia on the day that accused 1 alleged he had been tortured.
- [63] I allowed a fairly extensive adjournment for this purpose, but Colonel Jackson was unable to find the relevant diary, and assumed he had destroyed it (believing he was permitted to do so in terms of the relevant standing orders). I draw no inference from this, as the issue of the diary was raised belatedly and the diary had never formed part of the docket.
- [64] Section 35(1) of the Constitution provides that everyone who is arrested for allegedly committing an offence has, inter alia, the right to remain silent and the right not to be compelled to make any confession or admission that could be used in evidence against that person.
- [65] To be admissible, a confession, an admission or a pointing out must, in addition to being relevant and being made voluntarily, be constitutionally compliant.
- [66] Section 35(5) of the Constitution provides 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.
- [67] The onus is on the state to prove beyond reasonable doubt that the relevant confession or pointing out or admission was made freely, voluntarily and without undue influence. It is also for the state to prove that the accused's fundamental rights were not infringed in the process.
- [68] In regard to the use of pro-formas in such matters, the following was stated in the matter of Ngcobo and Other v Minister of Police (4755/2017) [2023] ZAKZPHC 126 (20 October 2023):

“[81] The defendant obtained ‘confessions’ from the plaintiffs in the guise of warning statements. Both Mlangeni and Mncwabe coincidentally did not use the prescribed pro forma for taking confessions. They knew that there was a prescribed pro forma for taking confessions. Such pro forma is a product of team expertise and guidance from courts. It is followed to ensure that safeguards for taking confessions are complied with to ensure that suspect’s constitutional rights are not infringed and that the process accords with the accused’s right to a fair trial. Each question in the pro-forma serves a particular purpose. The pro forma serves as a contemporaneous record of what took place during the taking of the confession. The failure to use the prescribed pro forma is courting disaster.”

- [69] None of the accused testified in the trial-within-a-trial, as was their right. This means the evidence of the state stands uncontested. What now needs to be determined is whether or not the state’s evidence meets the burden of proof required.
- [70] This court was invited by the defence to infer what essentially amounted to a conspiracy amongst all of the police officers involved, in order to successfully gain a conviction in regard to all 3 accused in this matter.
- [71] Reference was made to the fact that the confession, admission and pointing out were not recorded by way of video, as this would allegedly have placed the police officers’ conduct beyond reproach.
- [72] It was proposed that it be inferred that Warrant Officer Vinqi was an unreliable and dishonest witness based upon inter alia his demeanour, and the fact that Constitutional Warning statements were taken in regard to accused 2 and 3 after the pointing out and admission had already been made.
- [73] I was invited to view Warrant Officer Vinqi’s demeanour when testifying for the second time as evasive, due to the way he stood and the fact that he faced the bench when answering questions under cross-examination.
- [74] My own observation was simply that Warrant Officer Vinqi appeared fatigued due to the length of time that he was required to testify, and so leaned against the wall behind him and crossed his arms whilst facing the bench when answering questions. In my view there was nothing particularly significant about Warrant Officer Vinqi’s demeanour or stance when testifying.
- [75] It was asked that negative inferences be drawn in regard to Col. Jackson assisting Warrant Officer Mbambo in tracing the accused in 2024, when charges were to be reinstated, along with Colonel Jackson being unable to find his diary from 2019.
- [76] In the matter of *Gcam-Gcam v The State* 2015 (2) SACR 501 (SCA) the following was stated at paragraphs 48 and 49 in regard to the approach to be adopted in a trial-within-a-trial:
- “...All that was required of the appellant was to present a version that was reasonably possibly true, even if it contained demonstrable*

falsehoods.

[49] When confronted with confessions made by suspects to police officers whilst in custody — even when those officers are said to be performing their duties independently of the investigating team — courts must be especially vigilant. For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise their constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case. This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial.”

[77] I was referred to the unreported decision of Mr Justice Brooks in the matter of *S v Gqoki and Others* (CC14/2018)

[2023] ZAECMHC 8 (26 February 2023), in which, in the circumstances of that matter, Mr Justice Brooks found himself compelled to state at paragraphs 52 & 53 that:

“[52] It is a reality of our times that members of the public are more trusting of members of the judiciary than they are of members of the South African Police force. The emergence of cases such as the present in which police brutality is revealed goes a long way towards the deterioration of the reputation of the South African Police Service in the eyes of members of the public. One of the direct effects that the deterioration of this reputation has is afforded by the example of an explanation given by many an accused person appearing in our courts who states that no mention of an assault was made to a commissioned police officer because he or she was just another member of the same force at whose hands the accused had suffered. Yet all of this could be avoided, from the poor level of integrity demonstrated in some investigations to the failure of the prosecution to secure the admission into evidence of a confession, if police investigators were obliged to use magistrates for the recordal of confessions.

[53] The time may well have arrived for the legislature to give serious consideration to the amendment of the CPA to remove the possibility that a confession might be recorded by a commissioned officer of the same force which is charged with investigation duties. This would go a long way to ensure that the quality of investigative work shows the improvement which is necessary to ensure an improvement in the rate of successful prosecutions for serious crimes in this country. I have little doubt that if members of the South African Police Services were aware that at some point during their investigation there may well be magisterial scrutiny of the background leading to the recordal of a confession, there would be a resistance on the part of the investigation team to resort to the improper use of police force or violence.”

- [78] I have given anxious consideration to the circumstances of this matter, the evidence led, and the relevant legal requirements, and have been vigilant in my analysis of the evidence presented by the state. Being vigilant does not, however, equate to making baseless assumptions.
- [79] Aside from minor discrepancies, I could find little fault with the evidence of the state witnesses, and there is no evidence or obvious inconsistency or error with which to infer the devious intentions suggested by the defence. To do so would accordingly, in the circumstances of this particular matter, amount to nothing more than speculation.
- [80] The police officers impressed as honest and forthright witnesses. There was nothing inherently improbable or materially contradictory in their evidence.
- [81] The versions advanced on behalf of the accused meant that any incriminating contents of the confession and pointing out (including all of the physical stops during the pointing out), were manufactured by police officers who had no connection to the investigation. The degree of organisation of multiple police officers from different police stations required in order to achieve such a result would have had to be extensive and invasive, and such an inference finds no support or even suggestion in the evidence before this court.
- [82] In regard to the admission (to the extent that it was incriminating), all information in the statement was in fact provided by accused 3, however she was allegedly not aware of her rights and had not been informed of the fact that she had been taken to make a confession.
- [83] In regard to accused 1, the erratic manner in which Colonel Jackson came to be identified as one of the police officers who had assaulted and tortured accused 1, despite accused 1 having known of his identity and appearance from earlier in 2024 when charges were reinstated, suggests that this was a belated accusation on the part of accused 1.
- [84] The charges in this matter were only reinstated in 2024. Despite the lapse of time there is no evidence to suggest that accused 1 (who was apparently the only accused to suffer an assault and torture) has ever raised this issue prior to the start of this trial in 2024.
- [85] Given all of the above I am satisfied that the state has proved beyond a reasonable doubt that the confession of accused 1, the pointing out by accused 2, and the admission by accused 3 were made freely and voluntarily and without undue influence, and that none of the relevant Constitutional rights were infringed.

Ruling:

- [86] I accordingly rule that the confession of accused 1, the pointing out of accused 2 and the admission of accused 3 are admissible in evidence in the main trial.

N MOLONY

ACTING JUDGE OF THE HIGH COURT

Appearances: For the State: Adv Mgenge instructed by Deputy Director of Public Prosecutions MAKHANDA For Accused 1: Mr Sigcau instructed by Legal Aid South Africa KING WILLIAM'S TOWN For Accused 2: Mr Mquqo instructed by Private Instructions EAST LONDON For Accused 3: Adv Mtini instructed by Legal Aid South Africa KING WILLIAM'S TOWN Heard on: 23, 24, 26 & 31 July 2024 and 01, 02, 20, 21, 22 & 26 August 2024

Judgment

delivered: 26 August 2024

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