.HE STATE -vs- GUSTAV TJIHORERO AND 1 0ther CA 21/93

1993/10/29

Coram: Strydom, JP et Frank, J.

EVIDENCE:

Confession - Undue influence - what is - magistrate or officer taking confession should ask additional questions to clear up uncertainty and not slavishly follow **rone0***d form.

case no CA 21/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

1. GUSTAV TJIHORERO FIRST APPELLANT

2. ANDREW KOMPONDA SECOND APPELLANT

and

THE STATE RESPONDENT

CORAM: STRYDOM, J.P. et **FRANK, J.**

Heard on: 18/10/1993

Delivered on: 29/10/1993

JUDGMENT

STRYDOM, J.P.: The two appellants (to whom I shall further refer to as accused 1 and accused 2) were charged in the magistrate's court, Windhoek, on two counts of theft of motor vehicles. They were both defended by counsel but was nevertheless convicted, accused no. 1 on both counts and accused no. 1 on one count only.

During the trial, confessions made by both accused to Chief Inspector Terblanche were admitted in evidence. The appeal lies mainly against the admissibility of these confessions.

The complainant in this matter is S.W.A. Toyota, a dealer in motor cars of that make. Accused no. 1 was at the relevant

time a driver in the employ of the complainant. On 19th July, 1990 it was established that three new and yet unlicenced Toyota High Lux trucks were missing from the stock yard. As the vehicles were under lock and key and could only be moved from the yard once the gate which gives access to the yard is unlocked, and as the yard was constantly under guard, it was suspected that the thefts were committed by a member or members of the complainant's staff who had access to the yard and authority to move vehicles around.

One Finkeldeh, the sales manager of the complainant, further testified that all vehicles removed from the yard are entered into a register which contains information such as the vehicle which is removed, for what purpose it is so removed, the person who removed it and whether the car was brought back and when it was so brought back.

An investigation of this register showed that the relevant vehicles were removed by accused no. 1 and that they were not returned. It took some time before it was discovered that the vehicles were missing because, according to Finkeldeh, cars in stock in the yard, are given a number, and the cars which were missing, were given stock numbers of other cars still in the yard; so that on checking those cars were found to be still in stock.

In the meantime the police had found accused no. 2 in possession of one of the stolen vehicles. He gave an explanation which implicated accused no. 1 which then led to

the arrest of accused no. 1. Both accused no. 1 and 2 made full confessions to Chief-Inspector Terblanche. When the confessions were introduced by the State, Counsel for the defence objected to the admissibility thereof but the court ruled that the statements were admissible. After close of the State's case the Defence case was also closed without leading any evidence.

The State first of all introduced the statement of accused no. 2. It was introduced on the basis that the statement contained extra judicial admissions made to a peace officer - Chief Inspector Terblanche. To this, Defence Counsel objected on the basis that the statement was a confession and did not only contain admissions. The magistrate however correctly ruled that he could only determine the issue once he was aware of the contents of the statement.

After the statement was read out in Court the magistrate again correctly ruled that it was indeed a confession. Counsel for the defence was then invited to address the Court on the admissibility or not of the statement. He submitted that it was inadmissible. When asked by the Court why that was so his only reply was because it was a confession. When he was pressed further he asked to address the Court at a later stage on the issue. It seems to me that Counsel for the Defence laboured under the misapprehension that confessions made to justices of the peace in contrast to those made to peace officers, are also not admissible unless they are reduced to writing before a magistrate. This is the only explanation I can give for the

rather unintelligible argument raised by counsel for the defence. The prosecutor may also have contributed to the confusion because in his argument he referred to Chief-Inspector Terblanche as a peace officer. If Terblance was only a peace officer then the statements would not have complied with the provisions of section 217 of Act 51 of 1977. Terblanche, holding the rank of Chief-Inspector, is however also a justice of the peace.

After that accused no. l's statement was introduced. This statement was written down on a roneod form containing various guestions and the answers of the accused thereto. One such question was:

> "Did any person make any promises to you or encourage you in any way to make this statement?"

To this the accused replied:

> "The sergeant told me that if I tell the truth he will testify in court that I co-operated."

On a further guestion do you expect any benefit if you should make a statement, the accused answered:

> "Yes, I want the court to give me extenuation."

Chief-Inspector Terblanche was cross-examined by Defence Counsel. Not a single question was directed towards the voluntariness or otherwise of the statements of accused 1 and 2 or to the contents thereof.

At the end of the State's case Counsel for the defence was then ready to argue the issue of the statements made by accused no. 1 and accused no. 2. A long argument was raised by Counsel but apart from saying that the statements fell far short of the stringent requirements of section 217 of the Act, counsel never said what those shortcomings were. Bearing in mind his cross-examination, or rather lack of cross-examination, in regard to issues such as voluntariness or whether the deponents were in their sound and sober senses when they made these statements, it again seems to me that counsel was of the opinion that a confession made to a commissioned officer is per se inadmissible.

I have referred rather fully to what had happened in the Court a quo because on appeal Mr Botes, on behalf of the accused, submitted that the State did not prove that the confessions were made freely and voluntary and more particularly that the statements were not made without undue influence. I must also state that Mr Botes was not the advocate who represented the accused in the Court-a-quo.

I will deal first with the statement made by accused no. 2.

As the confessions were taken by a Justice of the Peace it follows that the onus was on the State to prove that the statements were made freely and voluntary by the accused in their sound and sober senses and without being unduly influenced thereto. (See section 217 of Act 51 of 1977).

As far as accused no. 2 is concerned Inspector Terblanche

testified that accused no. 2 was brought to him. It was alleged that accused no. 2 was found in possession of one of the stolen vehicles and as a result thereof he told the accused that unless he could give a reasonable explanation of such possession he would be charged with the theft of such vehicle. Accused no. 2 then gave an explanation which was written down by the Inspector. Terblanche further testified that as a result of the warning the accused voluntarily made the statement.

Mr Botes' attack on the admissibility of this statement was first of all that the accused was threatened with prosecution and that the statement was therefore not freely and voluntary made. Secondly that there was no evidence that the accused was of sound and sober senses when he made the statement and thirdly that the accused was not warned according to Judge's Rules that he was not under any duty to speak.

I cannot agree with the submissions made by Mr Botes. In regard to the first point the accused was found in possession of a new car which was stolen. Under these circumstances it seems to me that Terblanche was only doing his duty by informing the accused that unless he could give a reasonable explanation he would be charged. In the statement itself, which is an affidavit, it is stated by the accused that the statement is given voluntarily. When Terblanche was cross-examined by Counsel for the defence not a single question was directed towards this aspect, in fact no questions regarding the statement by accused no. 2 were

asked. It therefore seems to me that the questions whether the statement was freely and voluntarily made, whether the accused was in his sound and sober senses and whether he was unduly influenced by anybody to make the statement were never in issue between the State and the defence. Even when counsel argued the matter he was at pains to show what in general the requirements are for the admissibility of a confession without in anyway indicating which of the requirements were not complied with or to refer to any facts which will tend to support his contentions.

Further to the second point raised by Mr Botes, the accused, after having given a long explanation of how he came into possession of the stolen vehicle, ended his statement by saying that he was aware of the contents of the statement and that he understood and comprehended it.

The fact that the accused was not warned according to Judges Rules does not per se render the statement inadmissible. As far as 1926 it was already stated in R v Barlin 1926 A.D. 459 at p. 465 as follows:

> "Whether the statement of an accused person to a police officer can be used against him at the trial depends upon whether it is shown to have been freely and voluntarily made, and that is a point to be decided by the trial Judge upon the facts of each case. The absence or presence of a prior caution; the fact that the statement was elicited by questions and the nature of those questions; the stage at which the statement was made, whether before or after arrest, all these are circumstances to be taken into account by the

Judge in arriving at a conclusion."

In 1931 the Judges Rules were formulated as a code of conduct to guide the police. A breach thereof does not have the effect to render such statement inadmissible. It is however one of the factors which the Court must consider in deciding whether such statement was made freely and voluntary. See in this regard:

R v Kuzwayo. 1949(3) SA 761 (A) at 767;

R v Jacobs 1954(2) SA 320 at 324 G - H and

S v Mpetha and Others (2), 1973(1) SA 576 (C).

As stated before the statement contains a full explanation of how the accused came to be in possession of the stolen car, the statement itself proclaims that it was voluntarily made, no cross-examination was levelled at these issues and neither did the accused at any stage give evidence to contradict the evidence of Terblanche or the statement he made. In these circumstances the breach of the Judges Rules

> "... did not operate so as to create a doubt as to the voluntariness of the statement and its freedom from undue influence." (Mpetha's case supra, p. 607).

Even if I am wrong in this conclusion, I am satisfied that the evidence against the accused is such that, in the absence of any explanation by him, a conviction was inevitable.

In regard to accused no. 1 Mr Botes argued that it is clear from the evidence and the statement made by the accused that he was unduly influenced to make the statement and that it

can therefore not be said to have been freely and voluntary. Mr January, on behalf of the State, submitted on the other hand, that the promise made by Sergeant Bekker was in reality merely an advice to tell the truth and did not constitute any undue influence.

In S v Mpetha. supra, at 577 F - G - 585B, after analyzing various other decisions, Williamson J stated in regard to undue influence the following:

> "In deciding whether a confession or admission was obtained as a result of undue influence, the test is not whether there was in reality no free will at all. The criterion is the improper bending, influencing or swaying of the will, not its total elimination as a freely operating entity. The whole object of the enquiry is to evaluate the freedom of volition of an accused and this of its very nature is an essentially subjective enquiry. It is his will as it actually operated and was effected by outside influences that is the concern."

It is clear from the evidence that when accused no. 1 was first brought to Chief-Inspector Terblanche, and notwithstanding the fact that he was confronted with the statement of accused no. 2, he denied all allegations and refused to say anything. The accused was then handed to Sergeant Bekker and still that same night the investigating officer requested the Inspector to take a statement from the accused.

As to how this had happened Bekker testified that he

interrogated the accused. It was specifically put to him by the prosecutor:

> "Initially the accused was that same day before Inspector Terblanche and he denied knowledge of these vehicles, what mode of persuasion did you use for the accused to be prepared to give a statement?"

The answer of the witness was that he told the accused that if he should tell the truth "dan sou dit makliker met hom gaan by die Hof...." (then the Court will be easier on him). It is also clear that the accused understood this to mean that when it come to punishment the Court would be more lenient towards him.

I agree with Mr January that the mere exhortation to tell the truth by itself does not usually amount to undue influence. (See R v Maqoetie 1959 (2) SA 322 (A)). However in the present instance the investigating officer went much further by promising the accused that if he should tell the truth he, i.e. the investigating officer, would testify that he gave his co-operation as a result whereof the Court will be easier on him. The State, so it seems to me, accepted that this promise induced the accused then to make the statement. This is clear from the question asked to Bekker by the prosecutor. That, so it seems to me, was also the state of mind of the accused when he told Terblanche what the Sergeant had said to him and that he expected to benefit therefrom. This must also be seen against the background that he was previously confronted with the allegations made by accused no. 2.

The onus is on the State to prove that the accused was not unduly influenced. I am not satisfied that the State proved beyond reasonable doubt that the accused, when he ultimately decided to make a statement, did so freely and voluntarily and, when he did so there was not an "improper bending influencing or swaying of the will" of the accused. See for instance R v Jacobs, supra at 322 C - H.

It therefore follows that the confession must be ruled inadmissible. Mr January conceded that, apart from the confession, there is not sufficient evidence to convict the accused. I agree with the concession made by Mr January. Although there is evidence that the particular vehicles were removed from the stockyard by accused no. 1, the witness Finkeldeh testified that the accused was not necessarily the person who was reguired to return the vehicles to the stockyard. There is evidence that stock-numbers of the vehicles were changed but there is no evidence when this was done and by whom.

Lastly I wish to refer to the prescribed roneod form which was used by Chief Inspector Terblanche when he took the statement of accused no. 1. Officers and magistrates using this form are, when the answers given to them by a particular deponent are not clear or need further elucidation, entitled and must ask further questions in order to clear up such uncertainties, as long as the guestions and answers thereto are also written down.

In the present instance the officer should have informed the

accused that Sergeant Bekker could not make any promises to him and that he could not expect any benefit from making a statement. If the accused was thereafter given the choice and if he was still willing to make a statement it will go a long way to dispel the notion that he was improperly induced. (See S v Gaba. 1985(4) 734 (A) at 752 F - 753 A, and S v Kekane and Others. 1986 (4) SA 466 (T) at 475 G - 478 B).

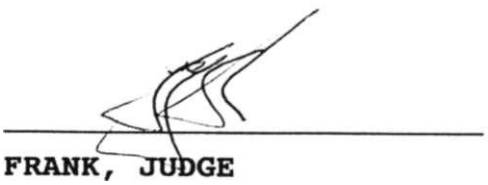
In the result the following orders are made:

(1) The appeal of accused no. 1 is upheld and the convictions and sentences are set aside.

(2) The appeal of accused no. 2 is dismissed.

STRYDOM, JUDGE PRESIDENT

I agree



FRANK, JUDGE

FOR THE APPELLANT:	MR L.C. BOTES
Instructed by:	Karuaihe & Conradie
FOR THE RESPONDENT:	MR H.C. JANUARY