IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO. 216957

In the matter between:

THE STATE

and

ANDILE SINETHEMBA NJIVA &

SANDILE ZAKHELE TSHEZI

JUDGMENT

NHLANGULELA DJP

[1] This is a review of the conviction and sentence of the two accused by the Bizana Magistrate's Court. The two accused were found guilty by the learned magistrate on charges of stock theft, and accused 1 was sentenced to 3 years imprisonment and accused 2 was sentenced to 18 months imprisonment. The test on review is to determine whether the proceedings appear to be in accordance with justice. A material irregularity would vitiate the proceedings and render same not in accordance with justice.

[2] The relevant facts may be summarised as follows.

[3] During the early hours of the morning on 17 July 2015 W/O *Jungqwana* of the Stock Theft Unit of the Bizana Police Station and his colleague were patrolling the road between Nomlacu and Harding. They stopped a suspicious looking sedan motor vehicle driven by one *Lazola Ndamase* with the two accused as front seat passengers. The back seat had been removed and they found eleven live goats in the back and in the luggage compartment.

[4] Upon questioning the driver and the accused they ascertained that *Ndamase* and the two accused were not in possession of the necessary permits to transport or possess the stock. The two accused confirmed that the goats belonged to them and that they had hired *Ndamase* to transport the goats to Harding. Accused 1 and 2 were unable to furnish any documentary proof that they were lawfully in possession of the stock.

[5] The evidence of W/O *Jungqwana* proceeded as follows, and I quote *verbatim* from the record:

> *"Accused No.1 and 2 further informed me that five of these 11 goats, they have stolen them from a location which is –a locality which is close to that vicinity by the name of Umbukeni."*

[6] W/O *Jungqwana* then proceeded to testify that after first taking the goats to the Bizana Police Station, the two accused then took him to the homestead in

Umbukeni locality where they had stolen the goats. He found a lady at such homestead by the name of *Beatrice Loggenberg* who is the complainant in the case, and who confirmed that five goats had been stolen from her kraal during the night of 16/17 July 2015. She subsequently identified five of the 11 goats found in *Ndamase*'s vehicle as being her goats stolen that night. The five goats were returned to her with the consent of the accused.

[7] Upon being asked by the prosecutor, W/O *Jungqwana* testified that the complainant had produced the stock card relating to the five goats. He was then asked whether the accused explained how they got hold of the goats at the complainant's homestead. Before answering, the Court intervened and I quote *verbatim* from the record:

> *"COURT: Who showed – who showed?* Warrant Officer *Jungwana* replied as follows: *They were taken – they told me that they taken out at (sic) – the goats from the kraal and they even showed me the –where they torn up (sic) the fence so as to gain exit."*

[8] W/O *Jungqwana* proceeded to testify that he personally inspected the area where the fence had been cut and it appeared to be freshly cut (presumably due to the absence of rust marks).

[9] The prosecutor then established from W/O *Jungwana* that the *"admissions"* were freely and voluntarily made without any undue influence. All this evidence was freely admitted. Neither of the accused was legally represented at this stage of the proceedings.

[10] When the accused testified, they denied that they had stolen the goats. Both were strenuously cross-examined by the prosecutor and they were reminded of the *"admissions"* they made to W/O *Jungqwana*. They denied that they made such admissions. This cross-examination was allowed by the Court.

[11] When accused 2 was cross-examined by the prosecutor the following questions were asked:

> *"PROSECUTOR: Was it your first time to be in this business of theft of goats? ... I've never stolen ... At all? ... ... At all. Have you never been arrested or convicted of theft of goats ... ... Yes, I was once convicted of goats which had no stock card in my homestead.*
>
> *Okay, have no further questions."*

[12] Following the cross-examination by the prosecutor, the Court put the following follow-up questions to accused 2:

> *"COURT: Is it your evidence that you were once convicted of theft of goats ... That is correct, Your Honour.*
>
> *What was the sentence? ... Your Worship, I was convicted and then I was sentenced to five months imprisonment."*

[13] These question were followed up by a number of other questions by the Court designed to show that having been convicted and sentenced previously of stock-theft, the accused must have realised that it was a crime to be in possession of

stock without the necessary permit. Further, when the wife of accused 2 testified in defence of her husband, the Court put the following questions to her:

> *"COURT: Your husband was once convicted of a stock theft related incident, do you know anything about that? ... Yes, Your Honour. What was he convicted of? ... Two goats – were found, Your Honour, in his possession. There was no stock card for those goats.*
>
> *Your husband made admissions to the police on his arrest. (Long pause). Would you like to make any comment on that? ... No comment Your Honour."*

[14] In the last (3rd) paragraph on the first page of his judgment, the leaned magistrate summarises the facts. He states:

> *"And it is also an undisputed fact that accused no. 1 admitted that he had stolen the goats from the complainant's premises ..."*

[15] Of course, it is incorrect to say that it is *"... an undisputed fact ..."* Both accused, when giving evidence denied that they made the "admissions" testified to by W/O *Jungqwana*. But this is immaterial. What is material is that this is the only direct evidence linking the accused to the theft of stock. It is clear from a contextual reading of the judgment that this evidence of W/O *Jungqwana* played a major role, if not the decisive role, in the conviction of both accused of stock theft.

[16] It is equally clear from the judgment that the previous conviction of accused no. 2 of stock theft played an important, if not a decisive role in his conviction. When dealing with accused no.2, the learned magistrate observed:

> *"He (accused no.2) never became suspicious of accused no.1's actions, despite the fact that he has a previous conviction of theft of stock under the same circumstances."*

[17] In addition, the magistrate also referred to the *"admission"* made by accused no.2 that he had stolen the goats. There is no doubt in my mind that the learned magistrate took both the *"admissions"* into account when convicting the two accused, and in addition also took the previous conviction of accused no.2 into account in convicting him.

[18] This matter first came before *Griffiths* J sitting as a Court of Review. He addressed a query to the learned magistrate in the following terms:

> *"It seems from the record (page 18 line 21−page 19 line 10) that a confession made by the accused to a warrant officer was accepted in evidence. Indeed, this confession was used in cross-examination of the two accused and was relied on by the magistrate in his judgment in convicting both accused. Was this confession admissible bearing in mind the provisions of section 217 of the Criminal Procedure Act?*
>
> *Secondly, from what appears at page 58 of the record it seems that the magistrate himself questioned accused two about a previous conviction*

relating to stock theft. Such previous convictions ought not to be disclosed to the court prior to conviction. How and why did this occur?

Because of these irregularities, unless they can be explained, should the convictions of both accused not be set aside?"

[19] The learned magistrate responded with a lengthy answer, essentially disputing that the admissions amount to a confession and disputing that he committed any irregularity in the proceedings. It is unnecessary to repeat the grounds advanced by the learned magistrate for his expressed views. What is disconcerting, however, is the intemperate and aggressive language used by the learned magistrate in his response to the queries raised by the Reviewing Judge. I refer to only a few examples:

"Nothing in this record of these proceedings can confuse anyone to record the evidence of an admission as a confession …. With respect, his opinion is not understandable."

"It is shocking to learn that the Honourable Reviewing Judge is quick to express an opinion that the magistrate committed an irregularity whereas the magistrate properly followed laid-down legal procedures which were correctly interpreted by our courts."

"Had these selected 'irregularities' appearing in his query been fairly considered with the totality of the evidence, including the correct application of the legal principles thereto, even from the cursory reading

> *of the record of these proceedings, it would have been easily discovered without questioning, that the proceedings are regular ... ... The alleged irregularities pointed out by the judge do not exist."*

[20] I will later return to the language used by the learned magistrate, but first it is necessary to determine whether the evidence of the *"admissions"* amount to admissible confessions or admissions; and secondly, whether it was proper to place evidence of a previous conviction before Court before conviction and not for purpose of sentence.

[21] The first issue is whether the evidence constitutes a confession or an admission. There is no statutory definition of a confession, but for more than 87 years the definition proposed by *De Villiers* ACJ in *R v Becker* 1929 AD at 171 has been regarded as being of unquestionable authority and a *"self-contained statutory definition."*

The Chief Justice said:

> *"A confession could only mean an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law."*

[22] It is now recognised that for an admission to be regarded as a confession, it must be an extra-curial admission of **all** the elements of the offence charged. For instance, the admission *"I killed my wife"* is not a confession of murder because it lacks an admission of the required *mens rea.* The statement *"I murdered my wife,"* however, is a confession because the word *"murder"* is a judicial technical term which includes all the definitional elements of the crime of murder. (See:

Du Toit et al: *Commentary on the Criminal Procedure Act* (vol 2) 24-53 (service 56, 2016) and the decided cases cited starting with *R v Blyth* 1940 AD 355.)

[23] The evidence that the accused said they have stolen the goats must be looked at in the context of the further evidence that the accused took W/O *Jungwana* to the homestead of the complainant where they showed him fresh markings where they cut the fence to remove the goats.

[24] The evidence relied on can never, in my respectful view, be a mere admission because then the rhetorical question arises: an admission of what? And the answer can only be an admission of theft of goats, which elevates the admission to a confession.

[25] I therefore find that the evidence of the "admissions" by the two accused, against the totality of all the other evidence, amount to a confession of stock theft.

[26] The next question is whether the confession was admissible in evidence.

[27] Section 217 of the Criminal Procedure Act governs the admissibility of confessions. It is well known and does not bear repeating. It suffices to say that confessions are generally admissible subject to the proviso's under sub-sections (1) (a) and (b), and further subject to the requirements under s. 217 (1). For purposes of this judgment I accept that the requirements of the confession being freely and voluntarily made under s. 217 (1) are met. The only issue is whether the proviso under sub-section 1 (a) was met.

[28] Confessions are inadmissible under the proviso to s.217 (1) (a) unless they are confirmed and reduced in writing in the presence of a magistrate or justice. A non-commissioned officer of the SAPS, such as W/O *Jungqwana*, is not a justice of the peace in terms of s. 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (only commissioned officers are), and therefore not entitled to take confessions. The requirement that the confession must have been confirmed and reduced in writing in the presence of a magistrate or justice has therefore not been met, and the confession was clearly inadmissible in evidence.

[29] The learned magistrate's contention that he was entitled to treat the statement as an admission and not as a confession is, with respect, devoid of any merit. For the reasons mentioned, the statement that the accused *"stole"* the goats is a confession and not an admission, and must be treated as such.

[30] The tendering of this evidence by the prosecutor and the acceptance thereof by the Court, both constitute gross irregularities which do not render the trial in accordance with justice.

[31] The same applies, in my respectful view, to the tendering in evidence and the acceptance of the previous conviction of stock theft of accused no.2 before conviction.

[32] Section 271 (1) of the CPA reads as follows:

> *"(1) The prosecution may, after an accused has been convicted but* ***before sentence*** *has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused."* (My emphasis)

[33] It has repeatedly and authoritatively been held that previous convictions are relevant only to the issue of sentence, and not to any aspect of conviction. This is why s. 271 (1) clearly and unambiguously provides for the proof of previous convictions **after** conviction and **before** sentence. The ratio for this requirement is to guard against the fallibility of human nature to (even subconsciously) assume that because an accused person had previously committed a similar crime he has a propensity to repeat the commission of such a crime in the future. (See the commentary and case law in Du Toit (*supra*) at 27-6A to 27-7).

[34] In *S v Njikaza* 2002 (2) SACR 481(C) it was held that for a magistrate to question an accused on his previous convictions even after conviction but in circumstances where the State had indicated that it would not prove previous convictions, constitutes a *"serious irregularity."* To question an accused on his previous convictions – for whatever reason – **before** conviction, as had both the prosecutor and magistrate done in this case, constitute in my respectful view an even more serious irregularity.

[35] The question whether the proceedings were in accordance with justice must also be determined with reference to the accused's constitutional rights and right to a fair trial.

[36] Section 35 (1) (a) – (c) of the constitution provide that an accused has a right *"... not to be compelled to make any confession or admission ..."* Such a person is also given the right to remain silent and to consult with a legal representative.

[37] In *S v Maliga* 2015(2) SACR 202 (SCA) the prosecutor and presiding officer were severely criticised for the breach of their professional duty to ensure that *"justice is done."* In that case the appellant was lured into testifying following the reception into evidence of a plainly inadmissible confession. Section 35 (3) of the Constitution, said *Pillay* JA, at [19], *"compels presiding officers and indeed all officers of the court to play a role during the course of a trial in order to achieve a fair and just outcome."*

[38] In my respectful view, the prosecutor in this case acted unprofessionally by tendering into evidence not only a plainly inadmissible confession, but also previous convictions before conviction. The learned magistrate also acted in breach of his professional duty by not only allowing clearly inadmissible evidence, but in addition relying on such evidence in convicting the accused.

[39] A final issue calls for comment. It is the custom – indeed the duty – of reviewing Judges to draw the attention of magistrates to perceived irregularities in the proceedings. Very often satisfactory answers and explanations are given by magistrates to the Judges' queries which clear the perceived irregularities up, resulting in the certification of the proceedings as being in accordance with justice. Sometimes the perceived irregularities are conceded and orders are set aside or amended. But the queries of Judges and the responses of magistrates are

always, always couched in civil and respectful language. Issues are discussed and addressed, never the persons. The exchanges are *ad rem*, never *ad hominem.*

[40] The queries raised in this matter by the reviewing Judge are set out earlier in this judgment. They are couched in respectful and moderate terms. Many of the responses by the learned magistrate, also set out above, do not address the merits of the issues raised, but cast aspersions on the integrity and intellectual and judicial capacity of the Judge. The intemperate, uncivil and disrespectful language used by the learned magistrate is not only totally unacceptable, but also calls for strong censure.

[41] Under our Constitution, the Judiciary and Magistracy constitute one undivided Judiciary under the administrative management of the Office of the Chief Justice. It will be a sad day in our democracy if these two arms of our Judiciary are allowed to continue to address each other in the terms used by the learned magistrate in this case. I intend to forward a copy of this judgment to the D.P.P. Mthatha, to the Magistrate's Commission, and to the Chief Magistrate, Mthatha.

[42] I make the following orders:

1. The conviction and sentences of accused no.1 and accused no.2 imposed by the Magistrates' Court, Bizana, on 26 January 2016 in this case be and are hereby set aside.

2. The convictions of both accused are replaced by an order in the following terms:

Accused no. 1 and accused no. 2 are both found not guilty and are discharged.

3. The return of the five stolen goats by the SAPS to the complainant Beatrice Loggenberg, is confirmed.

4. The Registrar of this Court is requested to forward a copy of this judgment to the Office of the D.P.P. Mthatha, and the Office of the Magistrate's Commission, and to the Chief Magistrate, Mthatha.

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NHLANGULELA DJP

I agree:

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ALKEMA J

Delivered on 07 November 2016