Admissibility of Confessions in South African Law

A Critical Analysis

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Introduction

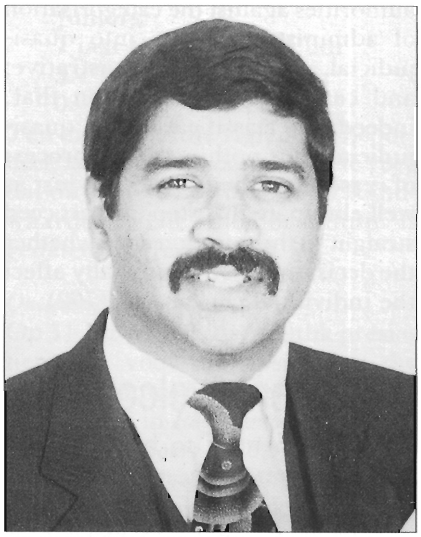
The admissibility of confessions is an issue frequently encountered in our courts, more particularly the Supreme Court. In the Supreme Court, the issue of admissibility may not only be an important factor for conviction or acquittal of the accused but in many instances – eg where the death sentence may follow – a matter of life and death. This aspect of our law accordingly merits a critical analysis in order to determine whether or not the interests of the accused are properly safeguarded against the possibility of a wrong conviction. In this series of articles the writer therefore proposes critically to examine a number of relevant issues.

Onus on accused

It is trite that where an accused avers that a confession is inadmissible and where he bears the onus in terms of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 to show that the confession has not been freely and voluntarily made by him, in his sound and sober senses, and without having been unduly influenced to make it, the onus has to be discharged on a balance of probabilities. If the accused was influenced by an improper inducement before he went to the magistrate the confession will be excluded.

Dropping of the veil

There may moreover be great difficulty in deciding whether there had been undue influence, for the magistrate usually has no personal knowledge of what went on before the accused came to him. In *R v Gumede* 1942 AD 398 the Appellate Division drew attention to the difficulties which faced a court when a confession to a magistrate was tendered without



any evidence as to how the accused had come to make it. There may have been earlier improper inducements acting upon his mind 'which may not come to light owing to the dropping of the veil between the previous interrogations by the police and the subsequent appearance of the interrogated person before the Magistrate' (per Feetham JA at 433).

The trial within a trial

In order to determine whether an alleged confession is admissible a trial within a trial is held. In the Supreme Court this was formerly conducted by the presiding judge alone in the absence of the assessors, but s 145(4)(b) of the Act now allows the judge to sit with the assessors unless he is of the opinion that it would be in the interests of the administration of justice that the assessors do not take part in the proceedings.

Cross-examination on contents of confession

During a trial within a trial the accused may be cross-examined and his credibility attacked on the question of voluntariness, but not normally on the question of whether the statement was true; unless he alleges that the statement was false and that he (the accused) was not the author thereof and that the story had been prescribed to him by the police or some other person. In the latter situation he may be cross-examined on the contents of the statement to show that the version could not have come from the police or any other person. (See *S v Lebone* 1965 2 SA 837 (A), followed in *S v Motlhabakwe* 1985 3 SA 188 (NC) and *S v Talane* 1986 3 SA 196 (A)).

In *Talane*'s case Boshoff JA states at 205I:

> Soos uit die feite blyk, het ons in die onderhawige saak juis die geval waar die appellant beweer dat die verklaring vals is en dat hy deur die polisie gedwing was om wat hulle aan hom voorgesê het aan kaptein Visser te vertel. Die Staatsaanklaer was dus geregtig om, soos hy wel gedoen het, die appellant oor die inhoud van die verklaring te kruisvra.

The learned Judge of Appeal states further at 206B:

> Die kruisverhoor oor die inhoud van die verklaring was bedoel om die appellant se geloofwaardigheid ten opsigte van die maak van die verklaring aan te tas en dit was nodig en baie belangrik dat dit ten aanhore van die assessore plaasvind sodat hulle ingevolge die bepalings van art 145(4)(a) van die Strafproseswet 51 van 1977 kon deelneem aan die beslissing oor die vraag of getuienis van die bekentenis gedoen deur hom as getuienis teen hom toelaatbaar is.

Potentially prejudicial

With respect, it is submitted that cross-examination on the contents of the statement before the court has ruled on its admissibility can be potentially prejudicial to the accused.

One must bear in mind that an accused (especially an unsophisticated one) will very rarely be prepared to admit that 'the police assaulted me so I confessed or made a statement.' He would rather lie and say: 'The police assaulted me and told me what to say.'

The writer submits that the difficulty with *Talane*'s case is that the courts may, in these situations, find the accused to be an untruthful witness, reject his version, and rule that the confession is admissible. Yet, the fact that the accused has been untruthful regarding the identity of the author of his statement, does not necessarily mean that he was not assaulted or unduly influenced. One has to guard against over-emphasising the accused's demerits as a witness. Of particular interest here are the following remarks made by Feetham J in *Maharaj v Parandaya* 1939 NPD 239 243:

> Some innocent people meet accusations by simply telling the truth. Others, who may be equally innocent of the accusation, take refuge in some invented story, because they are not satisfied that the truth alone would be sufficient to carry conviction.

And in *Goodrich v Goodrich* 1946 AD 390 396 Greenberg JA further warns us that:

> . . . in each case one has to ask oneself whether the fact that a party has sought to strengthen his case by perjured evidence proves or tends to prove his belief that his case is ill-founded, and one should be careful to guard against the intrusion of any idea that the party should lose his case as a penalty for perjury.

Safer approach

The writer contends that the premature disclosure of the contents of the confession may be prejudicial to the accused notwithstanding the fact that the courts will always try to be fair to the accused by not allowing themselves to be influenced by the contents before ruling on its admissibility. The trained legal mind is, however, not infallible, and the practice followed by some courts not to have regard to the contents of the statement before deciding on its admissibility is indeed a salutary one. The writer suggests that the better approach is for the court to disallow cross-examination on the contents of the confession (irrespective of the accused's allegations that he is not the source thereof) until a decision on the admissibility has been made. The prosecution should rather confine itself to cross-examination on the nature of the alleged assaults or undue influence to show whether or not the accused's allegations are worthy of credence. This will no doubt be the safer and less dangerous approach.

The writer submits that the better approach was that suggested by Viljoen JA in *S v Gaba* 1985 4 SA 734 (A). In this case the Appellate Division approved the practice, followed by some courts, not to have regard to the contents of a confession before the question of its admissibility in terms of s 217(1) has been decided. At 749 H-I the learned Judge of Appeal stated:

> The practice followed by some Courts (see, for instance, *S v Mahlala and Others* 1967 (2) SA 401 (W) at 403B) not to have regard to the contents of the confession before the issue referred to has been decided, seems, therefore, to be a salutary one because there is always the danger that if this is not done the accused may be prejudiced in some way or another, particularly when the presiding Judge does not, in terms of s 145(4)(b) of Act 51 of 1977, deem it necessary, in the interests of justice, to sit alone.
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> (See also 749E-G.)

More recently the Appellate Division has held in *S v De Vries* 1989 1 SA 228 (A) 233H-I (per Nicholas AJA) that:

> It is . . . essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial . . . In South Africa it 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 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 his guilt.

Conclusion

The Appellate Division is not likely to overrule *Talane*'s case and its predecessors. The only alternative to remedy the situation would therefore be to amend the Act so as to provide that until such time as a confession has been duly admitted by the court, no cross-examination, for whatever purpose, on its contents shall be permissible. It is trusted that the legislature will give effect to this proposal.

To be continued

◄ *from 61*

was never too tired to help a perplexed colleague.

On the Bench he was never too involved to help an unsure 'amps-broeder'.

He practised and lived not only for himself, but was concerned for others as well – he served on the Bar Council and became Chairman of the Johannesburg Bar Council in 1968 and was Chairman of the General Council of the Bar from 1969 to 1972, although he did not complete that year, because he was elevated to the Bench.

As I was in such close personal contact with Mr Justice Coetzee, perhaps my tribute to him may be too personalised. I have, however, been materially assisted by a telefax which the Chairman of the Johannesburg Bar Council received only yesterday afternoon and handed to me. This is from a Mr Noel Benjamin, who is now a partner in a well-known firm of solicitors in Grey's Inn, Jacques and Lewis, and this is what one of the paragraphs therein, which I think correctly reflects what everybody who was associated with the late Mr Coetzee, would say –

'During the years the late Judge Coetzee practised at the Bar he represented a wide spectrum of clients who benefitted from his manifest skill and dexterity, his courage, and understanding of the personal difficulties facing many of the persons who consulted him – he was a most excellent advocate. We enjoyed over this period a close working relationship with him in accordance with the highest standards and soundest professional traditions'.

This is a spontaneous tribute which accurately reflects, objectively, what those of us who come into daily contact with him felt, subjectively.

For the rest, I have been asked to associate the General Council of the Bar and the Law Society of the Transvaal with the tributes paid to the late Mr Justice Coetzee and, the Johannesburg Bar as a whole, together with the Chairman and the individual members of the Johannesburg Bar Council, as well as those of Advocates Group G associate themselves with the expressions of sympathy to his widow and children. I would only add that his passing is a great loss – South Africa has lost a distinguished son; the profession has lost an outstanding member; the Bench has lost an illustrious colleague; the Bar has lost an exemplary contributor, and, I personally have lost a valued and concerned personal friend. ■