Confession to peace officer in the person of a police officer

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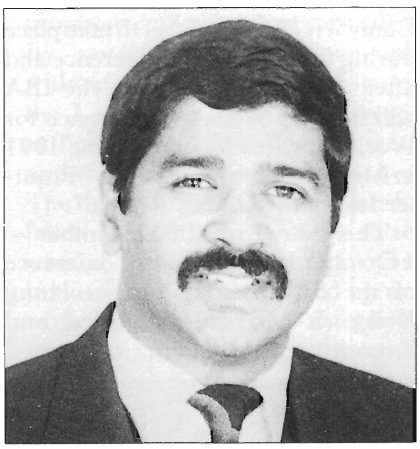

This is the second part of the series of articles written by Pranil Singh of the Durban Bar on the admissibility of confessions in South African law (see also (1990) 3 *Consultus* 62).

The term "peace officer" has been defined in section 1 of the Criminal Procedure Act 51 of 1977. It "includes any magistrate, justice, police official, member of the prisons service as defined in section 1 of the Prisons Act, 1959 (Act 8 of 1959) and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section."

A confession made to a police officer below the rank of lieutenant is not admissible in evidence unless it was confirmed and reduced to writing in the presence of magistrate or justice (s 217(1)(a)).

Judicially deprecated

Attempts by the police to avoid a magistrate's investigation into the events preceeding the confession by taking the accused to confess to a senior police officer who was a justice of the peace have been judicially deprecated (see *S v Mofokeng* 1968 4 SA 852 (W); *S v Mdluli* 1972 2 SA 839 (A)). The latter practice, as Hoffman and Zeffertt suggests in *The South African Law of Evidence* 4 ed 226, should not be adopted unless the circumstances make it impractical for the accused to be brought before a magistrate (*S v Mazibuko* 1978 4 SA 563 (A)).

In the writer's view the fact that the prosecution bears the onus, where the confession is confirmed by a senior police officer, of proving beyond reasonable doubt that the confession was made freely and voluntarily by the accused in his sound and sober senses and without having been unduly influenced to make it, has had no deterrent effect.

However, although there is nothing to prevent the police from adopting such a practice its presence in a given case is not without legal significance:

> It is a circumstance to be considered in conjuction with other relevant circumstances, if any, by a court of law in making the ultimate decision whether or not the State has proved . . . that the confession in question was made . . . freely and voluntarily and without undue influence. (Per Joubert AJA in *S v Mazibuko* (*supra*) 568G.)

One would expect a strong judicial directive to be noted and acted upon by responsible officials. And no stronger and no clearer a directive could be imagined than that given by Colman J in *S v Mofokeng* (*supra*).

Strong directive

In *Mofokeng*'s case the learned Judge had cause to comment on a practice adopted in Johannesburg (and in that case by the Murder and Robbery Squad at Brixton) in taking confessions. The learned Judge said that while in the past the usual practice was to take a person willing to confess to a magistrate a new departure has come about:

> Recently . . . it has become common, in Johannesburg at any rate, to take such a person before a police officer, who, by virtue of his rank, is a justice of the peace, and who records a statement which is later tendered in evidence against the accused at his trial. Sometimes . . . the justice of the peace is a senior officer belonging to the same branch or unit of the Police as those charged with the investigation of the crime to which the statement relates. (858H.)

The learned Judge disapproved of this practice and directed that, where

practicable, it is preferable that the suspect or accused be brought before a magistrate.

Prof D Zeffertt, *Does one listen to a Judge?* (1971) 88 *SALJ* 176 states:

> One would have thought that what his lordship had said would have been noted and obeyed – however much a private individual or official might disagree: the writer, for instance, has questioned the efficacy of the older, more hallowed practice as a safeguard to an accused person (see 1968 *Annual Survey* 399-410). One's own predilections or whims are irrelevant. A judge, in his wisdom, has given a practice direction and that is that.

Fertile earth

Despite what the learned judge said in *Mofokeng*'s case, one notices that that same police station ignored the strictures of Colman J. In *S v Dhlamini* 1971 1 SA 807 (A) 815A Jansen JA (Ogilvie Thompson JA and De Villiers AJA concurring) has had cause again to comment on that practice:

> In this regard we were referred to the remarks of Colman J, in *S v Mofokeng and Another* 1968 (4) SA 852 (W) at pp 858B *et seq*, with which I am in full agreement. It is not a question of impugning in any way the integrity of responsible police officers in carrying out their duties as justices of the peace; it is the fact that this procedure constitutes fertile earth, for an accused, in which to plant the seed of suspicion, which there readily sprouts and burgeons to the stature of a reasonable doubt whether he, when making the confession to the police officer (as justice of the peace), was not still being actuated by an improper inducement that might have gone before.

The primary purpose of the proviso to s 217(1) is to afford the accused a degree of protection by requiring that he be brought before an impartial official who would not bring pressure to bear on him in making the confession, but would ensure that the statement is freely and voluntarily made.

The learned authors Du Toit, De Jager, Paizes, Skeen and Van der Merwe in *Commentary on the Criminal Procedure Act* state (correctly) at 24-60 that the abovementioned purpose has not fully been realised for the following reasons:

> First, the confirmation of a confession before a magistrate has, as Lansdown and Campbell (at 874), 'had the effect of dropping a veil between the treatment of the accused by his custodians and his resulting confession.' This gives a somewhat suspect statement an 'aura of respectability and admissibility'' (*S v Majozi and others* 1964 (1) SA 68 (N) at 71). Secondly, a confession has been held to be properly confirmed in terms of the proviso in circumstances where the justice who confirmed it was the investigating policeman or a member of the same police unit (*S v Mahlala and others* 1967 (2) SA 401 (W); *S v Mofokeng and another* 1968 (4) SA 852 (W). Although the courts have criticised this practice (see *S v Mdluli and others* 1972 (2) SA 834 (A); *S v Biko* 1972 (4) SA 492 (O); *S v Khoza en andere* 1984 (1) SA 57 (A)) there is nothing to prevent the police from employing it.

No irregularity

In *S v Khoza supra* 59G-H Hefer AJA (as he then was) stated:

> Die 'onreëlmatighede' wat te berde gebring is, sluit in die afneem van bekentenisse deur vrederegters in die persone van polisieoffisiere en, in een geval, deur die ondersoekbeampte, die gebruik van polisiemanne as tolke en die optrede van landdroste . . . by die afneem daarvan. Ons is verwys na 'n aantal gewysdes waarin sulke 'onreëlmatighede' veroordeel is en bekentenisse, in die lig daarvan, ontoelaatbaar bevind is. Dit moet egter steeds beklemtoon word dat die primêre vraag by die beoordeling van die toelaatbaarheid van enige bekentenis is of dit volgens die voorskrifte van art 217(1) van die Strafproseswet 51 van 1977 gemaak is, dws vrywillig, ongedwonge en sonder onbehoorlike beïnvloeding. (*S v Radebe and Another* 1968 (4) SA 410 (A) op 419A-B).) Die veroordeling deur die Howe van praktyke soos dié waarna so pas verwys is, moet nie gesien word as die daarstelling van toelaatbaarheidsvereistes ander as of benewens dié van art 217(1) nie. Telkens wanneer 'n bekentenis in die lig daarvan uitgesluit is, is immers duidelik aangedui dat dit geskied het omdat dit, in die omstandighede van die bepaalde saak, twyfel laat ontstaan het of die bekentenis vrywillig gemaak is . . .

In *S v Magwaza* 1985 3 SA 29 (A) Hoexter JA stated at 36F:

> It is well known that the taking down of a confession by a peace officer in the person of a police officer, particularly when the latter is the investigating officer in the case or the senior police officer of the unit investigating the crime, and likewise the use of such a policeman as an interpreter in the taking down of such a confession, represent practices which in a long line of decisions have been consistently criticised and deplored by our Courts.

Despite the criticisms by the various courts concerning the aforesaid practices, the Appellate Division in *S v Mbatha* 1987 2 SA 272 (A), however, stated that there exists no legal basis for labelling the practice of a police officer attached to an investigating unit taking confessions as an irregularity. At 279C Joubert JA stated:

> Dit is onteenseglik so dat art 217(1)(a) aan kaptein Thoms as 'n vrederegter 'n wye en onbeperkte statutêre bevoegdheid verleen om bekentenisse af te neem wat op die pleeg van 'n misdaad betrekking het. Geen Hof het die bevoegdheid om 'n vrederegter sy statutêre bevoegdheid te ontneem of te ontsê nie. Dit kan derhalwe nooit gesê word dat die uitoefening deur kaptein Thoms van sy statutêre bevoegdheid om bekentenisse af te neem *per se* onreëlmatig is nie.

The learned Judge of Appeal stated further at 279G that:

> Die Wetgewer ontsê nie 'n offisier wat aan 'n ondersoekeenheid verbonde is die bevoegdheid om bekentenisse af te neem nie. Regtens is hy bevoeg om dit te doen en die Howe kan hom nie dit ontneem nie. Die Howe het geen bevoegdheid om toelaatbaarheidsvereistes vir bekentenisse deur offisiere as vrederegters afgeneem te stel wat nie deur art 217(1)(a) voorgeskryf is nie.

Conclusion

The writer contends, with respect, that the criticism by the courts regarding the taking of a confession by a police officer should not go unheeded and that as Lansdown and Campbell *op cit* at 875-6 suggests that what is necessary

> [is] a tightening up of the provision, so that, as in India, no confession made to a police officer is admissible at all, or only, as in Roman-Dutch law and today in Tanzania and Zanzibar, if made in the immediate presence of a magistrate.

(See also *S v Mbele* 1981 2 SA 738 (A) at 743 and (1971) 88 *SALJ* 176).

Note:

After many years of experience both in the administrative and judicial fields I am inclined to support the proposal put forward by Adv Singh in this article. The provisions of the Criminal Procedure Act whereby confessions made to senior police officers are admissible in a court of law in certain circumstances certainly cause more problems than what they seek to solve, and the legislature would therefore be well advised to delete them from the statute book. Such a step would benefit not only the administration of justice but also the Police Force. – *Editor* ■