CRI/T/16/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

JOHN RALENGANA
MAKAMOHO MAJORO

RULING ON THE ADMISSIBILITY OF A STATEMENT MADE BY A3 TO A MAGISTRATE

Delivered by the Honourable Mr. Justice J.L. Kheola on the 8th day of March, 1989

The Ministry of Justice has prescribed a form which has to be used by a magistrate when recording a statement/ confession being made by an accused person. The first part of the form consists of a number of questions which have to be put to the accused person. The answer to some of the questions may be such that the magistrate must make a full enquiry or investigation of what actually happened before the accused person appeared before him.

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In the instant case the learned magistrate asked the A3 whether he had been encouraged by any person to make the statement. The answer by A3 was that he had been encouraged by the police officer in charge. The learned magistrate merely recorded the answer and made no investigation as to the nature of the encouragement. It seems to me that it was her duty to find out from the accused how the officer in charge had encouraged him.

In the case of R. v. Gumede, 1942 A.D. 398 at p. 413 Feetham, J.A., said:

> "In the case of Ibrahim v. R. (1914) A.C. 599, a Privy Council decision which was referred to by Innes C.J. in R. v. Barlin, 1926 A.D. 459, Lord Summer.... says, at p. 610: "The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it..... It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence, judges have thought it better to reject it for the due administration of justice...."

We do not know what kind of encouragement was made by the police officer in charge but the onus is on the Crown to prove beyond a reasonable doubt that the statement was made freely and voluntarily. The onus was on the Crown to prove that the kind of encouragment made to the accused was not of such a nature that it would affect the admissibility of the statement. The learned magistrate did not care to find out what kind of encouragement was made.

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It is common cause that the encouragement came from P.W.1 Warrant Officer Raleaka. The Crown decided not to call him as a witness in the trial within a trial proceeding. It seems to me that this was the witness who would have enlightened the Court on the nature of the encouragement made to A3.

The next two questions on the form show clearly that the learned magistrate did not know what kind of investigation she was expected to conduct. The first question was whether the accused had previously made a statement similar, if so, to whom and when. The answer was in the negative. The next question was why do you then desire to repeat the statement; the answer was "I think it would be to my advantage to make this statement." The learned magistrate again decided not to find out what advantage the accused had in mind. It was her duty to find out what advantage the accused was thinking of and to tell him that he would not get such advantage. I am aware that in R. Baartman, 1960 (3) S.A. 535 (A.D.) the accused before confessing told the magistrate that no one had made any promises to him, but that he wished to make a statement because he hoped that he would get a lighter sentence if he spoke. The Appellate Division said that there was not duty upon the magistrate to tell him that he would probably not get a lighter sentence, and as no inducement had been held out, the confession was admissible.

That case can be distinguished from the present one because in the former no promises had been made to the accused and the advantage he expected was that he would get a lighter sentence. In

The present case there was the encouragement referred to above and then the advantage expected by the accused was not specified.

The next irregularity committed by the learned magistrate is of a very serious nature. She says that the accused was brought into her office by a policeman and that when the accused made his statement the policeman was in the next room whose door leads directly into her office. She could not even rule out the possibility that the policeman could have been standing near the door in order to hear what the accused was saying. The general practice which is well known by policeman and most magistrates is that a policeman who has brought a suspect to make a statement to a magistrate should be nowhere near the office of the latter when the statement is being recorded. An accused person can never feel free when he knows that the policeman is overhearing what he is saying to a magistrate.

The learned magistrate failed to reveal on the form (I.D.A.) that the accused had refused to give a statement on the previous day on the ground that he was not prepared to do so if the statement was to be used in evidence against him. She says that the accused said he had not understood the warning properly on the previous day. The logical thing to have been done by the learned magistrate would have been to find out who had explained the warning to him during the night. The other Crown witnesses say that the statement was not taken on the previous day because the learned magistrate had other work to do. These contradictions show that the Court is not being told the truth.

I am of the opinion that because of the unsatisfactory circumstances preceding the making of this statement it cannot be said that it was made freely and voluntarily. It is inadmissible.

J.L. KHEOLA
JUDGE

8th March, 1989.

For the Crown - Mr. Mdhluli

For the Accused - Mr. Pheko and Mr. Seotsanyana.