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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FUZILE HOWARD TSEWU ..... FIRST APPELLANT

NONTEMBISO ESLINA NDABENI ..... SECOND APPELLANT

BUKIWE GETRUDE SOFUTE ..... THIRD APPELLANT

AND

PRESIDENT OF THE REGIONAL COURT FOR THE REGIONAL DIVISION OF THE EASTERN CAPE ..... FIRST RESPONDENT

ATTORNEY GENERAL, EASTERN CAPE DIVISION ..... SECOND RESPONDENT

SENIOR STATE PROSECUTOR ..... THIRD RESPONDENT

CORAM : VILJOEN, HEFER, VIVIER, JJA, BOSHOFF et STEYN, AJJA

HEARD : 10 MARCH 1987

DELIVERED : 25 MAY 1987

J U D G M E N T

VILJOEN, JA

While/....

While the appellants were being detained in terms of section 29 of the Internal Security Act No 74 of 1982 (hereinafter referred to as the Internal Security Act) they made statements which were reduced to writing before a magistrate. In the court below they applied, for reasons which will be referred to presently, for a mandamus directing the first respondent (the regional magistrate) to order the third respondent (the senior state prosecutor of the regional court, Port Elizabeth), to furnish the appellants with copies of the aforesaid statements. The application was dismissed but the court a quo, Kannemeyer & Kroon JJ, granted the appellants leave to appeal to this Court.

The reasons why they required copies of these statements were the following: Subsequent to the making of the statements/.....

ments referred to criminal proceedings were instituted against the appellants. They were charged on count 1 with having contravened section 54(1) read with certain other sections of the Internal Security Act; on count 2 with a contravention of s 32(1) read with certain other sections of the Arms and Ammunition Act No 75 of 1969; on count 3 of being members of an unlawful organisation in contravention of s 13(1)(a)(iv) read with certain other sections of the Internal Security Act and on count 4 of a contravention of s 28(1) read with certain other sections of the Explosives Act No 26 of 1956.

They aver in their various founding

affidavits/.....

affidavits that they assumed, on good grounds which they set out but which need not be detailed here, that the statements made by them would be used against them by the State in their criminal trial.They had requested the State to make the statements available to them but their requests were refused. They said that without their statements they could not be of any assistance in the application of the provisions of sections 115, 122 A and 220 of the Criminal Procedure Act No 51 of 1977 to any court before which they might be required to plead and they would be seriously handicapped and prejudiced in the preparation of their defence and in the trial. Particulars of the prejudice which

they would suffer were not supplied.

The State's refusal to make the statements available to the appellants is based on s 29(8) of the Internal Security Act which provides:

> "The provisions of section 335 of the Criminal Procedure Act, 1977 (Act No 51 of 1977) shall not apply in respect of any statement by any person detained in terms of the provisions of this section, made during such detention: Provided that if in the course of any subsequent criminal proceedings relating to the matter in connection with which the said person made that statement, any part of such statement is put to him by the prosecutor, any person in possession of the statement shall at the request of such first-mentioned person furnish him with a copy of the said statement."

Section 335 of the Criminal Procedure

Act No 51 of 1977 (hereinafter referred to as the Criminal Procedure Act) which is referred to in s 29(8) of the Act quoted above provides as follows:

> "Whenever a person has in relation to any matter made to a peace officer a statement in writing or a statement which was reduced to writing, and criminal procceedings are thereafter instituted against such person in connection with that matter, the person in possession of such statement shall furnish the person who made the statement, at his request, with a copy of such statement."

On behalf of the appellants it is submitted by counsel that a fair trial is a fundamental right and one that is accorded to every accused person by the high judicial traditions of South Africa. They cite S v Lwane 1966(2) SA 433(A) and refer to what Ogilvie Thompson JA said at 444 D - E concerning/.....

concerning the duty of a judicial officer to warn a witness in criminal proceedings that he is not obliged to give evidence which might have a tendency to expose him to a criminal charge. The learned Judge said:

> "According to the high judicial traditions of this country it is not in the interests of society that an accused should be convicted unless he has had a fair trial in accordance with the accepted tenets of adjudication."

Counsel further submit that, apart from statute, and in the absence of section 335 of the Criminal Procedure Act, a person awaiting trial would ordinarily be entitled on request to a copy of a statement relating to the subject matter of his trial made by him to a magistrate, or at least

the court has a discretion to order that he be furnished with such copy. This, contend counsel, is in the interest of fairness and justice and they cite S v Mpetha and Others (1) 1982(2) SA 253(C) at 257A where Williamson J said:

> "To my mind it is only fair and just that a person who makes a statement to the police, and who is thereafter prosecuted in connection with some matter referred to in that statement, should be entitled to see that statement when preparing his defence."

This principle, submit counsel, is recognised in the systems of most western countries and they refer to the Canadian case of R v Savion and Mizrahi 1980(52) CCC, (2nd) 276 cited in Re Kristman and the Queen 12 DLR (4th) 283, 301/2 and to Cases and Annotations 10 ALR (4th) 1092 (USA). This annotation

counsel contend, speaks of a changed attitude in the area of criminal discovery so that the court has a discretion, which it will exercise, in the interests of justice and for good cause shown or when necessary for the due administration of justice, in favour of pre-trial discovery of documents in the possession of the State. The onus is, however, acknowledged counsel, on the accused to show that the document is necessary for the preparation of his defence and in the interests of a fair trial and is not simply part of a "fishing expedition". Another decision to which we were referred was the Australian case Regina v Chin 59 ALR 1. Chin and another gentleman by the name of

Choo were tried before a judge and jury. After the defence case had been closed, the prosecution was allowed to introduce evidence, not in rebuttal but in supplying an element which should have been proved by the prosecution in presenting its case in the first instance. On appeal to it by the Crown the High Court of Australia upheld a decision of the Court of Criminal Appeal which had found in the appellant's (Chin's) favour and had ordered a new trial on the ground that there had been a miscarriage of justice in the original trial. Apparently, according to the law of procedure applicable in Australia, or at least in New South Wales where Chin and Choo were tried, a criminal trial was normally

preceded/....

preceded by committal proceedings. What that procedure entailed is uncertain but I deduce that such proceedings serve to apprise the defence of the case the prosecution would be presenting to the trial court.

In the course of his judgment Dawson J said:

> "As with Chin's form, there is nothing to warrant the conclusion that the prosecution could not have proved and tendered in evidence Choo's visa application form in the course of the presentation of its case. Such indications as there are suggest that it could have done so and, if that were so, the proper course would have been for the prosecution to have so tendered it, having previously given notice of its intention to adduce additional evidence. Such notice was necessary because of the absence of any reference to the document in the committal proceedings. The effect of permitting the prosecution to tender the document by way of reply was to allow

it to split its case in circumstances which, on the material before us, were unexceptional and did not warrant any departure from the rule that the prosecution must offer all its proofs during the progress of the prosecution case."

In the joint judgment of Gibbs CJ and Wilson J it was said:

"The evidence that Choo had used the respondent's telephone number in his application form was so material that fairness dictated that the prosecution should have given notice to the respondent of its intention to adduce the application forms in evidence. Had such notice been given, it would have been proper for the judge to have allowed the Crown Prosecutor to cross-examine the respondent regarding this matter, notwithstanding that the matters to which the cross-examination was directed could have been proved in chief if evidence was available. However, if such notice had been given,

> it is possible that neither the respondent nor Choo would have entered the witness box. Moreover, the evidence was elicited, not by the cross-examination of the respondent, but, after his case had closed, in the cross-examination of Choo. Had the respondent been asked whether Choo had used his telephone number, and if so why he had done so, he would have had an opportunity to furnish his explanation during the ordinary course of cross-examination and re-examination. As it was, he had to return to the witness box to give his explanation, thus fixing the jury's attention on what was undoubtedly damaging evidence, and giving it an emphasis that it would not have had if the trial had taken its regular course."

Relying on these cases counsel submit that the court a quo had a discretion, to be exercised in the interest of fairness, to order production of the said statements, but, owing to its misunderstanding of the relevant law, it failed to exercise

that discretion, and that this Court should make the order which the court a quo should have made.

Even if the court had a discretion as submitted by counsel I fail to see what, in the present case, there was before the court a quo which could have been considered by it in the exercise of that discretion. As I have pointed out, no reason was advanced why and for what purposes the statements were required. It was said generally that they would be seriously handicapped and prejudiced in the preparation of their defence and in the trial but they did not state in what respect.

In my/.....

In my view, however, it is not a matter of discretion which has to be exercised by the court in the interests of fairness. The court has a duty, generally, to observe the rules and principles designed to ensure that every accused person has a fair trial. I am not aware of the requirements in regard to disclosure in criminal cases in other legal systems, but the changed attitude in the area of criminal discovery referred to by counsel has certainly not taken root in the South African system. The admissibility of and the procedure relating to statements made by accused persons are extensively regulated by the Criminal Procedure Act and in so

far as the right of accused persons to be provided with copies of a statement or statements made by them is concerned, section 335 quoted above is the governing provision.

I have no quarrel with the general principle of fairness enunciated in the Chin, Lwane and Mpetha cases supra. Neither Chin's nor Lwane's case dealt with a statement made by an accused person. It is, of course, a long-standing principle in S A law that, in the interests of fairness, a witness who testifies in a criminal trial should, as was reiterated in Lwane's case, be warned against incriminating himself. Such self-incriminating evidence is per se prejudicial to such person's interests which cannot be said of

the refusal to supply an accused person with a statement he has made himself and of the contents of which he must *prima facie* be aware.

As far as Chin's case is concerned, our law also recognises the principle that the State should not, subject to certain exceptions or safeguards, be allowed to introduce new evidence to bolster its case which should have been proved before the closure. Whether, if facts similar to those in Chin's case presented themselves in our courts, the judgment would have been the same, is not necessary to decide. I emphasise the fact that Chin's case was a jury case which enhances the possibility of potential prejudice to an accused person - a possibility which is less likely to occur in our courts where a reasoned

judgment is delivered by the court. From this judgment the views of both judge and assessors would clearly appear and any prejudice to the accused would be ascertainable. The inquiry in our law would be whether any irregularity which occurred amounted to a failure of justice - see s 322 of the Criminal Procedure Act.

In any event, I do not agree with the implication contained in counsels' argument that the appellants will necessarily be deprived of a fair trial in the event of s 29(8) of the Internal Security Act being applicable. In terms of s 335 of the Criminal Procedure Act an accused person is entitled to a statement made by him, whether such statement is intended to be used by the State, or not. That is the only

privilege,/...

privilege, as I shall later demonstrate, which he would forfeit if he were precluded from relying on s 335 of the Criminal Procedure Act.

Assuming, however, that the withholding of a statement from an accused person who made it could be said to be prejudicial or potentially prejudicial to such person, the inquiry in the present matter is not whether an accused person would be deprived of a fair trial but simply whether, as a matter of interpretation, s 29(8) of the Internal Security Act is applicable.

In Mpetha's case supra the accused were charged under certain sections of the Terrorism Act 1983 of 1967 (hereinafter referred to as the Terrorism Act) and the State claimed i a a specific privilege from disclosure by reason of the provisions of s 6(6) of that Act which provides:

"No person, other than the Minister or an

official/.....

official in the service of the State acting in the performance of his official duties shall have access to any detainee or shall be entitled to any official information relating to or obtained from any detainee."

Williamson J, approving of the decisions in S v Hassim 1971(4) SA 120 (N) and S v ffrench-Beytagh 1971(4) SA 333 (T) to the effect that S v Ndou 1970(2) SA 15 (T) was wrongly decided, came to the conclusion that the accuseds' rights under s 335 of the Criminal Procedure Act were not defeated by s 6(6) of the Terrorism Act. In Hassim's case supra James JP dealt at 123 with an accused's rights under s 380 of the Criminal Procedure Act 56 of 1955 (the precursor of s 335 of the present Criminal Procedure Act) and said at G - H on that page (I

omit/.....

omit words which are not relevant for present purposes):

> "If the Legislature intended that any person who became ---- an accused ---- in a trial under the Terrorism Act should be denied the right to claim a copy of the written statements he made to the police, it would have been easy enough to say so in unequivocal terms. It has not done so and this is a pointer to the fact that it did not intend to take away this right."

As far as section 29(8) of the Internal Security Act is concerned the Legislature has taken the cue and has expressly excluded the operation of s 335 of the Criminal Procedure Act.

But, argue counsel for the appellants, section 29(8) is not applicable to the facts of the present/.....

present case. In this regard they advance a two-fold argument. Firstly, they submit, when the appellants made their statements to the magistrate they were pro tem taken out of detention and these statements were therefore not made "during such detention" as required by the subsection and secondly, they argue, the subsection is not applicable because the statements made before a magistrate are not the type of statement contemplated by the subsection. Developing their first submission, counsel point out that the provision is in terms limited to a statement made by any person detained in terms of the provisions of s 29 which is made "during such detention". It is accordingly contemplated by the legislature, sub-

mit counsel, that a person detained under section 29 might make a statement otherwise than during such detention; if not, the words "made during such detention" are redundant. The subtle purport of this submission seems to be that the detention may,for some reason or other, be interrupted, and for the duration of such interruption the person concerned would not be under detention and the provision would not apply. In support of this submission counsel referred to a passage in the judgment in Schermbrucker v Klindt NO 1965(4) SA 606(A) at 619 D - H. In that case an urgent application was heard by Snyman J in the motion court of the Witwatersrand Local Division for an interdict restraining the S A Police from continuing with an

alleged unlawful method of interrogating the applicant's husband who was a detainee in terms of Act 37 of 1963. When it became apparent that a dispute of fact had arisen on the papers in the light of the affidavits filed on behalf of the respondent, counsel for the applicant requested the learned judge to order, in the exercise of his discretion in terms of rule 9(a) of the Transvaal Rules of Court, that appellant's detained husband appear personally in court to be examined and cross-examined. Rule 9(a) provided that the court may, in any motion proceedings before it, order any person to appear personally to be examined and cross-examined. The application was refused by Snyman J. There followed an appeal to the full court of the Transvaal and eventually the matter

came to this Court. In the course of the judgment of Botha JA the latter said (619C) that no court has power to order anything to be done which would be in conflict with an Act of Parliament. It follows,he said, that no court can issue any order or process the effect of which would be to require or authorise an interference in any manner whatsoever with the kind of detention prescribed by the relevant section of the said Act or which would be likely to defeat the purposes of that section. There then follows the following dictum upon which counsel rely (D - H):

> "Now it seems to me that, if a detainee were to be required to comply with an order by a Court requiring his personal attendance before it, the manner of his detention as prescribed by sec. 17 would be interfered

with in more ways than one, and the purposes of the section may be defeated. In the first place, the detainee would be required to depart, albeit temporarily, from the place of his detention, for during the period during which he is complying with the order, he is clearly not being detained at the place determined by the commissioned officer of police as required by sec. 17. In the second place, the detainee would be brought out of isolation and into contact with the outside world, where access to him could not be effectively controlled or prohibited. The prohibition against access to the detainee can, having regard to the provisions of sec. 17(2), be effectively enforced only while he is being detained in isolation from contact with the outside world at the place deemed fit by a commissioned officer of police, for no other effective machinery is provided for its enforcement and no sanction is prescribed for a contravention thereof. The absence of any such provision in sec. 17 is, in my view, a clear indication that the Legislature did not contemplate the possibility of any temporary absence of a detainee from the place of his detention. Such a possibility could in any

event hardly have been contemplated having regard to the fact that the detention, though temporary, was clearly intended to be continuous in order to induce the detainee to speak. Finally, it seems to me that compliance by a detainee with an order requiring his personal attendance in a Court would result in an interruption of his detention and interrogation designed to induce him to speak. Such interruptions, especially lengthy interruptions, may therefore clearly defeat the purpose of the section. The purpose of the detention, though it temporarily deprives the detainee of his liberty, is intended to induce him to speak, and any interference with that detention which may negative the inducement to speak is likely to defeat the purpose of the Legislature."

The reasoning of Botha JA makes it quite clear that the Court did not decide that the court of first instance correctly refused the application because any appearance of the detainee in court to

give evidence would suspend the detention. The ratio was that it would defeat the purpose of the detention. It is not submitted in the present case that the removal of the appellants from the place of their detention to the magistrate's quarters for the purpose of making statements before the magistrate defeated the purpose of the detention. In fact, it was the police officers concerned in the interrogation who caused the appellants to be taken to the magistrate. The appellants were not discharged from detention for the period during which they were escorted to the magistrate, remained with the magistrate while making their statements and were escorted back to the place of detention. Subject to the directions of the Minister the Commissioner of Police only orders

the release of a detained person in terms of s 29(1)(a)(i) when he is satisfied that such person has satisfactorily replied to all questions at the interrogation or that no useful purpose will be served by his further detention. The word "interrogation" in this section figures very strongly in the appellants' second submission which I shall consider in due course. What I wish to emphasize in the context of the first submission is that a formal act by the Commissioner of Police is required for the detainee's release and the Commissioner had not performed such an act when the appellants were taken to the magistrate for the purpose of making statements.

In support of their second submission

counsel argue that persons detained under s 29 of the Internal Security Act are so detained with the object of being interrogated during their detention. This interrogation, they argue, may be at length and recurrent. It would accordingly be difficult for the State, they submit, to be required to produce all statements made by a detainee during detention if that detainee were eventually charged with a criminal offence. The provision is, in their submission, designed to obviate the necessity for such production. The avowed purpose, they contend, of detention in terms of s 29 is to obtain information as to certain offences by interrogation in confinement until the detainee has, in the opinion of the Commissioner of Police

replied satisfactorily "to all questions" whilst being interrogated, not by the magistrate but by the police, during his detention in terms of s 29. S 29(8) does not, the argument proceeds, cover statements made to magistrates in circumstances where such magistrates have to comply with the provisions of s 217 and 219(A) of the Criminal Procedure Act. In view of the fact that the magistrate is an independent official who has nothing to do with the interrogation of a detainee, such statements, they submit, are not privileged.

It is true that s 29 is designed for the purpose of interrogating detainees and that in the case of a detainee who declines to speak or who fails,

in the opinion of the Commissioner of Police, to "reply satisfactorily to all questions", the continued detention is designed to induce him to speak. See Rossouw v Sachs 1964(2) SA 551(A) 56 A - B. It is equally true that a magistrate has nothing to do with the interrogation of a detainee. Non constat, however, that s 29 does not apply to a statement made by a detainee who is prepared to make a clean breast of things and to make a statement before a magistrate. S 29(8) does not refer to a statement made during the interrogation of a detainee. It refers in terms to any statement made by him during detention and, as I have already demonstrated, he remains in detention while making a statement to a magistrate. Obviously,

should charges thereafter be brought against him as contemplated in the proviso to s 29(1) (b) (i) of the Internal Security Act, such statement will only be admissible in evidence against him if the requirements of s 217 of the Criminal Procedure Act can be met. That does not, however, remove the statement from the purview of s 29(8) of the Internal Security Act.

Such evidence may include a statement made before either a commissioned police officer or a magistrate. The police officer, even though not one of the interrogating team, may be housed in the same premises where the detainee is detained. Even though the statement made before the police officer must, before it can become admissible, be proved to have

been freely and voluntarily made, it has not been submitted, and, in my view, correctly so, that such statement is made otherwise than "during such detention". Subject to considerations relating to the onus of proof in terms of the Criminal Procedure Act, such a statement would be of the same type as that made before a magistrate.

I agree with respect with the interpretation by Cloete JP of s 29(8) of the Internal Security Act in the matter of State v Nzo and Others 1985(2) SA 170 (E) which is reflected in the headnote as follows:

> "It follows from the provisions of ss (8) of s 29 of the Internal Security Act 74 of 1982 that an accused person detained under the provisions of s 29 is deprived

of the right to have a copy of any statement he has made whilst under such detention by the explicit provisions of ss (8) which nullifies the rights granted to him by s 335 of the Criminal Procedure Act 51 of 1977. The only circumstances in which an accused will be entitled to a copy of such a statement is determined in the proviso to ss (8) of s 29, namely where, in the course of any subsequent criminal proceedings relating to the matter in connection with which the person made that statement, any part of such statement is put to him by the prosecutor."

In spite of an indication in this case during preliminary skirmishes between the State and the defence, in an application for bail, that the State had a strong case because it was in possession of confessions made by the detainee

appellants, the State could always decide not to use those confessions in the trial. I agree, with respect, with the following reasoning of the court a quo:

> "It may be that, for instance, the State considers on more mature consideration that the disclosure of some information contained in a statement would be so deleterious to the public weal that it would be better not to use the statement even if its case were weakened by such a decision."

The appeal is dismissed with costs.

JUDGE OF APPEAL

HEFER JA)
VIVIER JA)
BOSHOFF AJA) - agree
STEYN AJA)