

NOTES / AANTEKENINGE

SHOULD MAGISTRATES TAKE DOWN CONFESSIONS?

1 Introduction

Section 217(1) of the Criminal Procedure Act 51 of 1977 (the Act) sets forth the requirements for the admissibility of a confession made by any person in relation to the commission of an offence. Section 217(1)(a) provides that where a confession is made to a peace officer who is not a magistrate or a justice of the peace, such a confession must be confirmed or reduced to writing in the presence of a magistrate. Pursuant to section 217(1)(b), where a confession has been made to a magistrate or has been confirmed and reduced to writing in the presence of a magistrate, it is deemed to be admissible in evidence upon mere production (ss (b)(i)); and presumed, unless the contrary is proved, that the accused made the confession freely and voluntarily, while she or he was in her or his sound and sober senses, and without having been unduly influenced in making it (ss (b)(ii)).

In *S v Zuma* (1995 (1) SACR 568 (CC)), the Constitutional Court found that section 217(1)(b)(ii) of the Act violated the right to a fair trial as embodied in section 25(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution). It is a longstanding principle of both English and South African law of evidence that the state bore the burden of proving that any confession on which it wished to rely was freely and voluntarily made. Section 217(1)(b)(ii) of the Act placed on the accused the burden of proving on a balance of probabilities that a confession made to or recorded by a magistrate was not free and voluntary. This section, therefore, created a legal burden of rebuttal on the accused – a so-called “reverse onus”.

The court held that the common law rule requiring the state to prove that a confession was made freely and voluntarily, was integral and inherent in the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights are the necessary reinforcement of the principle that the prosecution must prove the guilt of the accused beyond reasonable doubt. Reversing the burden of proof seriously compromises and undermines these rights. The court thus declared that section 217(1)(b)(ii) of the Act violated the provisions of the Constitution of the Republic of South Africa, 200 of 1993 (the interim Constitution) and was invalid.

In the authors' view, with the Constitutional Court's decision in *Zuma*, the principal *rationale* for sections 217(1)(a) and (b) of the Act seems to have fallen away. After all, the main reason to specifically provide for a confession made to or reduced to writing by a magistrate would be to ease the process

of admissibility of such a confession without the need to test its admissibility at a trial-within-a-trial. After *Zuma* – whether a confession was made to or reduced to writing by a magistrate or not – if the accused contests the admissibility of the confession, the presiding magistrate must hold a trial-within-a-trial in which the state bears the *onus* of proving the admissibility of the confession on a balance of probabilities.

This raises a possibility that did not exist prior to *Zuma*, namely that a magistrate to whom a confession was made or who reduced it to writing can be called as a witness by the state in a trial-within-a-trial. The authors question whether it is conducive to central tenets of the judicial function – independence and impartiality – for magistrates to take confessions at all, and thus be required to testify in any matter in which accused persons challenge confessions taken down by magistrates.

At the outset, the authors note that they do not address the situation in which the same magistrate who took down an accused's confession also presides over that accused's criminal trial, because as far as they are aware, this does not arise in practice. The authors believe that it would be grossly irregular for a magistrate to preside over a criminal trial when she or he has previously taken down a confession from the same accused (*S v Sibeko* 1990 (1) SACR 206 (T)). Moreover, it is trite that magistrates are not competent to give evidence in cases over which they preside or have presided (Schwikkard and Van der Merwe *Principles of Evidence* (2016) 453).

2 The principles of independence and impartiality

As Olivier points out, prior to 1994 judicial independence was neither constitutionally nor legislatively protected or guaranteed (Olivier "The Magistracy" in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 349). At present, however, judicial independence is a core value of our constitutional dispensation. Section 165(2) of the Constitution guarantees the independence of all courts, including magistrates' courts. The independence of magistrates in particular also resonates in section 174(7) of the Constitution, which mandates the enactment of legislation to ensure that the appointment, promotion, transfer, and dismissal of magistrates take place "without favour or prejudice".

In *De Lange v Smuts NO* (1998 7 BCLR 779 (CC)) Ackermann J found it instructive to refer to the views of the Canadian Supreme Court regarding section 11(d) of the Canadian Charter of Rights and Freedoms (Canadian Charter), which guarantees a person who is charged with an offence the right to be presumed innocent until proven guilty according to law, in a fair and public hearing by an independent and impartial tribunal (*De Lange v Smuts NO supra* par 69). Ackermann J cited with approval Dickson CJC's summary of the essence of judicial independence in *The Queen v Beauregard* [1986] 2 SCR 56, 69:

"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or

attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.”

According to the Constitutional Court in *Van Rooyen v The State* (2002 (5) SA 246 (CC) par 19), this requires judicial officers to act independently and impartially in cases that come before them, and at the institutional level, it requires structures to protect the courts and judicial officers against external interference.

In the leading decision on judicial independence under section 11(d) of the Canadian Charter, the Supreme Court of Canada in *Valente v The Queen* ([1985] 2 SCR 673) identified three essential conditions of judicial independence. The first is the security of tenure, which embodies the requirement that the decision-maker be removable only for just cause, “secure against interference by the executive or other appointing authority.” The second is a basic degree of financial security, free from “arbitrary interference by the executive in a manner that could affect judicial independence”. The third is institutional independence with respect to matters that relate directly to the exercise of the tribunal’s judicial function, as well as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. It is this third essential condition that the authors believe is violated by requiring magistrates to take down confessions.

In *Valente*, the court also drew the fundamental distinction between the concepts of “independence” and “impartiality” as follows (685):

“Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word ‘impartial’ [...] connotes absence of bias, actual or perceived. The word ‘independent’ [...] reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.”

Hlophe ADJP in *Freedom of Expression Institute v President, Ordinary Court Martial* (1999 (2) SA 471 (C)) remarked that it is clear from the wording of section 34 of the Constitution that independence and impartiality are also essential requirements of courts in South Africa. O’Regan J, in *De Lange v Smuts NO* (*supra* par 159), pointed out that the courts in which judicial officers hold office must exhibit institutional independence. This involves independence in the relationship between the courts and other arms of government.

It, therefore, follows that the appropriate test is whether the tribunal “from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence” (*R v Généreux* ([1991] 1 SCR 259, 287). It is indubitable that the appearance or perception of independence plays a significant role in evaluating whether courts are, in fact, sufficiently independent (*In the Matter of Minister of Police*

and *Vowana* (Case No: 884/2014 (EC) par 16). The reasons for this were clarified in *Valente* (689):

“Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.”

The Constitutional Court in *Van Rooyen v The State* (*supra* par 32) also pointed out that the jurisprudence of the European Court of Human Rights supports the principle that appearances must be considered when evaluating the independence of courts.

The perception of judicial independence has been described as a “fundamental jurisprudential principle” (*In the Matter of Minister of Police and Vowana supra* par 16):

“The requirement of judicial officers to not only be independent but also be seen to be independent is one of the foundational precepts of our law and one of the very important aspects of the rule of law ...”

Pursuant to section 165 of the Constitution, judicial officers are accountable to all persons to whom the Constitution applies. Citizens are entitled “to assume with confidence that the law is applied without fear, favour or prejudice and the constitutional principle of legality is painstakingly observed” (par 18). The Bangalore Principles of Judicial Conduct provide that (www.undoc.org/judicialgroup (accessed 2021-06-01)):

“[A] Judge shall exercise the judicial function independently [...] free of any extraneous influences, inducements, pressures, threats or interference [...] from any quarter or for any reason [...] Impartiality is essential to the proper discharge of judicial office [...] A Judge shall ensure his or her conduct is above reproach in the view of a reasonable observer [...] The behaviour and conduct of a Judge must reaffirm the people’s faith in the integrity of the judiciary.”

In considering issues of appearances or perceptions of independence and impartiality, it should be noted that the test is an objective one. This test, which was formulated in Canadian jurisprudence and quoted with approval by the Constitutional Court in *Van Rooyen*, asks: “What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?”

It is especially the appearance of a lack of independence that taints the act of magistrates taking down confessions, because, as is argued below, this raises the possibility that magistrates can be called by the state to give evidence on behalf of the state at trials-within-trials in which accused persons contest the admissibility confessions taken down by magistrates. This might create the perception of a close relationship between the magistracy and the National Prosecuting Authority, calling into question the impartiality of the magistracy.

3 Is taking down a confession a judicial act?

Hoexter points out that South African jurisprudence identifies the normal or core function of the judicial office to hear and determine matters in court (Hoexter “Non-judicial Functions and Activities” in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 288). Put simply: “The main job of judges is to decide court cases” (Mr Justice Howie “Judicial Independence” 2003 118 *SALJ* 680). Thus, non-judicial activities should be regarded as any extra-curial activities that are not directly related to this core function.

The *Oxford English Dictionary* (<https://www-oed-com.uplib.idm.oclc.org>) defines “extrajudicial” as:

“Lying outside the proceedings in court; forming no part of the case before the court. Of an opinion, confession, etc.: Not delivered from the bench, not made in court, informal.”

In *NSPCA v Minister of Agriculture, Forestry and Fisheries* (2013 (5) SA 571 (CC)) Zondo J, giving judgment for the court, suggested that to determine whether the performance of a function by a member of the judiciary offends against the separation of powers, the following questions should be asked:

- (i) Is the function complained of a non-judicial function? If so,
- (ii) Is the performance of the function expressly provided for in the Constitution? If not,
- (iii) Is the non-judicial function closely connected with the core function of the judiciary? If not,
- (iv) Is there any compelling reason why the function should be performed by a member of the judiciary?

“In the absence of such justification”, the Constitutional Court held that (par 38):

“[T]he separation of powers is offended and the relevant statutory provision, or the performance of such a function by a member of the Judiciary, is inconsistent with the Constitution and must be declared unconstitutional.”

Applying this test to the act of taking down a confession, the outcome is as follows:

- (i) *Is the function of taking down a confession a non-judicial act?* According to the dictionary definition, taking down a confession clearly constitutes an “extrajudicial” act. Moreover, practically, there is nothing “judicial” about taking down a confession. The admissibility of a confession does not hinge on it being made specifically to a peace officer or a justice or a magistrate. A confession can be made to anyone and anyone can record a confession. Thus, taking down a confession is clearly a non-judicial function.
- (ii) *Is the performance of the function of taking down a confession provided for in the Constitution?* The taking down of confessions by magistrates is not provided for in the Constitution and is in fact only indirectly provided for in section 217(1)(a) of the Act.
- (iii) *Is taking down a confession closely connected with the core function of the judiciary?* Taking down a confession is clearly not connected

with the core judicial function, because any person can take down a confession, and judges are not called upon to take confessions at all.

- (iv) *Is there a compelling reason why the function of taking down a confession should be performed by a member of the judiciary?* As is demonstrated below, the so-called “compelling reason” for the proviso to section 217(1) of the Act (i.e., sections 217(1)(a) and (b)), namely to act as a technical safeguarding provision to protect arrested persons against abusive police behaviour, is a red herring. In fact, these subsections do not seem to provide any appreciable protection to accused persons.

Thus, the authors believe that the taking down of confessions by magistrates is inconsistent with the Constitution.

4 What is the purpose of the proviso to section 217(1) of the Act?

What is the purpose of the proviso to section 217(1) of the Act, which has no counterpart in English law and was introduced into South African law by the Criminal Procedure and Evidence Act 31 of 1917 (Zeffert and Paizes *The South African Law of Evidence* (2017) 539)? The primary purpose of section 217(1)(a) seems to act as a

“[t]echnical safeguarding provision to protect arrested persons against abusive police behaviour and to try to minimise the incidence of falsely induced confessions” (Bellengère, Theophilopoulos & Palmer (eds) *The Law of Evidence in South Africa: Basic Principles* (2013) 376).

Thus, so the argument goes, the accused should derive some sense of protection from the fact that she is brought before an impartial official who would not unduly influence her into making a confession, and so ensure that the confession is freely and voluntarily made.

Although this might be a laudable aim in the abstract, the proviso to section 217 of the Act has in fact not achieved its ostensible purpose. First, as Lansdown and Campbell point out, the confirmation of a confession before a magistrate has had the effect of dropping a veil between the treatment of the accused by his custodians, and the resulting confession (Lansdown and Campbell *South African Criminal Law and Procedure* Vol v (1982) 874). This gives a somewhat suspect statement an “aura of respectability and admissibility” (*S v Majosi* 1964 (1) SA 68 (N) 71).

Secondly, a confession has been deemed properly confirmed in terms of section 217(1)(a) of the Act in circumstances where the justice who confirmed the confession was the investigating police officer or member of the same police unit (Zeffert and Paizes *The Law of Evidence in South Africa* (2017) 539). Although the courts have criticised this practice, there is nothing to prevent to police from using it. In *S v Latha* (1994 (1) SACR 447 (A)) the Appellate Division did indicate that it frowned on the practice, but the court viewed as a “redeeming feature” the fact that the police had not foreseen at the outset that the appellants were going to make full confessions and had, as soon as this became evident, warned them and gave them the opportunity to proceed before a magistrate.

Zeffertt and Paizes conclude that the proviso has thus “failed in its aim of protecting accused persons and has become a technical bar to the admission of highly relevant and reliable evidence” (Zeffertt and Paizes *supra* 539). The South African Law Commission in its discussion paper on the simplification of criminal procedure reached the same conclusion (The South African Law Commission Discussion Paper 96 Project 73 *Simplification of Criminal Procedure* 80). The Commission stated:

“6.79 The distinction that has been made between admissions and confessions owes its origin to early judicial reaction to the exclusion of ‘confessions’ made to police officers. There is no rational reason for different treatment being given to various self-incriminatory statements (or conduct), irrespective of whether they are made to the police. In each case the evidence is only relevant because it is incriminatory, and should be admissible on common grounds.

6.80 The reduction of a confession to writing in the presence of a magistrate does not appear to have had any significant advantages for the accused.” (footnotes omitted.)

The Commission also stated that the distinction between admissions and confessions may hamper effective police investigations in that a genuine failure to recognise a statement as a confession may lead to it being excluded as evidence if it is not reduced to writing in the presence of a magistrate. The distinction would also appear to inhibit investigating officers from recording confessions themselves (Discussion Paper 96 80–81).

The Commission advocated for a return to the common-law position in terms of which the sole inquiry is whether the accused’s statement was freely and voluntarily made in the absence of undue influence, because this is where the real protection afforded by section 217 lies.

Another measure of protection afforded the accused is the procedure that our courts follow at a trial-within-a-trial to determine the admissibility of self-incriminatory statements. The procedure is designed to cater to the accused’s right to a fair trial and to ensure that questions of admissibility and guilt are distinguished from each other and decided separately (*S v K* 1999 (2) SACR 388 (C) 390). It is trite that, as a general matter, an accused’s evidence during a trial-within-a-trial may not be held against her in determining her guilt. This is achieved by ensuring that at a trial-within-a-trial the accused can go into the witness box and testify on the question of the voluntariness of the confession without being exposed to general cross-examination on the issue of guilt (see, for example, *S v De Vries* 1989 (2) SA 228 (A)).

If section 217(1)(a) has failed in its purpose to protect the accused, all it seems to have achieved is to saddle magistrates with an unnecessary “extrajudicial” or administrative burden. The South African Law Commission has recommended the abolition of sections 217(1)(a) and (b) (Discussion Paper 96 83 *et seq.*).

5 The magistrates’ courts struggle for independence

In the pre-democratic era, it was common for magistrates to perform administrative functions in addition to their judicial ones. This was because

magistrates were essentially civil servants, and administrative work was the rule rather than the exception (Hoexter “Non-judicial Functions and Activities” 288 292). It is in this *milieu* that sections 217(1)(a) and (b) of the Act came into being, which indirectly empowered magistrates to take down confessions.

However, even prior to 1994, criticism had been directed at this “vesting of judicial and administrative functions in one person” (Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 274). Constitutional democracy demands a more rigorous and thoughtful approach to the separation of powers and judicial independence.

Even so, in *Van Rooyen v The State* (*supra*) Chaskalson CJ acknowledged that magistrates continued to exercise a number of administrative functions, at the risk of them becoming answerable to the executive to the detriment of the separation of powers (par 79 n78 and 232). The court was, however, quick to point out that there might be reasons why it remained necessary for magistrates to exercise administrative functions, and why this was not “inconsistent with the evolving process of securing institutional independence at all levels of the court system” (par 233).

The court in *Van Rooyen* also stated that magistrates’ courts were independent overall, but not all courts needed to be held to “the most rigorous and elaborate conditions of judicial independence” (par 21–27).

Moreover, the court made much of superior courts’ powers of judicial review as a buttress against interference by the executive. In other words, it was acceptable for magistrates’ courts to have a lesser degree of independence than the High Court and the Constitutional Court, because the superior courts could always be called upon to “remedy undue influence and abuse of power” by the executive branch over magistrates’ courts (see Franco and Powell “The meaning of Institutional Independence in *Van Rooyen v The State*” 2004 SALJ 572). This seems a rather feeble foundation upon which to continue to tolerate the *status quo*. Also, the argument that the lack of capacity and fear of administrative disruption might lead to a continued degree of subservience of the magistracy to the executive is equally unconvincing (Hoexter “Non-judicial Functions and Activities” 299).

The call from the magistracy for a unified judicial system that places magistrates under the same governance umbrella as that for judges (see Olivier “The Magistracy” in Hoexter and Olivier *The Judiciary in South Africa* 350), will require increased independence for the lower courts. That is because judges are not expected to perform the same kinds of administrative functions as magistrates. They enjoy, on the whole, a greater degree of independence. For example, it would be beyond the pale to expect judges to take down confessions, which is clearly a non-judicial act.

6 Conclusion

The discussion above raises the question of whether the public perception of the independence of magistrates is tarnished by the fact that magistrates can be called by the state to testify for the state at a trial-within-a-trial at which the admissibility of a confession is contested. One can make a

plausible argument that magistrates' testimony at a trial-within-a-trial violates the institutional independence and impartiality of magistrates, because it might create the impression that magistrates routinely act in furtherance of the state's objectives at criminal trials, and, consequently, that there is not sufficient independence between the magistracy and the National Prosecuting Authority.

It would seem that the purpose of section 217(1)(a) was to shield the accused against abusive police practices, although, as has been argued, it has failed in this purpose. Even so, the requirement that a confession made to a peace officer must be confirmed before or taken down by a magistrate saddles every magistrate tasked with taking down a confession with a duty to act as a check against the police unduly influencing accused persons or inducing them into making false confessions.

This, in the authors' view, misplaces a duty that should, first and foremost, rest on the police. From the time of the formulation of the so-called "Judges' Rules" in England in the early twentieth century, there has been a consistent practice of laying down guidelines for the interaction between the police and suspects which, from approximately the 1960s, moved unwaveringly in the direction of recognising the legitimacy of police questioning. In this country Judges' Rules were drawn up in 1931 as a code of conduct to guide the police in their interaction with suspects and accused persons. These rules are, however, purely administrative directives without any force of law, and they have largely fallen into disuse and serve no meaningful purpose.

In the United Kingdom, section 66 of the Police and Criminal Evidence Act of 1984 authorises the Secretary of State to issue codes of practice in connection with, *inter alia*, the detention, treatment, questioning, and identification of persons by police officers. The failure to abide by any such code will not render the individual police officer criminally or civilly liable, but evidence obtained in breach of the code may be inadmissible.

In the view of the South African Law Commission, the introduction of similar codes of practice in South Africa would go a long way toward regulating the interaction between suspects and the police and reducing the objection to police questioning suspects (Discussion Paper 96 78). The South African Police Service has compiled a *Policy on the Prevention of Torture and The Treatment of Persons in Custody of the South African Police Service* (07/01/2013). This policy, in the form of instructions, constitutes a detailed code of conduct and provides a clear and comprehensive set of rules of procedure regarding police questioning. Until such time as this policy is incorporated into National Orders and Instructions issued by the Commissioner of Police (which, as far as could be determined, has not yet occurred), it is the responsibility of every station commissioner and other commander to ensure members under their command at all times adhere thereto.

The South African Law Commission has recommended that the policy should be incorporated in regulations made by the Minister of Safety and Security in terms of section 24 of the South African Police Service Act 68 of 1995, which would allow for broader participation in their formulation and amendment. The policy should ensure constitutional compliance by police officers in their dealings with suspects and accused persons.

In short, it is first and foremost the obligation of the South African Police Service to ensure that police officers abide by its policy and instructions regarding the treatment of people in custody. It should not be incumbent on the magistracy to act as a “watchdog” over police practices by being required to engage in the extrajudicial act of taking down confessions first made to police officers.

Not only does the proviso to section 217 not aid the accused, but it might also lead to an erosion of the perception of the independence and impartiality of the magistracy. When magistrates are routinely called by the state to testify on behalf of the state at trials-within-trials, this might create the appearance of a cosy relationship between the magistracy and the executive, to the apparent detriment of the doctrine of separation of powers. It also does not bode well for the judicial independence of magistrates if they routinely have to take the witness box in trials-within-trials and be subject to cross-examination by the accused’s attorney. Moreover, in such cases, the presiding magistrate would sit in judgment of the testifying magistrate, and might ultimately be called upon to make a finding regarding the credibility of the testifying magistrate.

With the enactment of the Constitution, there is generally “less anxiety over whether accused persons are afforded sufficient protection against unfair practices by the police” (Zeffertt and Paizes *Evidence* 537). That is because the right to a fair trial is now placed at the centre of our criminal justice system. Our courts have developed and articulated several rules and principles to ensure that confessions are obtained in a manner that does not render the trial unfair or is otherwise detrimental to the administration of justice.

For these reasons, the authors argue that magistrates should no longer be required to take down confessions. The mere fact that magistrates can be called by the state to give testimony about the circumstances under which confessions were made, could create the public perception that magistrates routinely assist the state in furthering its case. The public image of the magistracy might also be seriously impugned if magistrates – in fulfilling an extrajudicial function – are regularly subject to cross-examination by the accused at a trial-within-a-trial, and by the presiding magistrate sitting in judgment over the testifying magistrate.

Moreover, in accordance with the test formulated by Zondo J in the *NSPCA* case, the act of taking down a confession clearly constitutes a non-judicial act, which is neither provided for in the Constitution nor is it closely related to the core function of the judiciary. There is also no compelling reason why the function of taking down a confession should be performed by a member of the judiciary. As such, the separation of powers is offended by the performance of such a function by magistrates, and, in our view, is therefore unconstitutional.

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