58/78/TMS

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

THEMBA H. GWALA	First Appellan
ANTON N. XABA	Second Appella
JOHN V. NENE	Third Appellan
VUXIMUSI T. MAGUBANE	Fourth Appella
MATTHEWS M. MEYIWA	Fifth Appellan
AZARIA NDEBELE	Sixth Appellan
ZAKHELE E. MDLALOSE	Seventh Appell
JOSEPH N. NDULI	Eighth Appella
CLEOPAS M. NDHLOVU	Ninth Appellan
and	
THE STATE	Respondent.

CORAM: Rumpff, C.J., Wessels, J.A., Galgut, A.J.A.

HEARD: 18, 19, 21 FEBRUARY 1980

DELIVERED: 28 MARCH 1980.

JUDGMENT...../2

to counts 3 and 5. Suffice it to state that the Court a quo held that the substance of the charges had been proved beyond any reasonable doubt. It must also be borne in mind that accused no. 9 elected not to testify in his defence.

In all, some 137 witnesses (which included 9 of the 10 accused) testified at the trial. As was to be expected, the evidence led on behalf of the State and the accused respectively gave rise to sharp conflicts of fact. Many of the witnesses who testified on behalf of the State were regarded as accomplices and were given the customary warning before testifying. In addition, many of the State witnesses had been detained for interrogation in terms of the provisions of section 6 of the Act and kept in separate confinement for varying periods. Counsel for the State assured the Court a quo that, although some witnesses were still being detained at the time they testified, none was being so detained in terms of section 6 of the Act. I infer that the purpose of the detention probably was to avoid the witnesses

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being tampered with or possibly being injured or killed by persons who were strongly of the opinion that they ought not to testify against their former associates.

An important issue of fact which the Court had to was required to determine arose out of the contention advanced on behalf of the accused that in this case the Security Branch of the South African Police interrogated detainees in accordance with a so-called investigatory system which was designed not only to coerce the person being interrogated into furnishing information but also eventually to render him so compliant as to become willing to testify against the accused and when so doing to adopt what he thought the police believed or wanted to know, whether or not he, the witness, in fact had any knowledge of the facts or believed them to be true. A considerable volume of

13 (a) ..... evidence

evidence, including expert evidence, on this issue was led by and on behalf of the accused. The State also led the evidence of a large number of witnesses to rebut that evidence.

The criticism by the defence of the investigatory system allegedly employed by the police was based not only on the alleged effects of separate confinement on the persons being interrogated, but also of other alleged forms of pressure intended or calculated to reduce them to a state of debility, dependency and dread (the so-called BTD syndrome) and thereby force them to make statements which satisfied the police regardless of the truth or falsity thereof. The defence led evidence from most of the accused, and from certain other persons who had also been detained in terms of section 6 of the Act, as to the pressures allegedly applied to them during interrogation, e.g., assaults, deprivation of food and sleep, detention

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in insanitary cells, subjection to indignities, threats of assault and indefinite detention and threats that relatives would be detained (to name but some of the pressures referred to in the evidence). This evidence, together with that of an expert witness, Dr L.J. West, was tendered to lay the foundation for an inference that seemingly truthful and unbiassed State witnesses not only gave false evidence against the accused but also falsely denied in the witness box that any ill-treatment or undue influence by their interrogators led them to do so. The defence contended in the alternative that evidence obtained as a result of the employment of the so-called investigatory system was suspect and unreliable and should, therefore, be disregarded.

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In regard to the burden of proof in so far as the determination of the above-mentioned issue is concerned, HOWARD, J., stated in the judgment of the Court a quo:

> "The onus remains throughout on the prosecution to prove the guilt of the accused beyond reasonable doubt, and this includes the refutation of any relevant evidence which tends to cast doubt on the credibility of State witnesses."

In my opinion, the Court a quo adopted the correct approach in determining the factual issues relevant to the so-called investigatory system.

The evidence of Dr. West is dealt with in great detail in the judgment of the Court a quo, and it would serve no useful purpose to do so once more in this judgment. It suffices to quote the following passage in the judgment of the Court a quo:

> "Dr. West is an eminent American physician and psychiatrist who was fully qualified by virtue of his learning and experience to give expert evidence on this aspect of the case. His curriculum vitae (Exhibit "PP 1") makes

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impressive reading and he was an impressive witness. He described the nature, causes and effects of debility, dependency and dread (the DDD syndrome), deriving mainly but not exclusively from his study of a group of American airmen who had been prisoners of the Chinese Communists during the Korean conflict. DDD summarises the essential elements of the techniques used by trained Chinese interrogators to force these prisoners to make false confessions and give false evidence at "show" trials in support of propaganda to the effect that the United States was conducting bacteriological warfare against the civilian population of North Korea and Manchuria. As appears from Table 1 in Exhibit "PP 4", 59 airmen were subjected to this technique for the purpose of extorting confessions, 48 of them being clearly involved in a centrally directed and co-ordinated programme. Confessions were extracted from 36 of them, and 23 of the confessions were used in a propaganda campaign which included films and tape recordings of the show trials at which the deponents testified in accordance with their confessions. According to Dr. West these U.S.A.F. officers, many of whom had distinguished war records, not only gave the false evidence required of them but claimed that they had been well treated and were testifying voluntarily as a matter of conscience. Moreover, the films showed them to be in apparent good health, with no obvious signs of having been subjected to the DDD syndrome."

Dr. West also expressed the opinion that detention under section 6 of the Act, permitting as it does indefinite confinement with a considerable degree of isolation from outside contact, and interrogation until the detainee has satisfactorily replied to all questions could create conditions similar to those he had been describing (i.e. the PTSD syndrome). That interrogation of a detainee could have the effect referred to by Dr. West must, in my opinion, be accepted. However, it must be borne in mind that a detainee is not wholly within the power of his interrogators. The Commissioner of the South African Police is empowered to order the release of the detainee "when satisfied that he has satisfactorily replied to all questions at the said interrogation or that no useful purpose will be served by his further detention..." Moreover, the Commissioner is required to furnish the Minister of Justice once a month with the reasons why any detainee shall not be released (section 6(2). A detainee may at any time make representations in writing to the Minister relating

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to his detention or release (section 6(3)) and the Minister may at any time order a detainee's release (section 6 (4)). If circumstances so permit, a detainee shall be visited in privacy by a magistrate at least once a fortnight (section 6(7)). These are thus, in my opinion, reasonably adequate safeguards against any abuse by police interrogators of their powers to question detainees. It must also be borne in mind that section 6, apart from authorising the detention of the detainee and his interrogation during such detention, does not give the police interrogators any special powers in conducting the interrogation. As to impermissible interrogation of a detainee, see Mapoma v. Rex, 1964(2) S.A. 557 (A.D.) at p. 561 D - F and Rosenthal v. Rex, 1966(2) S.A. 476(C) at p. 492C - 493E. In enacting section 6, the Legislature clearly did not authorise any form of coercion beyond that necessarily flowing from the fact of detention.

Unlike the unfortunate American airmen referred to by Mr. West in his evidence, detainees (or

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most of them at any rate) would no doubt appreciate that, though detention is in a sense for an indefinite period, they would in time appear in a court of law, either as accused or witnesses, that the trial would take place in open court to which the public and the press would have access and that the proceedings would be conducted in accordance with the accepted rules of procedure ordinarily applicable to criminal trials. In many respects, therefore, the position of detainees under section 6 bears no comparison to the position of the American airmen, who appeared at so-called "show" trials conducted for purely propaganda purposes and in order to produce "confessions" made by them whilst in detention as prisoners of war as a result of the effect of the DDD syndrome.

Dr Vent's evidence is placed in proper perspective if regard is had to the following question put to him by HOWARD J and his answer thereto:

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"HOWARD, J: "What is being suggested to you, Dr West, is this, that the Courts are alive to the fact that evidence obtained via section 6 of the Terrorism Act may be suspect for very much the reasons you have given in your evidence, that is, that it is obtained under circumstances where it is not volunteered, to put it no higher than that, and that it may be influenced by the police under these circumstances. What is being suggested to you is that the Court either is or ought to be alive to these factors and take them into account in evaluating that sort of evidence. In other words, one doesn't have to accept evidence that is obtained in that fashion?---

DR WEST: That seems like a very reasonable orientation for a court to hold towards such evidence and if my evidence would add anything, I think it would only be to acquaint the Court with the excess to which, beyond what common sense and ordinary experience might project, individuals can be led to make statements that have the way of vicissitude....., statements that they will not quickly disavow, statements that may seem in harmony with the statements of a number of other people who made statements under similar conditions to the same interrogators, and statements which even those who extracted them may believe to be true and yet it may all be false due to the operation of these factors which are rather more subtle than the sort of allegation in the affidavit that we just reviewed a few minutes ago."

As to the approach to evidence given by detainees see e.g.

S v Hagmin and Others (1973 (3) SA 443 (AD)) where VAN BLERK JA stated the following at p 454 H - G:

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"The object is the acquiring of information. But if a prosecution should ensue, the Court is not obliged to be satisfied with the evidence so acquired. The Court retains its normal power and function, which it will exercise with vigilance and scrutiny, to pronounce upon the evidence placed before it, bearing in mind, inter alia, in any particular case, the question whether the circumstances under which the evidence was obtained has effected its credibility. No hard and fast rule can be laid down. Each case will turn on the totality of its own particular facts and the impressions which the various witnesses make on the Court."

The approach of the Court a quo to the evidence given by accomplices and detainees is stated in the judgment as follows:

"Quite apart from the circumstances under which it was obtained, the evidence of accomplices requires particular scrutiny, because of the cumulative effect of the factors mentioned by HOLMES, J.A. in S v Mlapezula & Ors, 1965 (4) SA 439 (AD) at p 440 D - H. In a case such as this, where an accomplice is detained or threatened with detention under section 6 of Act 83 of 1967, the possibility of his falsely implicating one or more of the accused to save his own skin or shield

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the real culprits is obvious. Like any other accomplice, his inside knowledge of the relevant events equips him to blend fact with fiction in a convincing manner.

In considering the evidence of witnesses who are accomplices and/or have been in detention or threatened with detention we have been acutely aware of the problems mentioned above. In no case have we accepted the evidence of a witness where there is a reasonable possibility that the circumstances of his detention or interrogation have materially affected his reliability - unless, of course, his evidence is otherwise demonstrated to be reliable. Where the evidence of an accomplice has been in issue we have not resolved the issue against the accused without first satisfying ourselves that the dangers inherent in accepting the accomplice's evidence have been eliminated - in most instances by satisfactory corroboration directly implicating the accused in the commission of the offence. In cases where such corroboration is afforded by another accomplice we have examined all the relevant circumstances to ensure that on the totality of the evidence it is safe to convict." (My underlining)

As I have already indicated, a considerable volume of evidence was led both in substantiation and rebuttal of the defence case that the police applied a particular investigatory system in the interrogation of

the detainees. As appears from the lengthy judgment of the Court a quo, all the relevant evidence was considered with meticulous care before making any finding on the credibility of the witnesses concerned. It will serve no useful purpose to set out the evidence relevant to the investigatory system issue. It is, however, necessary to refer to the death of Joseph (Mbuyisi) Mdluli. Mdluli was to have been an accused in the present case. The circumstances surrounding his death were relied on by counsel in support of the defence submissions relating to the investigatory system. Mdluli was arrested at his home at 22h30 on 18 March 1976. At that time he was in good health and had no injuries. He died, while in police custody, on 19 March 1976. A pathologist, Dr Van Straaten, was taken to the police station near midnight of 19 March and there saw Mdluli's body. The police officers there present informed him that Mdluli had died at about 21h30. Dr Van Straaten, who was called by the defence, carried out a

post-mortem examination. He found that Mlauli had suffered serious injuries all over his body. He was at first of the view that the cause of death was consistent with strangulation. However, he consulted Professor Gordon, a professor of forensic medicine, who was also the Chief Government Pathologist. They were of the view "that the cause of death should rather read: 'associated with the application of force to the neck' ". Dr Van Straaten testified that Mlauli could have died at any time within the twelve hours prior to his seeing the body. He was of the view that death would have followed almost immediately after the application of the force to the neck. Another pathologist, Dr Shagiro, was also called by the defence. He had not seen the body. He had seen all the relevant photographs and medical reports and had consulted with Dr Van Straaten. Save that he was of the view that death could have occurred within the three hours before Dr Van Straaten first saw the body his evidence is the same as that of Dr Van Straaten.

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It was submitted that in the absence of satisfactory evidence from the police as to how Mdluli received his injuries, including the one that caused his death, the Court a quo should have found that Mdluli was assaulted and that other detainees who gave evidence in the case were similarly assaulted as part of the investigatory system.

It appears from the record that a criminal trial had earlier been held in which four police officers were charged with causing Mdluli's death. They were acquitted. Both Dr Van Streaten and Dr Shapiro were present during the trial and testified thereat. It appears from their evidence in the present case that in the earlier trial there had been evidence that Mdluli had been involved in a struggle with several policemen and that it had there been suggested that Mdluli had sustained his injuries during the struggle and that he could, at a later stage, have sustained the injury to his neck when falling over a chair. There is no need to analyse the evidence given by Dr Van Streaten and Dr Shapiro. It is sufficient to say that having regard to

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their testimony I am not persuaded that the Court a quo erred in coming to the following conclusion:

> "The most plausible inference, we think is that most if not all of the injuries were inflicted by one or more unidentified members of the security police. However, there is simply no basis for drawing any inference as to the circumstances in which the injuries were inflicted. One can only speculate about whether they were inflicted unlawfully in the course of an assault, or in circumstances where the use of force was justified, e.g. to prevent escape. And one ventures even further into the realm of speculation if one tries to determine whether at the time the injuries were inflicted the police were engaged in an interrogation of Mdluli - coercive or otherwise. Bearing in mind the incidence of the onus we do not think that the evidence excludes the reasonable possibility that the police assaulted Mdluli in the course of interrogation, but we cannot make any positive finding in that regard."

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After a meticulous examination of the evidence led on behalf of the accused and that led in rebuttal thereof by the State, the Court a quo held that the evidence as a whole established that the police did not follow the set pattern or system of investigation suggested by the defence. The Court a quo held that nearly all of the defence evidence relevant to the issue now under consideration had been demonstrated to be false; "and the little that remains does not give rise to the inference that the defence sought to draw, viz., that the evidence of apparently truthful and unbiased witnesses who denied ill-treatment and undue influence by the police was in fact a product of the so-called MDD syndrome". The "little bit that remains" included the finding by the Court a quo that there was a reasonable possibility that the police assaulted Mdluli in the course of interrogation. On this part of the case, the following is stated in the judgment of the Court a quo:

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"Nevertheless, adopting the cautious approach indicated earlier in this judgment we have necessarily had to consider, in the case of each witness who was detained or threatened with detention in terms of section 6, whether his evidence was possibly produced or influenced by pressure in one form or another."

I venture to suggest that even if the Court a quo were to have found in favour of the accused on this issue, it would still have been under a duty to determine in the case of each and every witness whether there was a reasonable possibility that the set pattern was employed in his interrogation and how it affected his credibility. Needless to say, no court of law in this country would in any circumstances condone the employment by the police of any set pattern of interrogation which is either intended or calculated to result in a witness giving false testimony on oath.

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