The Three Who Died

Solitary confinement, prolonged sleeplessness under constant interrogation accompanied by bullying threats - some detainees are given one kind of treatment, some another. But others, as the affidavits showed, were subject to physical torture.

Michael Shivute, Caleb Mayekiso and Abdullah Haron had all been arrested and detained under the Terrorism Act at the same time as the others - during May or early June of 1969.

• Michael Shivute's death was revealed by the Minister of Police, Mr. S. Muller, in reply to a question in Parliament in February, 1970. He said that Shivute had committed suicide on June 16, the night of his detention under the Terrorism Act. This is the only information available about his death. It is not known if an inquest was held.

• An inquest was, however, held on the death of 44-year old Imam Abdullah Haron, a prominent religious and community leader in Cape Town. He had been Imam for thirteen years, and was also on the editorial board of the Moslem News. He founded a religious school and a Moslem Youth Association. He was a man prominent also in sporting activities, and as editor of the Moslem News, and in his sermons, he was known for his outspoken statements against racial discrimination, which he believed to be contrary to the teachings of the Koran.

The Imam was detained on May 28, and died, according to the police, on Saturday, September 27. The death of this prominent man aroused considerable concern.

According to the post-mortem report, the Imam had 26 bruises on his body, a haemotoma (blood swelling) on his back and a fractured rib. Security Police evidence was that the Imam slipped and fell down the last few steps of a flight of stairs after interrogation on September 19. He landed on his buttocks and did not appear to be hurt. He had been away from

his cell, in the exclusive custody of the Security Police, for two days and nights.

A pathologist and a specialist surgeon who gave evidence at the inquest stated that the bruises had not all been sustained at the same time - some were fresher than others, and that they could not all have been caused by a fall down stairs. Some were parallel, longitudinal bruises similar to injuries seen on assault victims. The explanation given at the inquest by Sergeant van Wyk, the investigating officer, that the Imam had 'fallen down stairs', was the same that he had given when a previous prisoner, Alan Brooks, had sustained a fractured ankle while being interrogated by van Wyk. (Brooks stated van Wyk had twisted his leg until his ankle broke). The Imam had been kept in solitary confinement with only the police having access to him, yet no evidence was offered by the police as to how he had received so many injuries.

The magistrate found that the Imam died as a result of injuries partly caused by an accidental fall down a flight of stairs. He said that, on the available evidence, he could not say how the other injuries were caused.

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The third man who died while being detained was a man who had already served a four-year prison sentence on Robben Island for belonging to the ANC.

Caleb Mayekiso was a prominent leader of the ANC in the Eastern Cape, when it was a legal organisation. He had been chairman of its strongest branches and at the same time active in trade union work. He was arrested many times for his political activities and was one of the 156 accused in the Treason Trial.

After being arrested in 1963 and detained for several months he was tried and sentenced to four years imprisonment. He was released in 1968. He was again arrested on May 13, 1969.

Eighteen days later, according to the District Surgeon, he died of 'natural causes'. His wife said he was well and healthy when the Security Police took him away. There was no apparent reason why he should have died so suddenly and so unexpectedly 'of natural causes'.

These three deaths of men detained in association with other men and women, whose abortive trial has been described here, were in fact only three more whose death under South Africa's several detention laws is so far known. From what information is available, fifteen people have died in confinement under the detention laws. Not all the names are known and the number may be more than fifteen.

It was with this background and this knowledge that the relatives of the men and women who had been re-arrested, deeply agitated about their fate, made the urgent application for an order to protect them from assault and torture by the Security Police.

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VI. THE COURT REFUSES

The application for a court order against the Ministers of Justice and Police to protect the 22 who had been re-detained from further "assaults, threats and torture", was heard in the Pretoria Supreme Court on February 20, 1970.

Six day later the presiding Judge, Mr. Justice Theron, ruled that the matter was not urgent. He ordered that it stand down, to be placed on the roll 'in due course'. At the same time he refused to order the court registrar to hasten the hearing of the application.

By the middle of May (when this was being written) the application had still not come before a court.

The application referred to the 'same team of Security Police led by Major T. Swanepoel' which had interrogated them previously. 'The cruelty meted out to the detainees constitutes an integral part of an interrogational method adopted by certain members of the Security Police under the direction of Major Swanepoel . . . there is a grave likelihood that the detainees are in imminent danger of having to submit to a systematic process of prolonged unlawful interrogation and brutality at the hands of the same team of interrogators unless the Court interdicts and restrains the servants of the Respondents from doing so'.

The police denied that they had assaulted or intended to assault anyone. But there were precedents for the restraining order. In a previous case where the Judge had found in favour of the applicant he had remarked that 'if the denial of

any maltreatment or the use of unlawful pressures in the past, or of the intention to resort to such action in the future is correct, then it is clear that respondent will suffer no inconvenience whatever by the grant of interim relief'.* In other words, you cannot be inconvenienced by a court order restraining you from doing what you have no intention of doing and never have done.

But Mr. Justice Theron did not agree. The facts are almost a year old, he commented, and are called to life to seek restraint for a treatment which might or might not take place, without giving the police an opportunity to show, as they may conceivably, that no further interrogation of the detainees is necessary and certainly will not take place. And he quoted counsel for the police who contended that the highest the applicants can put their foundation is that because some maltreatment took place a year ago, and although no further maltreatment took place since, the fear exists that maltreatment will be applied in the future. 'I do not think that is a foundation for the grant of the relief sought'.

For the relatives, counsel argued in vain that the fear of assault rose from the fact that this had taken place during interrogation at the time of their first detention. The assaults ceased when statements had been obtained. Now they were being detained again in exactly the same way, by the same people for the same purposes, 'and if that doesn't give rise to a reasonable apprehension, it is difficult to think of anything which does give rise to apprehension.'

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* Gosschalk vs. Rossouw (SALR. 1966 (2) pp.493-494)

The Judge considered that the respondents might conceivably show that no further interrogation of the detainees was necessary and certainly would not take place. (Why then were they being detained again under the Terrorism Act, 'for the purposes of interrogation'?) 'I am not convinced of the urgency of this application,' he said. In the circumstances I make no order in regard to the application for relief sought . . . ' and with these words, in the Pretoria Supreme Court, he dismissed the application with costs.

One of the relatives of the detained people had stated that it was common knowledge that a number of people had died while under detention in terms of the Act. At this stage, Justice Theron interrupted counsel to ask: 'What is the relevance of that?'

'Well, My Lord', counsel replied, 'it is a question of the apprehension of the consequences of illtreatment . . . '

'But', interrupted the Judge, 'didn't they die of natural causes?'

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VII. THE TWO WHO WOULD NOT TESTIFY

Apart from the 22 who suffered arrest, detention, trial, acquittal and re-arrest, there are the two detained witnesses who refused to testify against their friends - Shanti Naidoo and Brysine Mamkahle.

These two women, whose silence may well have been the stumbling block which brought the trial to a sudden end, were jailed for two months because they would not bear witness against their friends. They were due to be released on February 16 or to be called as witnesses once again.

They were not released. They could not be called as witnesses in a trial which had ended with the acquittal of all the accused. Yet nothing has been heard of them. Their fate is cloaked in silence. Obviously they have been re-detained under the Terrorism Act and are again in the power of the Security Police.

Shanti Naidoo's mother, Mrs. Monommoney Naidoo, frantically worried about her daughter, brought a habeus corpus action to try to secure her release, but the action was dismissed with costs. The law is clear: "No court of law shall pronounce upon the validity of any action taken under this Section (6) or order the release of any detainee".

'Shanti is frail and delicate', Mrs. Naidoo said. 'I am going out of my mind with worry. I am haunted by the fact that two detainees, arrested at the same time as Shanti, died in jail'.

But there is no way in which Shanti Naidoo and Brysine Mamkahle can be reached. The blank wall of silence intervenes between any attempt to find out what has happened to them, is happening to them. They can be held for years if the Security Police so wish. For ever. Or until they die 'of natural causes'.

VIII. THE QUESTION OF JUSTICE

A further attempt was made on March 18 by the attorney, Mr. Joel Carlson, to find out something about the detained people. He applied to the Security Police for details, asking for information about their whereabouts, for permission for relatives to visit them, for medical attention for those who are ailing, and for the aged. He also asked when the detainees are to be charged and brought to trial.

Two months later, he still had had no reply, and he well knows that by law he is not entitled to demand a reply.

If the detainees are charged again and once more brought to court, can we then be satisfied that justice will take its course and all will be well?

For years now people have praised the impartiality and justice of the South African courts, which have many times in the past arrived at judgments contrary to those desired by the political rulers; they have even overthrown in the courts what the government required, or criticised what the police had done. South African judges, it was generally believed, based their findings on legal evidence without any obvious intrusion of political attitudes.

Now unhappily there are other factors which outweigh the possibility of impartial justice in political trials. The first is that the laws themselves are of such a nature today that within their framework justice becomes non-existent. Law must be related to life, to morality and to justice. 'Unjust laws have the nature of violence'. Mere order, mere law, are not ends in themselves.

Professor Richard A. Falk * was an observer on behalf of the International Commission of Jurists at the first trial held in South Africa under the Terrorism Act (the trial of 35 South-West Africans in February, 1968, charged with engaging in various terrorist activities). He makes observations on that trial which are very significant for other political trials.

He found it difficult to assess the trial from the perspective of the Rule of Law. 'What took place in open court was only a small, visible fraction of the overall relationship between the South African Government and those who oppose South African rule in South West Africa . . . there are no realistic possibilities for peaceful change; any political activity, especially if it includes challenging prevailing racial policies, is soon branded as 'Communistic' and subject to suppression as criminal conduct'.

Another factor is the extra-legal environment. He comments on the name of the statute: the Terrorism Act, and that the trial was generally referred to as 'The Terrorist Trial'. 'In application and intention, however, the statute seeks to punish severely any political action that is designed to change either white domination or the system of apartheid'. But the South African official rhetoric labels the defendants as 'terrorists'.

'The extra-legal environment is also relevant. The policies of the South African Government seem designed to demoralize totally the African inhabitants. An elaborate system of African informers is relied upon to cripple political action and to humiliate Africans in the eyes of each other'.

Procedural changes in South African law relating to political offences also play a part. There are changes in the definitions of categories of crimes - such words as communism,

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* Professor of International Law at the University of Princeton, U.S.A. All further passages in this section appearing in quotes come from the report he made to the International Commission of Jurists, and published by them.

sabotage, terrorism, are defined in various laws so as to cover almost any political activity, from displaying a poster to organising a strike. There have been other changes, for example, the onus of proof of guilt previously rested on the prosecution, and under some laws this has been changed so that the onus is on the defendant to prove his innocence. Once charged, he is guilty unless he can prove otherwise. But these are not the most important changes.

The most vital change is that today, in effect, legal power resides not in the courts but in the hands of the Security Police. Judges now play a relatively insignificant role in the trial system. Basically it is the Security Police who decide guilt and select who is to be punished. The role of the judge is virtually reduced to the passing of sentence within the limits laid down in the law as agreed on by Parliament.

Perhaps the trial of Winnie Mandela and the 21 others gives the most vivid demonstration of this. On the evidence the prosecution was forced to end the trial, and the judge, according to the law, found the accused not guilty and discharged them - but the judge's acquittal had no relevance to their fate. The Security Police re-arrested them all and swept them away. It is simply that the police have the power to scrap the whole proceedings and the outcome which was not to their liking, and they set about the preparation of their victims once more.

The Security Police select the victims, they arrest them, and from that moment have them completely in their hands. 'I am convinced', writes Professor Falks, 'for several reasons that a large number, if not all, of these defendants were tortured in prison.* An extended period in solitary confinement itself approaches torture, but the Special Branch used interrogation methods that involved active forms of torture including beating and frightening the defendants in horrible ways'.

The victims are taken from prison cells by Security Police, who even find ways of concealing how long they are out of the cells under interrogation. The victims are beaten, tortured, threatened, terrorised, mentally confused by sleeplessness, and

finally the Security Police prepare the statements and only bring them to court after months of solitary confinement. There need be no sign of physical assault or injury.

The case is conducted with the usual legal decorum. 'The conduct of the trial itself appeared to conform with procedural standards suitable for criminal litigation in many respects. The judge was polite to the Defence Team and appeared to be diligent about conducting the trial in accordance with normal and fair rules of criminal procedure. It is like a play already set up, the script prepared. The motions of a trial are carried through by court officials, by prosecution, by the judge, and by the defence counsel, many of whom cautiously but courageously still try to expose some of the worst police irregularities.

But the outcome rests entirely with the Security Police. The outcome is in fact already decided, behind closed doors, and the trial itself is only the final procedure; coming before the judge is the only public act in a play decided on largely in secret, the acting out of the final part of the script. It is the Security Police who decide who shall be witnesses and who shall be accused; they work for months on the accused to compel them to provide the evidence for their own trial; and it is they who escort the prosecution witnesses from solitary confinement to the witness box, and back to solitary confinement again.

The extra-legal environment surrounds and enters the courtroom. 'Despite this facade of legal propriety there were several disturbing features that I observed during my period in court. For one thing, the defendants were referred to by number rather than by name, each was assigned a number that was pinned to his shorts or jacket . . . The use of numbers rather than names is consistent with the general depersonalization and dehumanisation of Africans that pervades every aspect of apartheid as an operative system of racial administration'. Professor Falks goes on to describe the formidable atmosphere, which is now part of every political trial; the heavily armed uniformed police surrounding the court buildings, the ferocious police-dogs barely restrained on leashes, the generally

menacing quality of the scene. 'In addition, several prominent members of the Special Branch were in attendance, including those officers who had used brutal means to carry out the interrogations during the periods when the prisoners had been confined to prolonged solitary detention. The atmosphere of the court was very much dominated by these security features which appeared to have some intimidating effect on the defendants and even on their counsel'.

The presence of those same high-ranking members of the Security force, including the ones responsible for the secret interrogations, ensures that the actors will not deviate from the parts prepared for them. Golding is only one prosecution witness who has given eloquent testimony of this - too terrified even in the open court to say, in front of his torturers, that they had assaulted him.

But in any case, it may be unwise to bring what has happened to the notice of the judge. 'The reality of prison torture contrasts with the inadvisability of registering such a complaint. It was generally agreed that to complain about torture in the setting of the terrorism trial would inflame the prosecution and the judge. It was not in the best interest of the defendants - on trial for their lives - to assume this risk in an atmosphere of oppression such as prevails in South Africa'. And Professor Falks adds, referring to the unknown number of detainees, 'The reliance on unlimited detention in solitary confinement - without being charged with an offence - is a flagrant violation of the Rule of Laws, even without torture'.

Yet it is these allegations of torture and prolonged confinement which go to the very heart of the question of justice, and once they are brushed aside, then the possibility of justice, has also been dismissed. The trial is tainted with illegality and abuse before it even begins. Judges show a strong disinclination to believe, even to investigate, allegations against the police, whose traditional role, after all, is supposed to be to uphold the law. The laws themselves, in so many ways violating traditional concepts of justice, should demand greater, not less, vigilance

from the courts. Yet South African judges in the main have become less, not more, concerned about the actions of the Security Police. Their judgments have tended to shield the perpetrators of torture rather than the victims.

Into the courts, too, enter the fears of the ruling white community which is totally cut off from African life, which has no conception of African aspirations and no understanding of the motives of the accused. In the all-white courts all dominant roles are filled by members of that white community, people who in their everyday lives share both the isolation and fears, and who are now set up to judge Africans whose feelings, motives and acts they do not try to begin to understand.

This enormous desert between the accused and the administrators of 'justice' is often revealed in the judge's summing-up at the end of a political trial, when his remarks will show that he has not had even the slightest shred of understanding of what it was all about.

The judges demand from the accused repentance, and when instead of recanting, the accused justifies and defends his actions, this becomes a challenge to the courts, to law and order. Over and over again in passing sentence, judges have commented on this brazen defiance and the lack of any sense of remorse.

But the crucial point is that the police are now in effect both prosecutor and judge; the basic decisions are taken secretly in Compol Buildings. There need be no instructions passed on from Minister or Government. Nobody 'tells' the judges what to do - nobody has to tell them. The laws are there; unlimited, unquestioned, unmitigated power has passed into the hands of the secret police. Wherever a gap appeared, wherever a court judgment or ruling exposed any weak link in this chain of absolute power, of power unanswerable to parliament or courts or public, then a new law was passed to close the gap, to seal it absolutely. The 90-day law, the 180-day law, the Terrorism Act, the Sabotage Act, the Bureau of State Security with its

terrifying unassailability - all these were the final stages in the abrogation of the Rule of Law in South Africa. It is this, together with the closing of all legitimate avenues of protest, that creates a new concept of law and a new definition of justice in South Africa today.

The courts remain, the judges remain, the ceremonies, titles, formalities, modes of address remain. There are no bribes. The corruption is much deeper, more subtle. The trial is played out with all formal etiquette and courtesy. Defence counsel will expose some witnesses as liars; others will confess that what they say is what they were told to say; it does not matter much. Counsel address each other and the judge with dignity in the traditional terms. All the trappings and the props are there. The political trial lacks only one thing - the possibility of justice being done.

Ends

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