444/90
/mb

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal between:

CHARLES BONGANI ZWANE ..... Appellant

and

THE STATE..... Respondent

CORAM: NESTADT, KUMLEBEN et VAN DEN HEEVER JJA

HEARD: 23 AUGUST 1993

DELIVERED: 9 SEPTEMBER 1993

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

The appellant stood trial in the Witwatersrand Local Division of the Supreme Court on various _ charges of murder, attempted murder, contraventions of the Arms and Ammunition Act 75 of 1979 and on 1 count alleging arson. The charges related to four separate unlawful attacks upon persons, in one case involving the burning down of a house. The trial court held that the appellant's complicity in the first three' incidents was proved and found him guilty on 9 counts of murder, 8 of attempted murder, 1 of arson and 2 contraventions of the said Act. For each murder conviction the death penalty was imposed. The murder convictions and sentences are before us as of right in terms of s 316A(1) of the Criminal Procedure Act 51 of 1977. Leave was granted by the court a quo to appeal against the convictions on the other counts.

The fact that all these offences were committed was at no stage in dispute, the only issue being whether the appellant was criminally liable as a participant. In the circumstances a brief account of the four incidents, based upon the evidence of the State witnesses, will suffice.

At about midnight on 26/27 December 1988 the premises at 1674 Orlando East, district Johannesburg, were attacked (the "Orlando East incident"). The owner or occupier was Mrs Mabule. She let certain rooms on the property to policemen and ran a shebeen there. It was often used by policemen. On the night in question a . number of people were drinking in the living room and there were occupants in certain of the other rooms as well. A hail of automatic gun-fire was suddenly directed at them. Shots were fired into certain occupied rooms in the house through a closed and

shattered window, and from other vantage points. In all 64 7,62 mm cartridge cases were found. This calibre is used in an assault rifle, commonly known as an "AK 47". It is clear that there were at least two assailants and that the shots were discharged at random into this house. Two AK 47s were used: one bearing serial no 3213 was subsequently found by the police. This lethal assault resulted in a conviction for the murder of 5 occupants (counts 7 to 11 inclusive) and on 5 counts of attempted murder (counts 2 to 6 inclusive). Some of the victims sustained severe injuries causing permanent disability. The only motive for the attack, it would seem, was that policemen frequented the shebeen and some were lodged on the premises.

During the evening of 20 January 1989 the witness Kapu was the sole survivor of an armed attack

4. upon three municipal policemen who were on foot patrol in Meadowlands, district Johannesburg (the "Meadowlands incident"). Each was wearing the green uniform of the municipal police force and carried a .9mm service pistol. As the trio walked along the street shots, again emanating from the AK 47 - serial no 3213, were fired from where cars were parked at the side of the road. Constable Kapu sustained an injury to his right shoulder as he fled and his two colleagues were killed by the gun-fire. Another man, a bystander, was also fatally shot. An eye-witness saw two persons running from the scene, one of whom was still firing his weapon as he ran towards a motor vehicle and made off in it. This incident gave rise to 3 convictions of murder (counts 14, 15 and 16) and 1 of attempted murder (count 17).

The events of the night of 22 February 1989

5. at the house of Mrs Dudu Chili in Orlando West, district Johannesburg (the "Chili house incident"), led to the convictions of attempted murder of Judith Msomi and Barbara Chili (counts 18 to 19), arson (count 20) and the murder of Finkie Marcia Msomi (count 21). Finkie was one of the five children of Mr Alfred Msomi and his wife, Ntombana. She received a telephone call that night which prompted the parents to send two of the children, Finkie and Judith, to the house of their neighbour, Mrs Dudu Chili. Their purpose was to turn off the lights of the house and return with Barbara Chili as her mother had been arrested that afternoon. When they did not return promptly, Msomi sent his son to investigate. He returned without them and reported to his father that the Chili's house was surrounded by members of the "Winnie Mandela Soccer Club". Msomi heard two shots as he was preparing to go and

investigate. This caused him and his wife to remain in their house until they heard two more shots followed by a muffled explosion. Msomi then left his home and noticed that the Chili house was on fire. Judith Msomi and Barbara Chili managed to escape from the house with burn injuries. One of the assailants, wearing a balaclava cap, was seen returning to a Combi and entering it. This vehicle and another drove from the scene. Finkie Msomi, who was 13 years old, had been fatally shot in the head. Alfred Msomi dragged her burning body from the house. People came and assisted in extinguishing the fire and in due course the police arrived. Prior to this incident Mrs Dudu Chili's son had been charged with the killing of one Maxwell Madondo, a member of the "Winnie Mandela Soccer Club". The members had been searching for her son for some time. It would appear that the

upon this house was to avenge the death of Madondo.

Although the appellant was 'acquitted on all counts arising from the fourth incident, it is necessary to refer to it. On 1 April 1989 at night the appellant was one of a number of people in a shebeen at 8139 Orlando West. An altercation arose and he produced a knife. When an attempt was made to disarm him, he threw it to another person called Sonwabu. The knife was wrested from Sonwabu and he was assaulted. The two of them, the appellant and Sonwabu, were ordered to leave the shebeen. A few minutes later a hand grenade was thrown into a room of the shebeen and a number of the occupants were killed and wounded. The appellant, as I have said, was found not guilty on the counts relating to this incident.

The appellant was arrested on 3 April 1989

and was detained in custody in terms of s 29 of the Internal Security Act 74 of 1982 at the Protea Police Station in Soweto. On 28 April 1989, whilst so - detained, he made a confession to a magistrate, which was recorded and featured as exhibit N. In the light of certain concessions rightly made, it was common cause on appeal that this confession if received in evidence proved the guilt of the appellant on all the counts on which he was convicted: but that without reliance on it no conviction can be sustained. The correctness of its admissibility is therefore the only issue on appeal. In the court a quo its admissibility was contested on the grounds that it was not voluntarily made and that the appellant had been unduly influenced. This led to a so-called "trial-within-a-trial" during which the appellant and three of his witnesses testified and some six State witnesses gave evidence. The court

9. ruled the confession to be admissible and reasons for this conclusion were furnished in the judgment on the merits. Since the entire case turns on this decision, the evidence of the appellant, on the one hand, and of the State witnesses (primarily that of Warrant Officer Havenga and Captain Badenhorst), on the other hand, must be recounted and examined in some detail.

On the night of his arrest, the appellant explained, he was immediately questioned about the fourth incident and the use of a hand grenade in that attack. He volunteered the name of "the culprit", Sonwabu, and agreed to point out his house to the police, which he did. During this attack on the shebeen at 8139 Orlando West, the fourth incident, the appellant said that some of his family were injured and he felt aggrieved on this account. (This may well explain his willingness to co-operate with the police

by taking them to Sonwabu's house.) On their arrival there a shoot-out followed and Sonwabu was killed. The fire-arm which Sonwabu had used, turned out to be the AK 47 (serial no 3213) used in the Orlando East incident. It was shown to the appellant. He did not deny that he was present at the shebeen at the time of the fourth incident, but claimed to be innocent of any of the offences committed there. He made no mention of the three earlier incidents. He was taken to the Protea Police Station in Soweto and detained in solitary confinement.

Shortly after lunch on 27 April 1989 he was taken from his cell by Havenga. After booking him out at the charge office they went to an office in another building at this police station - he referred to it as a "waarheidskantoor". In this office he was slapped by Havenga who said to him "You are not prepared to tell me any story but many people told me many stories."

When he challenged Havenga to produce his informants, Havenga and another policeman left the office. (Other evidence identifies this other person as Sergeant Schoeman.) After a while the two of them returned and he was taken to another office. This room was empty save for a mat, a rope and a table. Havenga had with him a small box with a winding handle. He noticed that the words "Sony" and "volts" appeared on it. He was made to sit on the mat. His arms were tied to his ankles with the rope. Two leads from the box were attached to him, one to each of his small toes. When the handle was turned, painful electric shocks were transmitted through his body. He had difficulty' in breathing and felt that he was going to die. Havenga stopped turning the handle and asked the appellant whether he was prepared to speak, without giving him any indication of what he was expected to say. He

responded by furnishing for the first time some details of the Chili house incident. These implicated him. This was all that he told Havenga and the interrogation was concluded. He returned to his cell sometime after 5 pm. When he had eaten his supper, Havenga and Schoeman came to the cell. He was ordered to undress and they examined his body for any sign of injuries.

The next day after breakfast he was taken from his cell and brought to the office in which he had been tortured the previous day. The machine was on the table. Two black policemen were present with Havenga. The name of one was "Frank" (a reference to Constable Frank Rametse) and the other was there to interpret if necessary. (He was in fact Constable Ace Mhlongo.) Havenga accused the appellant of not being prepared to tell him "a story or stories". He was again trussed up in the same manner with the rope. Havenga said that

13. it had been established that the AK 47 found at Sonwabu's' place had been used in three shooting incidents: at Orlando East, at Meadowlands and at Chili's house. He did not indicate that he thought or knew that the appellant was involved in those incidents. The leads from the machine were attached to a finger of each of the appellant's hands and the machine was operated by Havenga. Its effect was as before, so much so that the appellant again thought he was going to die. He was prepared to speak and said that he was present during the shooting incidents at Orlando East and at Meadowlands. He gave details about his participation in what had occurred at both of these places, implicating himself substantially. The torturing was discontinued and he was taken back to his cell. Before his departure Havenga told him to repeat what he had said to the magistrate and to do so

accurately: "Don't go and talk shit to the magistrate". He agreed to this instruction "just to satisfy the police and to prevent any further torturing".

That same afternoon he again found himself in the office where he was interviewed by Captain Badenhorst. Before doing so the latter placed a small tape recorder on the table between them. The appellant cannot remember what they discussed but when they were through- some policemen arrived to take him to a magistrate. Badenhorst's parting words were: "If you do say shit to the magistrate, I will be waiting for you here on your return". Both Havenga and Captain Badenhorst instructed him not to tell the magistrate that he had been assaulted when asked this question. He agreed to this: "Ek sal nie kak praat nie". He was then taken to a magistrate, a Mr Badenhorst. After the latter had put the customary prefatory questions to the

appellant and recorded his answers, the appellant made his statement setting out in some detail his complicity in the first three incidents and describing the fourth. His statement reads as follows:

> "In Desember 1988 het ek 'n ANC man teegekom. Ek het hom daar by mev Mandela ontmoet, ons het daar 'n partytjie gehou. Ons het toe gesit en gesels met die man en ek het hom daardie dag leer ken. Hy het aan my gese hy verstaan dat ek al in die verlede persone gesien het wat ook lede is van die ANC. Ons is uitmekaar uit en hy het gese hy sal my in die toekoms kontak. Hy sal self sien hoe.
>
> 'n Paar dae later het hy 'n persoon na my ouerhuis gestuur om my te kom haal, ene Gybon. Ons is toe met Gybon weg, die ANC man was te Orlando-Oos. Ons het met die man daar gesit en hy het vir Gybon gese die moet uitkyk hou buitekant, ek het saam met hom in die huis agtergebly.
>
> Aangesien ek sy naam vergeet het, het ek hom sy naam gevra en hy het gese hy is Sonwabu.
>
> Hy het gese hy wil graag he dat ek saam met hom moet werk. Hy het my gewys hoe 'n AK sowel as 'n handgranaat werk. Hy het my gese van 'n plek wat ons sou moet aanval te Orlando-Oos by 'n shebeen waar polisiebeamptes drink.

Voordat ons die plek aangeval het, dit is nou daar gaan skiet het, het ons eers daar gegaan om inspeksie te hou. Ek het die perseel binnegegaan en daar 'n inspeksie gehou. Die volgende dag was ons 3 wat toe teruggegaan het na die betrokke huis. Ek het 'n AK by my gehad en Sonwabu ook. Gybon was die drywer.

Ons het ingegaan by die huis en Sonwabu het aan die voordeur gaan klop. Ek het daar by die venster aan die voorkant gewag. Nadat hy geklop het toe die mense oopmaak het hy geskiet en ek het ook deur die venster geskiet. Ons is toe daar weg en het gaan slaap te Orlando-Oos by hulle woning. Hulle is toe weer na my toe, ek dink na die einde van Januarie of Februarie (ek is nie seker nie), dit is nou Gybon en Sonwabu. Hulle het my toe gevra waar ons polisiemanne kan kry daardie betrokke dag. Ons het toe rondgery en totdat ons polisiebeamptes te Mzimhlope Hostel aangetref het - dit was 3 polisiebeamptes. Ons was in 'n motor terwyl die polisie gestap het. Dit was so 19:00 in die middag. Sonwabu het vir Gybon gese om aan my 'n handgranaat te gee. Hy het gese dat hy die polisiebeamptes gaan skiet en dat ek hulle pistole moet afvat sodra hulle val. Nadat hy hulle geskiet het, het 2 van hulle geval en die 3de een het gehardloop langs die voertuig. Ek was toe bang om daardie pistole te gaan vat.

Sonwabu het 'n paar. waarskuwingskote afgevuur terwyl ons terugtree na die motor. Ons het ingeklim eh weggejaag. Hulle het my naby 'n kerk by my ouerhuis afgelaai en weggery en ek het toe

huistoe gegaan.

Daar by Maart se kant is hulle toe weer terug by my. Dit was nog Gybon en Sonwabu. Hulle net gese ons moet 'n sekere huis aanval te Orlando-Wes omdat 'n seun van die betrokke huis 'n lid van die Mandela sokkerklub vermoor net. Ons het so 11 uur die nag gegaan na die huis. Ons het petrol en petrolbomme en Sonwabu het 'n AK gehad. Ons het die petrol gestrooi en met die petrolbomme gegooi en Sonwabu het toe geskiet. Ons het toe uitmekaar uitgegaan die betrokke dag. Daarna het Sonwabu alleen gereeld 'n besoek daar by my afgele aangesien Gybon in hegtenis geneem was.

Hy het by my gekom op die 1.4.89, ek was by 'n shebeen gewees. Hy het daar buite bly staan en my broer gestuur om my te kom roep. Ons het daar buite gepraat en ek het hom gese ek was besig om te drink daar binne. Ons is saam die huis in en het daar gesit en drink. Terwyl ons daar sit het ek net ' chips' gaan koop toe daar 'n argument tussen my en 'n ander persoon ontstaan. Ek het 'n mes uitgehaal en die mense het probeer keer insluitende Sonwabu. Terwyl almal die mes probeer afvat het 'n argument tussen Sonwabu en 'n lyfwag van daardie shebeen ontstaan. Die man het bly aan hom slaan en Sonwabu het die hele tyd gekeer en gese dat hy nie baklei nie.

Toe hulle klaar baklei het, het Sonwabu uitgegaan en my geroep. Hier vanuit sy broek het hy 'n handgranaat gehaal. Hy het dit in die erf geslinger tussen die hoofhuis en buitekamers. Ons

is toe saam weg en het te Zondi oornag. Die volgende oggend is ek toe weer huistoe en dit was om klere te gaan haal want hy het my aangeraai om weg te hardloop en nie daar te slaap nie, maar uitstedig te raak. Toe ek by die huis kom het ek besluit om te bly. Ek het my mense by die huis gese van die voorval op 1.4.89. Ek het hulle gese ek is nie bereid om vir die polisie te vlug nie, maar dat ek gaan wag vir die polisie. Ek het daar gebly totdat ek arresteer was op die 4de. Hulle het my gevra waar Sonwabu woon en ek het hulle gaan wys.

Hulle is toe na sy plek en hy het begin skiet. Die polisie het ook geskiet totdat die polisie op 'n
stadium 'n handgranaat in sy kamer geslinger het en hy is toe gevolglik dood. Dit is al."

I turn now to the State evidence. According to Havenga, on 27 April the appellant was interviewed from 3.10 pm to 5.30 pm in the company of Schoeman. They were in one office from the outset. Havenga did not know or suspect that the appellant had been involved in any specific offences. He questioned him about caches of arms within the Republic and about activities of terrorists beyond its borders. It was

 during the course of this interview that the appellant told Havenga about the Chili house incident of which Havenga was hitherto unaware. He then terminated the interrogation as he had other work to do and the appellant returned to the prison cells. He was not at this stage undressed or inspected for injuries.

The next day, 28 July 1989, an interrogation took place in the same office from 10.18 am in the presence of Ace Mhlongo. Schoeman and Frank Rametse were not present. Havenga took up the questioning where he had left off. He asked him about the two occurrences now known to him, that is, the fourth incident and the Chili house incident. Havenga's evidence of how the appellant came to make an incriminating statement to him is as follows:

> "Kan u vir die hof vertel hoe ver hy met sy verklaring gegaan het op die 28ste? -- Die 28ste toe ek die beskuldigde uitboek as gevolg van die

inligting die vorige dag, van die 27ste, het ek hom uitgevra en toe het ek gese okay ons dra nou kennis van die voorval waar die handgranaat gegooi is en ons dra nou kennis oor die voorval van mev Chili. Is daar nog iets wat jy vir my wil se, toe begin hy te huil.

Ja, so hoe ver met sy storie het hy gegaan voordat jy hom gestop het op die 28ste — Soos ek gese het die beskuldigde het gehuil en gese daar het mense, van sy eie familielede seergekry in hierdie handgranaat onploffing.

HOF: Mense van sy eie familie? -- Van sy eie familie en wat moet daardie mense nou van hom dink.

Het seergekry in hierdie wat? — Handgranaat ontploffing en hy het besef dit is 'n verkeerde daad en hoe sy familie hom ooit daarvoor kan vergewe en hy het hartstogtelik gehuil.

MNR JACOBS: Hoe ver het hy met sy storie gegaan? Toe het hy vir my gese dat hy polisiemanne gesoek het. Dit is weer Gybon en Sonwabu wat by sy huis aangekom het en hulle het hom gevra waar kan hulle polisiemanne in die hande kry. En ek het hom gevra ja en toe se hy vir my dat hulle wou die polisiemanne se wapens geroof het en toe het ek hom dadelik gestaak, die ondervraging gestaak."

Havenga told him that he was a peace officer and that

he would make arrangements for him to make a statement to a person authorised to take a confession. For this purpose Captain Badenhorst, at that time a lieutenant and a person thus authorised in terms of s 217(1)(a) of the Criminal Procedure Act, was called in to interview the appellant because a magistrate was not available. He did so at about 1.30 pm in one of the offices at the Protea Police Station. The appellant confirmed that he wished to make a confession. Captain Badenhorst warned him according to Judges' Rules and placed a tape recorder on the table. (The recording was available at the trial but not used and no transcription of what was said was handed in.) The appellant admitted that he had been involved in terrorist activities and murders. He furnished details to Badenhorst of all four incidents. Constable Mkalanga was present and available to act as

an interpreter although the appellant spoke and understood both English and Afrikaans. When asked by Captain Badenhorst whether he was prepared to repeat this statement to a magistrate, the appellant agreed. He was handed over to Constable Taljaard who took him to the magistrate. Captain Badenhorst awaited his return, was handed exhibit N and booked the appellant into his cell. It was at this stage that on Havenga's instruction he was undressed in his cell and he, together with two other policemen, inspected the appellant for any signs of injury. The absence of any was recorded in the Occurence Book at the police station. This is a precaution, one infers from the evidence, taken to refute any allegation of assault as an inducement to confess and of the presence of visible injuries at the time of confession and afterwards. Havenga carried out the examination

because no doctor was available.

Havenga denied that he ever assaulted the appellant as alleged or at all or that he brought any undue influence to bear upon the appellant to persuade him to confess. Both he and Captain Badenhorst deny that they instructed him on how he should answer questions put by the magistrate or that they threatened him in this regard.

Frank Rametse, Ace Mhlongo and Schoeman each gave evidence confirming that of Havenga and Captain Badenhorst as set out above.

The magistrate said that he asked the appellant the questions preceding the actual confession in exhibit N and correctly recorded his answers. (The accuracy of the interpretation was not contested.) The appellant was calm and at ease during the interview and the magistrate had no reason to think that the

appellant had been in any way coerced into making the confession.

On this conflicting evidence one must decide whether the court a quo was correct in concluding that the appellant failed to discharge the onus, imposed by s 217(1)(b) of the Criminal Procedure Act, of proving that the confession was not voluntarily made or that he was unduly influenced.

May I say at the outset that there are certain criticisms of the appellant's case, which were raised in argument before us and relied upon in the court a. quo, that on the facts of this case to my mind carry little or no weight or need to be placed in perspective.

Twice in the judgment of the court a quo there is reference, with some emphasis, to the fact that the appellant during cross-examination said that

made the confession voluntarily. This observation, plainly adverse to the appellant's whole case, was based on the following two passages in his evidence:

> "En u het ook getuig die rede vir die verklaring wat u gemaak het is omdat u gemartel is? -- Die polisie het vir my gese om die verklaring wat ek aan hulle gemaak het aan 'n landdros moet herhaal.
>
> Maar die rede hoekom u dit gedoen het is omdat u gemartel of dan nou aangerand is? -— Nee, ek het gese ek het 'n sekere verklaring aan die polisie gemaak en nadat ek daardie verklaring gemaak het het die polisie vir my gese ek moet dieselfde verklaring aan 'n landdros gaan herhaal.
>
> Om dit makliker te stel, hoekom het u die verklaring voor die landdros gaan afle? -- Dit is die polisie wat vir my gese het om die verklaring te gaan maak.
>
> Is dit die enigste rede? -- Dit is die enigste rede ja.
>
> So u het hom nie gaan maak omdat u geslaan is nie? — Nee.
>
> En u het ook nie die verklaring voor die landdros gaan maak omdat u geskok is nie? — Dit is reg ja.

> En u het ook nie die verklaring gaan maak omdat u in eensame opsluiting was nie? — Nee."

and at a later stage he said:

> "En u het, vandat u die dag gearresteer is het u saamgewerk en sommer die eerste aand het u Sonwabu se huis gaan uitwys? — Ja.
>
> U het nooit iets teruggehou van die polisie nie, is dit reg? — Ja.
>
> En die samewerking op daardie stadium was die hele tyd vrywillig gewees, is dit korrek? — Dit is reg ja-
>
> So tot en met die afle van hierdie verklaring het u niks teruggehou van die polisie af volgens u nie? — Dit is reg.
> U het dit alles ook vrywillig aan hulle vertel? Ja."

If these two passages are taken at face value, nothing is left of his opposition to the admissibility of exhibit N. However, in a number of other passages in the record before or after these excerpts,the appellant persists in his contention that the assaults did cause him to confess. For instance, in his evidence-in-chief

these questions and answers are recorded:

> "The statements that you made to the police on the 27th and the 28th, why did you make those statements? — It was because of the torturing.
>
> Right. And what did you think would happen, did you think anything would happen with the torturing if you made the statements? — Well I thought that they would stop torturing me."

And at a later stage under cross-examination:

> "Nou vra ek weer hoekom het u dit vir die landdros so gese, dit is nie die waarheid volgens u nie? -- Ek het voldoen aan wat die polisie aan my gese het naamlik dat ek die uitlatings wat ek aan hulle gemaak het aan die landdros herhaal, as ek anders gese het sou die polisie my weer gemartel het."

Thus the first-quoted two passages cannot be reconciled with the main basis of his opposition to the reception of exhibit N or with other answers he gave. There was no attempt during re-examination or by the court to seek an explanation for these startling contradictions and none readily comes to mind. Nevertheless, in

the circumstances I have difficulty in regarding the first-quoted two passages as conclusive, or virtually conclusive, evidence that the appellant's version amounts, or virtually amounts, to an acknowledgment that the assertion that he was assaulted is a fabrication. On the other hand, such contradictions and inconsistencies are not what one would expect from a witness who_is testifying confidently and truthfully on this vital aspect of his case.

The appellant said that when members of his family visited him in custody he did not tell any of them that he had been tortured. At a later stage he contradicted 'this by calling his girl friend and uncle who both said that the appellant on such visits had told them that he had been tortured. It is not clear on what basis these witnesses were permitted to give such evidence since at no stage did the State

contend that his ground of opposition was a recent fabrication. He also called his father who said that the uncle had told him of the appellant's complaint of assault. The basis for allowing this hearsay evidence is similarly obscure. However that may be, Mr Pienaar, who appeared for the appellant, quite correctly conceded that the evidence of these three persons was flawed and in fact worthless. The appellant must have had a hand in their tendering this false evidence. But it is understandable in the circumstances for him to have sought in this way to strengthen his case and his decision to do so in this manner ought therefore not to weigh heavily against him.

When he was asked by the magistrate whether his decision to confess was the result of any assault or threats, he denied this. But if in truth he had been tortured, such a denial is to be expected

unless he had been given the assurance - and was confident - that he would not be again placed in the custody or within the reach of those who had maltreated him. (Cf S v Mbonane 1979(3) SA 182(T) 187H - 188B; S v Hoosain 1987(3) SA 1(A) 10F - G.) In this regard he was also taxed for not having complained to the magistrate who visited him regularly in terms of s 29(9) of the Internal Security Act or to others who saw him whilst he was still in custody. He was pertinently asked to explain his failure to complain to a doctor:

> "U het nooit by al die besoeke van die dokters enige klagtes gehad nie? -- Ek het geen klagtes aan die dokters verstrek nie.
>
> Hoekom nie? — Ja, indien ek aan griep gely het of verkoue het ek dit wel aan die dokter openbaar maar nooit het ek aan die dokter genoem dat ek op enige wyse deur die polisie aangerand was nie.
>
> My vraag is nou hoekom nie? -- Nee, ek was bang om

> dit te openbaar want ek was nog onder die polisie se gesag gewees."

It is reasonable to suppose that this reason could also have restrained him from making any complaint to other officials.

The appellant denied that he had first-hand knowledge of what is contained in the confession: he alleged with reference to the first three incidents that what he had said had been told to him or read by him in the newspapers and that in so far as he is implicated does not reflect the truth. These denials were false and, not surprisingly, he fared badly when cross-examined in this regard. But one must bear in mind, and make due allowance for, the fact that such a denial is an understandable reaction on the part of an unsophisticated person who does not appreciate, or confidently accept, that the truth of his confession is

 not an issue in the "trial-within-a-trial" or that, should the confession be rejected, he would not be prejudiced if its truth is not denied during such hearing. In S v Dladla 1980(1) SA 526(A) 530D, Miller JA, pointed out that "an innocent person may falsely deny certain facts because he fears to admit them". And, after referring to certain decisions in which this has been recognised, continued:

> "The warning in those cases against the drawing of a possibly erroneous inference from the circumstance that an accused person lied in certain respects or performed some other act which raises suspicion of his guilt ought to have been specially heeded in the circumstances of this case."

This admonition needs to be as acutely heeded when assessing the weight to be attached to the appellant's false evidence in this regard.

Counsel for the respondent, Mr Nel, urged us

to draw an adverse inference from the fact that no marks or abrasions were discernable where the rope had been tied round the appellant's ankles and arms or wrists. He submitted that inevitably, or at least as a strong probability, bruises or. abrasions would have been evident on the appellant's description of the shock treatment received and its effect upon him. But in the absence of any evidence that the rope was in direct contact with his skin, this point is not well taken.

I turn to other evidence of the appellant, which - still considered in isolation - is in my view open to more cogent criticism.

The appellant stated that from the time of his arrest until he was first assaulted he and Havenga worked together harmoniously ("het mooi saamgewerk") and were throughout on a friendly -footing.

(Incidentally the evidence of Havenga confirms this relationship with some illustrations of how well they got on and this evidence was not challenged in cross-examination.) In such circumstances it seems highly improbable that on the morning of 27 April Havenga, as the appellant said, would have made such a volte-face by slapping him without first saying a word and then saying no more than "you are not prepared to tell me any story but many people told me many stories." And when challenged to produce his informants, Havenga does not mention their names or disclose what they are alleged to have told him: in fact he said nothing more before he set about torturing the appellant. It was only after being tortured that the appellant was again asked whether he was prepared to talk or not On 28 April when he was once more brought to that office "on entering this room" Havenga accused him of "not being

 prepared

to tell him a story or stories" and proceeded to tie his ankles and hands together with a view to again torturing him. But when they parted company the previous afternoon, Havenga was satisfied with the response of the appellant and had no reason to think that the appellant was no longer prepared to collaborate. The appellant himself said - on his version rather incongruously - that he was not afraid, despite the presence of the machine, when he entered the office the next morning:

> "Maar kyk die oggend van die 28ste was u nie bang nie? — Ja, ek was nie bang nie.
>
> Maar toe was u ook onder polisie beheer? -- Ek was alleen gewees in die sel, daar was hoegenaamd geen polisiemanne in my onmiddellike omgewing, dus was ek nie bang nie.
>
> Is dit nou die regte storie wat u nou vertel ? -- Ja.
>
> U meen u was nie eers bang toe u in die kantoor instap en op die tafel sien u die masjien wat u

> gister geskok het nie? — Nee, ek was nie bang toe ek die apparaat op die tafel gesien het nie. Glad nie? — Glad nie."

In the circumstances it seems unlikely that Havenga would have assumed that the appellant was no longer prepared to co-operate and would have made preparations on 28 April to torture him without first questioning him. The appellant was asked about this in cross-examination and could not provide a satisfactory answer. The evidence reads as follows:

> "Adjudant-offisier Havenga was tevrede op die 27ste dat u nou genoeg vir hom gese het? — Ja, ek vermoed dat hy tevrede was.
>
> En hy was tevrede? -- Ja.
> Hoekom kom hy op die 28ste in die kantoor en beskuldig jou dat jy nie bereid is om die waarheid vir hom te vertel nie? — Ek dink adjudant-offisier Havenga kan in staat wees om daardie vraag te beantwoord, ek is nie in staat nie."

This evidence appears to me to be unconvincing.

Thus, viewed as a whole, one is bound to conclude that his evidence is in certain respects -- contradictory and improbable. Furthermore his untruthfulness, in the respects to which I have referred, cannot be left entirely out of account. In the result, though differing somewhat from the court a quo on the importance to be attached to certain deficiencies in his evidence, I agree that it must be regarded as unreliable.

The extent to which the State witnesses refute his version of what took place is self-evident. The court a quo found them to be good witnesses. Mr Pienaar was unable to point to any inherent shortcoming in their testimony which could warrant its rejection. One is therefore bound to conclude that the appellant failed to discharge the onus of proving that any assaults induced his

confession.

Nor can it be said that any other form of undue pressure prompted it. It was argued that the fact that the appellant was detained in terms of s 29 of the Internal Security Act and underwent a lengthy period of interrogation could be regarded as undue influence. There is no substance in this submission. It is true that one of the avowed objects of such detention is to question a detainee, though not necessarily in connection with any offence that he is alleged to have committed. No doubt any admission or confession made during the time that a person is thus in custody ought to be subjected to special scrutiny. (Cf S v Hassim and Others 1973(3)SA 443(A) 454 C - F.) However, in this case at no stage did the appellant contend that, apart from the slap and the use of the shocking apparatus, undue pressure was brought to bear that

resulted in his confession or indeed at all. This he confirmed under cross-examination:

> "En in u getuienis het u wel gese u was in 'solitary confinement', eensame opsluiting, is dit korrek? — Ja.
>
> U het nie melding gemaak dat dit 'n invloed gehad het dat u die verklaring maak nie? — Dit is reg ja.
>
> Dit het nie 'n invloed op u gehad nie, is dit korrek? — Dit is reg ja."

Furthermore it. is of some significance that in his application for leave to appeal under the heading of "The presence of undue influence" persistent or unreasonable interrogation is not mentioned. All that. is alleged is "that there was an element of trickery in the police interrogation". This certainly does not emerge from the evidence of Havenga, nor is it an inference that can be drawn from the evidence of the appellant himself.

40. It remains to consider whether the death penalty imposed in the case of each of the 9 murder convictions is in the circumstances the only proper sentence. The aggravating features are manifest and hardly call for any expatiation. They were premeditated with the deliberate intention of" causing death and destruction. The motive for the Orlando East attack was a most reprehensible one and executed in the knowledge that the killing would be indiscriminate. The avowed object of the Meadowlands murders was to rob policemen of their fire-arms. The Chili house incident was an act of revenge directed at innocent children or, at best for the appellant, aimed at the occupants regardless of their identity and whether or not they had any connection with the death of Madondo. The anguish and devastation caused by these murderous assaults can hardly be overstated. As it was

41/...

put by one of the State witnesses, Mr Excellent Thotobolo, at the conclusion of his evidence:

> "As gevolg van die skietery is die linkerbeen gebrekkig ja. Ek is nog nie heeltemal genees nie want my been was verbrysel en as gevolg van die beseerde kuit is daar nou 'n gat aan my onderbeen en as gevolg van hierdie gat kan ek nie meer 'n kortbroek aantrek nie. En ten laaste, ek was maar 'n onskuldige persoon, ek het nie hierdie aanval verdien nie."

The age of the appellant - he was 19 1/2 years old when the offences were committed - is the only valid mitigating factor. It is an important one, but entirely outweighed by the aggravating features of this case. They require one to lay stress on the retributive and deterrent objectives of punishment to the extent that makes the death penalty on each count the only proper one.

The appeal is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

NESTADT JA) Concur
VAN DEN HEEVER JA)