Case No 129/96

HARRY BANNENG ZAKADE	Firts Appellant
SIMON SIPHIUE PETER	Second Appellant
NICOLAAS KAMQUA	Third Appellant
JOHANNES DABULA	Fourth Appellant
ERIC MOKOENA	Fifth Appellant
THE STATE	Respondent

CORAM: NESTADT ,HOWIE et SCOTT JJA

HEARD: 5 NOVEMBER 1996

DELIVERED: 18 NOVEMBER 1996

JUDGMENT

HOWIE J A:

HOWIE JA :

In the Transvaal Provincial Division, before Goldblatt J and assessors, the five appellants were convicted and sentenced on a variety of charges. Three co-accused were acquitted. With the trial Judge's leave, appellants appeal against their convictions.

The only incriminating evidence against each appellant was a written confession, the admissibility of which was disputed. After an interlocutory hearing as to that dispute, the confessions were admitted. as having been properly proved in terms of s.217 of the Criminal Procedure Act, 51 of 1977. The question now is whether the trial Court's decision to admit them was correct.

The alleged offences were committed in the Boipatong area of the district of Vanderbijlpark on 26 September 1993. One of them involved the killing of a Boipatong policeman. Appellants were arrested nine days later during the early hours of 5 October. The confessions were made at

various times between 14h00 and 16h00 the same day.

The challenge to admissibility was based on the allegation, formally made by the attorney representing appellants, that the confessions were the product of police assaults.

The relevant State evidence consisted of the oral testimony of Sergeant Michael Kolokoto and Constable Nkosi Ngubo of the South African Police, together with documentation comprising the formally recorded questions and answers incorporated in the forms embodying the confessions as well as extracts from certain police Occurrence Books.

From the defence side two formal admissions were made but no evidence was led. The first admission was that appellants' answers as reflected in the confession forms were correctly recorded. The second was that appellants were not assaulted by those police officials who took them to make their respective confessions.

The sole ground on which the trial Court found that the confessions were admissible was that in the recorded answers already referred to, appellants unequivocally admitted that they were making the confessions voluntarily and without having been unduly influenced to do so. In the absence of evidence that such admissions were untrue, said the Court, they constituted uncontradicted prima facie proof of the requirements of admissibility.

It is indeed so that appellants' relevant answers preceding their confessions contain clear admissions as to voluntariness and the absence of undue influence. Those, I may add, were the only admissibility requirements in contention. However, the essential enquiry is whether the admissions constituted sufficiently reliable material to amount to prima facie evidence on the particular facts of this case.

As mentioned during the course of the appeal hearing, another enquiry that might conceivably arise is whether the admissions themselves were voluntarily made, in order, like other admissions, to be admissible in terms of S.219A of the Act. That question is not ordinarily raised in the present type of interlocutory hearing. The probable reason is that such admissions are dealt with as part and parcel of the material on which admissibility of the confession is judged, they are readily admitted for that purpose and usually the admissibility or inadmissibility of the confession turns on considerations which make it unnecessary to determine the admissibility of such admissions on their own. Be that as it may, I shall assume in the State's favour that the trial Court correctly had regard to the content of the admissions.

Before dealing with the evidence of Kolokoto and Ngubo it is necessary to say that four of the appellants bore signs of injury when they came to confess. First appellant

had a swelling on the back of his head, weals on the back of his thighs, a swollen upper lip and swollen hands. Asked about these wounds, he said municipal policemen hit him with sticks at the time of his arrest, not in order to make him confess but because they said he and the other arrestees had killed a policeman. In a later answer he said he was only assaulted at Boipatong police station.

Second appellant had an open wound on his head and signs of blows to the body. Oddly enough he was not asked by the recording magistrate how he had sustained these injuries. It was only at the end of his confession that he added that he was assaulted by the police at the time of his arrest.

After third appellant was asked if he had injuries, it was recorded that he had an open wound on the head, a swollen left arm and painful right ribs. He said that some of his fellow arrestees hit the municipal policemen that arrested them; he joined in and was struck by the police

in return.

Fourth appellant presented with a swollen upper lip and said he was involved in a fight at a tavern prior to arrest.

Fifth appellant had no injury and alleged no assault but in the circumstances of this matter, if relevant reasonable doubt arises from the fact of the wounds exhibited by the other appellants, that doubt should, in fairness and in logic, enure also to his benefit, too. Counsel for the State conceded that, and correctly so.

Bearing in mind the incidence of the onus, therefore, the State had to show that the injuries referred to were not inflicted in order to elicit the confessions.

Kolokoto and Ngubo were municipal policemen at the time and attached to the Boipatong police station - a so-called satellite station of Vanderbijlpark. Testifying in the main case prior to the interlocutory hearing, Kolokoto said that the arrest squad comprised municipal police and,

for their protection, members of the Stability Unit as a back-up force. According to him the last arrest was complete by about 04h00 on 5 October. Neither appellants nor their co-accused were assaulted prior to his handing them over at Vanderbijlpark police station for detention. When he left them there none had any injuries. Had there been any sign of an injury he would have seen it. He denied the allegation made on behalf of appellants that he and other policemen assaulted them. He said he did not know that appellants had later made statements. It was then put to him that if appellants did sustain injuries they must have done so in police detention. The record describes his answer as inaudible but to judge from what followed, his response to that particular question must have been short and insignificant.

After Kolokoto had given that evidence the proceedings were adjourned. Three days later the admissibility trial began and he testified again. Obviously he was called in

an endeavour by the State to try to explain how appellants' injuries occurred. The witness commenced by saying that certain of the appellants and their co-accused had sustained injury when, after arrest, they fought among themselves in the forecourt of the Boipatong police station. However, he said he did not see this himself - it was reported, to him by Ngubo who claimed that all the appellants and their co-accused had been involved. Kolokoto weakened the State's attempted explanation even more when he mentioned having seen appellants afterwards but observed no injuries. All he offered was that "hulle gelyk het soos mense wat baklei het, maar by die gesigte het ek nie enige wond gesien nie". Referred to the injuries recorded in the case of first appellant, the witness then came forward with the allegation that first and fifth appellants had wrestled with one another inside the police station. Asked if they sustained injuries in the course of that episode, he said "Ek kan so se".

He did not know how second appellant had come to be injured but he alleged that third appellant and his brother (the acquitted accused no 8) had fought with one another at the time they were arrested. The witness said that no question of appellants' making statements had arisen prior to their detention at Vanderbijlpark.

In cross-examination Kolokoto was referred to his evidence in the main case to the effect that when he handed the arrested persons over at Vanderbijlpark none of them had injuries and was then asked whether he now alleged that their injuries had been sustained in the brawl in the Boipatong forecourt. He said: "Dit kan positief wees". Not long afterwards, however, reminded that he had seen no wounds after the alleged fracas, he lamely conceded that he had no explanation for their causation and that they must have been caused while in detention at Vanderbijlpark. He also confessed to having failed to record the fight in the Boipatong Occurrence Book.

Ngubo made an equally poor showing. Having started with the broad allegation that the fight in the forecourt involved "die beskuldigdes" (apparently all of them), he then said that only four had taken part. Later this dwindled to two, namely, third appellant and his brother. The latter, said Ngubo, wanted to tell the police the truth but third appellant hit him with a stick to try to silence him. The witness said he and his colleagues let these hostilities develop because they wished to hear what promised to be information incriminating the detainees.

Ngubo, like Kolokoto, denied the accusation put by appellants' attorney that they were assaulted by the police, whether to make them confess or at all.

As part of the evidential material relative to the admissibility issue prosecuting counsel handed in extracts from the Boipatong and Vanderbijlpark Occurrence Books. The former had to do with the arrests, the latter with the detentions. It is not clear that the relevant entries were

accepted or even tendered as being evidence of their truth but there is no doubt that they were accepted all round as true and accurate evidence of what was officially recorded with regard to the arrests and detentions in question.

The pertinent entries may be summarised as follows. A Boipatong entry at 02h00 records the arrest of third and fourth appellants and their admission to Vanderbijlpark police station. An entry at 03h00 refers to the arrest of second appellant and one at 04h25 to the arrest of first appellant. A Vanderbijlpark entry at 05h05 by a Warrant Officer Mostert records the detention of a group including second, third and fourth appellants and the report "Hulle het geen klagtes of beserings nie". No Vanderbijlpark entry mentions the time of detention of first and fifth appellants. However at 07h25 there is an entry signed by one Kruger (no initials or rank are given in. the Court record) reading:

"Harry Zagadi ... kla almal van aanranding. Bekom verklaring en neem na D.G."

Finally, at 08h50 the entry reads:

"Ondersoek uit Deur S/Sers. Thekiso 10 S/mans soos (then follow ten names including those of appellants and their three co-accused) op MR795-10-93 Moord. Klagtes en beserings soos reeds gerapporteer."

Whether, in regard to this last entry, the detainees were taken out to the District Surgeon or in pursuance of the investigation one does not know.

What is plain overall is that there must have been a number of Vanderbijlpark policemen who could have shed some light on the progress of appellants' detention from inception to confession.

The trial Court "unhesitatingly" rejected the evidence of Kolokoto and Ngubo and recorded its impression that they had not told the whole truth.

One readily endorses this conclusion adverse to the State's only witnesses but strong suspicion must

necessarily arise as to what it was they were attempting to conceal.

The trial Court advanced the same grounds for admitting all the confessions. Exemplifying its reasoning is the following passage in relation to first appellant:

> "In our view, the answers given by the accused, clearly indicate that he was making a statement freely and voluntarily as envisaged in Section 217. There is no evidence before us that the statements made by the accused were not true, nor has any evidence been placed before us to cast any doubt upon the truth of the admissions made by the accused to the person taking the statement. Accordingly we find that there has been due compliance with the provisions of Section 217(1) of the Criminal Procedure Act and that the statement made by accused 1 is admissible."

Later follows this observation:

> "In general I would remark that the fact that a person making a statement either alleges that he was assaulted or has physical evidence of such assault, does not of necessity mean that there is a causal link between either the assault or the injury and his desire or willingness to make a statement. If there is such a causal link, the only person who would know whether or not there is such a causal link, is the accused and it is for the accused to at least give evidence of such a causal link before it can be argued that a suspicion should exist in the court's mind

which is not based on any factual evidence." Save for the first sentence in the last-quoted passage, 1 cannot agree with the trial Court's reasoning in either of these crucial excerpts. Starting with the second sentence in the later passage, it seems to me that this misplaces the onus. It was for the State to establish the requisites for admissibility and, consequently, for it, not appellants, to show that if they were assaulted such violence was unrelated to their decisions to confess. In seeking to discharge its onus the State produced evidence to the effect that appellants were neither assaulted nor injured prior to their being detained in the cells at Vanderbijlpark. That, at the latest, was at about 05h00 on the morning concerned. Approximately two-and-a-half hours later they were apparently complaining of assaults, so much so that it occurred to some police official that examination by a district surgeon would be appropriate. As remarked earlier, one does not know whether that idea was

followed up but the undeniable fact is that when the confessions were made four appellants had injuries consistent with assault. From this evidence it is a compelling inference that their injuries were indeed due to police assaults. As for the reason for such assaults, there are two equally strong possibilities: reprisal for appellants' suspected complicity in the killing of a police colleague or intimidation aimed at eliciting confessions. The State failed to lead any evidence to clear up the position. On its own case there was a reasonable possibility, to put it at its very lowest, that appellants were assaulted to make them confess.

This brings me to the earlier of the quoted passages in the trial Court's admissibility judgment. The absence of evidence to show that the confessions were untrue, assuming that to have been a relevant consideration for purposes of the admissibility enquiry, was wholly inadequate to solve the prosecution's difficulty. Far from

there being no evidence to cast doubt on the truth of the admissions made by appellants in answer to the prefatory questioning, the evidence that there was, raised doubt which, as I have said, was at the very least reasonable. If the evidence presented by the State rendered it open to reasonable doubt whether appellants confessed voluntarily, the self-same factors that give rise to that doubt must inevitably taint the admissions as well. If somebody wanted to force them to confess, that person would just as much have wanted them to give pro-prosecution answers to the preliminary questions. In this case the impact of appellants' answers was nullified by the implications inherent in the oral and documentary evidence emanating from the police. There was thus no logically defensible basis for regarding appellants' admissions as sufficiently reliable independent material by means of which to overcome the doubt attaching to the making of the confessions. There was therefore no prima facie case which could, in the

absence of defence evidence, be regarded as proof beyond reasonable doubt.

In addition, it seems to me that the trial Court overlooked the caveat expressed in S v Mkwanazi 1966 (1) SA 763 (A) at 745G and S v Radebe 1968 (4) SA 470 W at 414D that where a confession is the only incriminating evidence the question of admissibility must be particularly carefully investigated. This does not mean, of course, that the State's onus is any heavier. What it means is that in weighing up whether that onus has been discharged in such a case the application of caution and common sense will tend to lead more readily to doubt in the reasonable mind.

For these reasons I think the confessions were wrongly admitted and that the appeal must succeed.

The following order is made.

1. The appeals of all the appellants are allowed.

2. All their convictions and sentences are set aside.

C.T. HOWIE JUDGE

OF APPEAL

NESTADT JA] CONCUR

SCOTT JA]

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