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N v H

NGQANDU & TWO OTHERS v THE STATE

SMALBERGER, JA -

611/88

N v H

IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)

In the matter between:

MTUTUSELI NGQANDU

First Appellant

MNCEDISI NIMROD BIKA

Second Appellant

NKULULEKO RICHARD SODODO

Third Appellant

and

THE STATE

Respondent

CORAM:

VAN HEERDEN, SMALBERGER, JJA,  
et NICHOLAS, AJA

HEARD:

26 FEBRUARY 1990

DELIVERED:

22 MARCH 1990

J U D G M E N T

SMALBERGER, JA -

The three appellants, together with four  
other accused, appeared before FOXCROFT, AJ, and two

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assessors in the South Eastern Cape Local Division on a charge of murder. The charge arose from the death of one Lungele Nicholas Manene ("the deceased") at Port Elizabeth on 22 September 1985. The appellants were respectively accused 1, 3 and 4 at the trial. At the conclusion of the trial the first appellant was convicted of murder without extenuating circumstances and sentenced to death. The second and third appellants were both convicted of assault with intent to do grievous bodily harm, and each was sentenced to three years' imprisonment wholly suspended. The remaining accused were acquitted (some having been discharged at the end of the State case). The appellants unsuccessfully applied to the judge a quo for leave to appeal, but were subsequently granted leave by this Court to appeal against their convictions.

It is not in dispute that on the night of 22 September 1985 the deceased, a policeman, who was off-duty at the time, was set upon by a group of people in a street in Soweto, a black township in Port Elizabeth, and severely and brutally assaulted. The deceased's attempts to escape from his assailants were thwarted, and he was ultimately rendered helpless and set alight. The cause of his death was multiple injuries. The post-mortem examination revealed, inter alia, that he had 90% burns to his body, multiple stab wounds, including stab wounds of the heart, both lungs and the abdomen, and fractures of the jaw, nose and skull.

At the conclusion of a protracted trial-within-a-trial, the trial court ruled admissible certain confessions made by the three appellants, notwithstanding their claims that the confessions had not been freely and voluntarily made. In the case of

the second and third appellants it is only their confessions which link them to the events surrounding the deceased's death. The first appellant is further implicated in such events by the evidence of one Nkotove. He claimed that on the night the deceased was killed the first appellant came to a shop where he (Nkotove) was working. The first appellant had blood spots on his face, and he told Nkotove and others in the shop that "they had just killed Manene". This was a reference to the deceased. The first appellant confirmed this on a visit to the same shop the following day when he produced a newspaper cutting which contained a report about the deceased's death and a photograph of the deceased. The tracksuit top which Nkotove claimed the first appellant was wearing on the night in question was later found to have the blood of a primate on it.

The trial court accepted Nkotove's evidence.

On the strength of such evidence and the confession made by the first appellant, the court held that the first appellant had actively participated in the attack upon the deceased with the intention of killing him, and was therefore guilty of murder. It found, further, on the strength of their confessions, that the second and third appellants had during the course of the events immediately preceding the deceased's death, assaulted the deceased by respectively hitting him with a stone and throwing stones at him, but that neither had had the necessary intent to kill - hence their convictions of assault with intent to do grievous bodily harm.

The present appeal hinges mainly on the admissibility of the confessions made by the three appellants, more particularly on the question whether

they were freely and voluntarily made. It was conceded by Mr Kuny, for the appellants, that if the confessions were rightly admitted the appellants' convictions must stand and their appeals must fail. Mr Kuny also abandoned, rightly in my view, any suggestion that the confessions had not been correctly interpreted. He contended, however, that the trial court erred in holding that the confessions admitted in evidence were freely and voluntarily made. It therefore becomes necessary to consider the evidence at the trial-within-a-trial relevant to this contention.

A great deal of evidence was devoted to the events which occurred between the night of 23/24 September 1985 and the time the three appellants, and certain other accused, made confessions. On the night in question police raids were carried out at the homes of persons suspected of having participated in

the killing of the deceased. The homes of the three appellants were amongst these. The police were supported by members of the defence force. Various suspects, including the three appellants and their erstwhile co-accused, were taken from their homes and paraded in front of the lights of police vehicles with a view to their possible identification by informers or potential witnesses (who remained hidden from sight). Those who were detained on suspicion of their involvement in the deceased's death were thereafter taken to a police station referred to in evidence as "Berry's Corner". The appellants, their co-accused and the defence witnesses all testified to assaults upon them either during the course of the events that occurred that night, or at Berry's Corner. Their individual experiences differed, and the precise nature and extent of the assaults alleged by them varied from



person to person. Much of their evidence in this regard stands unrefuted, because they were unable to identify the alleged culprits, thereby creating difficulties in the way of the State in leading evidence in rebuttal.

On the morning of 24 September 1985 the detained suspects were handed over to detectives of the Murder and Robbery Squad responsible for investigating the circumstances of the deceased's death (the investigating team). There appears to have been virtually no prior contact between the suspects (including the appellants) and the members of the investigating team. The appellants (and others) were taken to Louis le Grange Square. The headquarters of the investigating team were situated there. They claim that they were further assaulted there in order to induce them to confess to the killing of the

deceased. Their allegations in this regard were denied by the policemen whom they sought to implicate.

It was argued that the evidence before us established that even before the appellants and others were taken to Louis le Grange Square they had been subjected to assaults on a systematic pattern with a view to ultimately extracting confessions from them. This, it was contended, heightened the probability that they were similarly dealt with at Louis le Grange Square. It can be accepted that between the time of their initial detention and when they were handed over to the investigating team the appellants and others were, regrettably, subjected to heavy-handed treatment, and perhaps even assaults, by certain members of the police and defence forces. This must be borne in mind as part of the background to the making of the confessions. However, the evidence does not support

the suggestion that there was a discernible pattern of assaults designed to elicit confessions from the various suspects. The alleged earlier assaults, with one or two exceptions, did not involve members of the investigating team. The witnesses who testified to such assaults were, in the main, unsatisfactory witnesses, and their allegations were denied by the members of the investigating team they sought to implicate. Although part of the overall picture, the appellants do not seriously suggest that the earlier assaults were instrumental in making them confess. They claim that it was the assaults upon them at Louis le Grange Square that caused them to do so. The proper approach to follow to determine whether each appellant's confession was freely and voluntarily made, and therefore correctly admitted in evidence, is to have regard to the circumstances pertaining to the

confessions made by each individual appellant. To this end the following must be considered: the claims of assault made by each appellant; contrary denials by the police witnesses; findings of credibility by the court a quo; and the general probabilities. Regard must also be had to the incidence of the onus of proof.

It is common cause that the first appellant was interrogated at Louis le Grange Square on the morning of 24 September (although the precise events that occurred there are in dispute). In the afternoon he was handed over to Captain Kriel ("Kriel"), to whom he made a written statement. The following morning he accompanied Kriel to the scene of the crime where he allegedly pointed out certain spots. Shortly after he returned from doing so he was taken to a magistrate, Mr Smith ("Smith"), to whom he made a further written statement. The admissibility of the statements made

to Smith and Kriel, and the pointing out to the latter, were challenged at the trial-within-a-trial.

It appears ex facie the statement made by the first appellant to Smith (which amounted to a confession, and to which I shall refer as such), that it was freely and voluntarily made. It was common cause that having regard to the provisions of s 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 the onus rested upon the first appellant to prove the contrary. In the case of the statement to Kriel the onus was on the State to prove the necessary pre-requisites for its admissibility. (The trial court ruled that the evidence in relation to the pointing out to Kriel was inadmissible, and nothing further need be said about the matter.)

The first appellant testified that he had been assaulted at the time of his initial detention as

a suspect, but not at Berry's Corner. When eventually taken to Louis le Grange Square he was interrogated by Detective Warrant Officer Strydom ("Strydom") and Detective Constable Oliphant ("Oliphant"). He was shown a newspaper cutting with a picture of a person (presumably the deceased), and was asked if he knew who the person was. When he denied that he knew the person he was struck by Oliphant with an open hand in the presence of Strydom. He was told to undress, which he did. He was later again struck by Oliphant. By that time Strydom had left. While being struck by Oliphant, Detective Sergeant Ntabeni ("Ntabeni") entered the room where they were. While attempting to ward off Oliphant's blows the first appellant fell, whereupon he was kicked by Ntabeni. He was told to tell the truth, and that he would be beaten until he did so. He was then taken to another room which had

blood on the walls. There he was further assaulted by Oliphant and Ntabeni. At that stage Detective Constable Ngoji ("Ngoji") arrived. He told the others to leave the first appellant alone. Ngoji then took the first appellant to Strydom. He denied having any knowledge of the deceased's death, but was told by Strydom that he should make a statement implicating himself, and that he would be further assaulted if he did not do so. He was not given details of what he should say. He was then taken to Kriel to make a statement. He was warned beforehand not to tell Kriel that he had been assaulted. He made a statement to Kriel. He did so because of the assaults upon him. He was not assaulted again thereafter. The following day he made a statement to Smith. He was again warned by Strydom before going to Smith not to mention that he had been assaulted. The statement to Smith was also

made because of the assaults upon him, and the threat of further assaults.

According to the first appellant, when he made his statement to Kriel he had red marks or weals over the front of his chest and stomach and grazes on his elbows. Both his feet were swollen and visibly injured as a result of his having been hit on his feet with sjamboks. His feet were also blistered where he had been burnt with cigarette ends. There was dried blood on his feet as well. These marks were allegedly caused during the assaults upon him at the time of his initial detention. Because of the injuries to his feet he could not wear shoes, and walked with difficulty. When he made his confession to Smith the following day he could still not walk properly, and this must have been obvious to Smith.



The first appellant's evidence was denied by Strydom, Oliphant and Ntabeni. It was never put to Ngoji that he had told Oliphant and Ntabeni to stop assaulting the first appellant. According to Kriel he asked the first appellant whether he had been assaulted or threatened by anyone to make a statement. To this the first appellant replied "No". When asked if he had any injuries the first appellant replied that he had injuries to his back and right foot. He was asked to point these out whereupon Kriel noted:

"Daar was 'n 2 sentimeter velkneusing op die linkerkant van die rug en 'n 2 sentimeter velkneusing op die kant van die regtervoet."

He had no other visible signs of injury. Kriel enquired from the first appellant as to the cause of his injuries. The first appellant told him that he had been assaulted at the time of his initial detention earlier that morning. He added that the fact that he

had been assaulted had not influenced him to make a statement.

Smith testified that when the first appellant came to his office to make his confession he had no visible signs of injury. In the course of introductory questioning the first appellant denied that he had been assaulted or threatened to make a statement, and disclaimed having any injuries. He also stated that he had not been influenced in any way to make a statement. Smith did not observe any signs of injury on the first appellant, although he did not specifically examine him for injuries as the first appellant had not alleged any. It was never suggested to Smith (who testified before the first appellant) that the first appellant had walked with difficulty and that he (Smith) must have observed this.

The trial court gave a very brief judgment on

the question of the admissibility of the contested statements. It specifically refrained from dealing in detail with the credibility of the various witnesses. It ruled that the confession made by the first appellant to Smith was admissible, holding that there was "no doubt" that the first appellant had failed to discharge the onus upon him of proving that his confession was not freely and voluntarily made. The statement made by the first appellant to Kriel, and the subsequent pointing out, were ruled inadmissible. The reason given was that "(w)e are not convinced that the injuries which accused no 1 received at the time of the arrest, however slight, played no part in his making of a statement to Captain Kriel some hours later", and that the same consideration applied to the pointing out. In a later passage in its judgment the trial court also makes mention of the statement having

been made "only a matter of hours after accused no 1 was apparently ill-treated in some minor way at the time of his arrest".

I am unpersuaded that the trial court erred in admitting the first appellant's confession to Smith. If anything the trial court was unduly cautious in excluding the first appellant's statement to Kriel, although undoubtedly that was the better side on which to err. The first appellant was an extremely poor witness. His own counsel was obliged to concede that he was not a credible witness. He grossly exaggerated the extent of the assaults upon him at the time of his detention, as well as the extent of his injuries. According to him his injuries were far more severe than recorded by Kriel. There is no reason why Kriel would have noted some, and not all, of his injuries. His claim that he walked with difficulty when he went to

make his confession finds no support in the evidence of Smith. Implicit in the findings of the trial court is a rejection of the first appellant's evidence of the extent of the assaults upon him and their consequences. Reference was made to the first appellant having been "ill-treated in some minor way" and having suffered "slight" injuries - a far cry from the first appellant's own evidence on this score. There was clearly never any acceptance of the first appellant's evidence by the trial court, nor any rejection of that of the State witnesses. There are also contradictions, and improbabilities in the first appellant's evidence. He contradicted himself on the question whether Strydom was present when he was first assaulted at Louis le Grange Square, and on the details of the assault upon him there. He claimed that he did not tell Smith that he had been assaulted because he was told not to. Yet

the same admonition did not prevent him from telling Kriel that he had been assaulted. (In all probability the assault upon him at the time of his initial detention was a minor one, and its effects had worn off by the time he saw Smith - hence the reason for not mentioning it to Smith). He also stated that he had refrained from telling Smith that he had been assaulted because he was afraid that the police would come to hear of it if he told him. This contradicted his earlier evidence that he believed that the police would remain unaware of anything he told Smith. He claimed that Strydom had told him to make a statement falsely implicating himself, but never told him what to say. This is highly improbable. Strydom had no means of knowing whether he would make a statement which remotely coincided with the facts, and if it did not, the statement would have been worthless. One

would therefore have expected Strydom to have told him what to say. In all the circumstances the first appellant quite clearly failed to discharge the onus resting upon him. As previously mentioned, it is conceded that if the first appellant's confession was correctly admitted his conviction must stand. It follows that his appeal must fail.

It will be convenient to deal next with the third appellant. It is common cause that he made a statement to Lieutenant Jonker ("Jonker") early on the afternoon of 25 September, and that on the following day he accompanied Major Oosthuizen ("Oosthuizen") to the scene of the murder where he pointed out certain spots to him. Although Jonker and Oosthuizen both testified before the third appellant I propose to deal with the latter's evidence first.

According to the third appellant, he was not

assaulted at the time of his detention. Later, at Berry's Corner, he was questioned about the deceased's death and thereafter assaulted. A piece of tube was placed over his face and he was suffocated. In addition he was hit and kicked. He was unable to identify his assailants. Later he was taken to Louis le Grange Square. There he was initially questioned about the deceased's death by Ngoji. He denied all knowledge of it. He was ordered to undress and to lie down on his stomach. He did so, with his head turned and one cheek flat on the ground. Ngoji held his hands behind his back, and ground with one foot on the third appellant's other cheek. Two other policemen, one white and one black, then entered the room where the third appellant and Ngoji were. The third appellant was not able to identify either of them. The white policeman struck him in the face twice with



an open hand. He then left the room and returned with a knobkierie with which he proceeded to hit the third appellant several blows on each arm. The blows were hard and caused the third appellant's forearms to swell visibly. Thereafter Ngoji throttled him and threatened to throw him out of the window. The white policeman then placed a piece of tube over his face which suffocated him. This was repeated a number of times until he eventually agreed to make a statement. The white policeman then apologised to him for the assaults. After that he was taken to Jonker by Ngoji. He was crying, and his face and body were red and swollen in places as a consequence of the assaults upon him. Jonker enquired from Ngoji whether he (the third appellant) had been assaulted. Jonker himself never assaulted him. He then proceeded to make a statement to Jonker. He did not do so freely and voluntarily

but because he had been assaulted. He also claimed that he was forced to go and point out places to Oosthuizen, and denied that he had directed Oosthuizen to the scene of the crime. He further denied that Oosthuizen had asked him whether he had been assaulted or threatened to do a pointing out.

Jonker's evidence was to the following effect. He interviewed the third appellant in his office. After having been duly warned and informed of his rights, the third appellant elected to make a statement. He did so freely and voluntarily and without being influenced thereto in any way. When the third appellant was brought to him he was not crying, nor did he have any visible signs of injury apart from a wound on his left side. When asked about it, the third appellant stated that it had been caused by a fall from a bicycle. (This was subsequently confirmed

by the third appellant when he testified.) The following day he handed the third appellant over to Oosthuizen after he had declared his willingness to go and point out the scene of the crime. According to Oosthuizen the third appellant confirmed to him his willingness to do so. Asked if he had been assaulted or threatened he replied "No". Thereafter the third appellant went and pointed out certain places. Throughout the third appellant was entirely at his ease.

The trial court held that the State had discharged the onus of proving that the third appellant's statement, and subsequent pointing out, had been free and voluntary. It rejected the third appellant's evidence on the basis that he had not told the truth, and accepted the evidence of the State witnesses. It accordingly ruled both the statement and

the pointing out admissible.

There are in my view no grounds for interfering with the findings of the trial court. It has not been shown that the court misdirected itself in any respect. The third appellant was a poor and demonstrably untruthful witness. Although he claimed that Ngoji had assaulted and threatened him - to the extent that he was one of the main actors in the whole drama - it was never put to Ngoji when he testified that he had done so. No explanation was forthcoming for this failure. The only inference to be drawn is that the third appellant's evidence in this respect was false and an afterthought. Likewise Oosthuizen's evidence was never challenged, and it was only when the third appellant was cross-examined thereon that he sought to dispute certain important aspects thereof. The third appellant grossly exaggerated the assaults,

if any, upon him. Jonker refutes his evidence as to the state he was in when he made his statement. The trial court, having had the advantage of seeing and hearing the witnesses, accepted Jonker's evidence. The third appellant's evidence that after having assaulted him quite severely to extract a confession from him, the unidentified white policeman apologised to him for doing so is highly improbable. Equally so is his evidence that when he appeared before Jonker, obviously distressed and bearing clear marks of an assault, Jonker would have asked Ngoji if he had been assaulted. In the circumstances the third appellant's appeal cannot succeed.

I come finally to the second appellant. He claimed that he was assaulted both at the time of his detention and subsequently at Berry's Corner. There he was told to make a statement implicating himself.

He was later taken to Louis le Grange Square. He was placed in a room and left there all day handcuffed to a chair. The following day he was taken to a room with blood-spattered walls. There a black policeman (probably Detective Constable Faleni ("Faleni")) assaulted him with his fists. He was then asked if he knew anything about "mice". This was apparently a reference to a piece of electrical equipment. He was told to lie down on the floor. His hands and feet were handcuffed. Electric leads from a box were placed on his fingers and electric current was passed through them, shocking him. This was later discontinued, and a piece of tube was placed over his face. All this was done in order to get him to make a statement. Eventually, because of the treatment meted out to him, he agreed to make one. He was then taken to Lieutenant de Lange ("de Lange") to whom he made a

statement. He was told not to tell de Lange that he had been assaulted. Thereafter he accompanied de Lange to the scene of the crime where he pointed out certain spots. According to the second appellant the pointing out was based not on his own knowledge of the events surrounding the deceased's death, but on what he had heard and his acquaintance with the area in question. The following day he was taken to a magistrate, Mr Lubbe ("Lubbe"), to whom he made a further statement. This statement was also made because of the previous assaults upon him, and not freely and voluntarily.

The State led no evidence in rebuttal concerning the events at Berry's Corner. The statement the second appellant allegedly made there was never produced or relied upon by the State. According to the State evidence, Detective Warrant Officer

Joubert ("Joubert") interrogated the second appellant on 24 September and again on the following day. After the second appellant indicated his willingness to make a statement and point out the scene of the murder, he was taken to de Lange. He made a statement to de Lange, and thereafter pointed out certain spots to him. On 26 September, after having declared himself willing to repeat his statement to a magistrate, he was taken to Lubbe where he made a further statement. The State witnesses who had dealings with the second appellant, including Faleni, denied that he had been assaulted at Louis le Grange Square.

According to de Lange the second appellant, when questioned in regard thereto, denied that he had been assaulted in order to make a statement. When asked if he had any injuries the second appellant pointed out extensive burn scars on his left arm and



stomach, adding that he had been burnt there as a child. De Lange examined his body but found no other injuries.

When asked the following day by Lubbe whether he had been assaulted the second appellant mentioned in some detail the alleged assaults upon him at Berry's Corner. He claimed, inter alia, that he had been hit twice on the back with a rubber baton. On examination Lubbe observed two linear weals on the second appellant's back, and he noted down a description of the injury. The second appellant did not complain of having been shocked or assaulted at Louis le Grange Square with a view to compelling him to make a statement. Because of the second appellant's recorded complaints of assault, and Lubbe's observations, the trial court held that it did not appear ex facie the second appellant's statement to the magistrate (Lubbe)

that the statement had been freely and voluntarily made. It accordingly held that the presumption in s 217(1)(b)(ii) of Act 51 of 1977 did not operate and that the onus rested on the State to prove that the second appellant's statements to both de Lange and Lubbe were freely and voluntarily made. Although the respondent sought to challenge on appeal the finding that the onus in respect of the statement to Lubbe was on it, the trial court's finding in this regard was in my view clearly correct.

In ruling that the statement made by the second appellant to Lubbe was admissible the trial court made the following observations:

"We have heard the evidence of the police officer who was allegedly involved in various assaults upon accused no 3, and we have heard the evidence of accused no 3. While he clearly bore the marks of some kind of injury, if the mice as he described the electric shock system which had been used on his arms had been used to the extent it was,

on his version, (the Court, having had an opportunity to inspect him, his left arm shows signs of extensive injuries, the skin being puckered up and scarred over a very wide area,) then we cannot accept that he would not have shown this injury to a magistrate nor even if he had not demonstrated it, that the magistrate would not have seen it for himself. If his arm had been burnt to that extent at that time as a result of this electric shock, the severe injuries must have been patently obvious. Yet it was not noticed or referred to by the magistrate, despite the accused having shown his arm to Lieutenant de Lange on the previous day. In this regard it is also of significance that Lieutenant de Lange in his evidence referred to these marks as being 'ou brandmerke' on the left arm and cheek, and not the very fresh burn wounds they must have been if they had been caused a matter of days before.

One is left with a situation where an accused is clearly not telling the truth about the treatment meted out to him and one cannot then speculate how these marks came to be there."

It is apparent from these remarks that the trial court totally misconceived the second appellant's evidence. It obviously laboured under the

misapprehension that the second appellant had claimed that the old burn marks visible on his left arm were caused by the electric shocks he had been given. This was clearly never his evidence. At no time did he claim that the appearance and condition of his left arm were due to the shock treatment he had received. He went no further than to allege that the shock treatment had affected his arm to some extent. This misdirection (which the respondent conceded) appears to have strongly influenced the trial court's finding that the second appellant was "clearly not telling the truth about the treatment meted out to him". There is no knowing what conclusion the trial court might have come to had it approached the second appellant's evidence correctly.

Nor can one gauge the influence that this misdirection might have had on the trial court's ruling

that the second appellant's statement to de Lange was admissible. It must needs have adversely affected its view of the second appellant's credibility. Although de Lange claims to have examined the second appellant and observed no fresh injuries or signs of assault upon him, Lubbe observed fresh linear weals on his back the following day. Either de Lange's examination of the second appellant was a very cursory one, or he was untruthful in claiming that the second appellant bore no signs of fresh injury. One is left with the uneasy feeling that even though the second appellant clearly exaggerated the extent of any assault upon him, the danger exists that he was influenced by the treatment he had been subjected to earlier when he made his statement to de Lange.

There is a further factor indicative either of a lack of voluntariness on the second appellant's

part, or of a lack of knowledge of how the deceased was killed. The place pointed out by the second appellant as being that where the deceased was killed did not coincide with what was, on the objective evidence, the place of the killing. In fact, they differed significantly. The trial court apparently lost sight of this fact when considering the admissibility of the second appellant's statement and the question of his guilt.

In my view it is doubtful whether, but for these misdirections, the trial court would have come to the conclusion to which it did. In my view, a reasonable doubt exists on the evidence whether the second appellant's statements were freely and voluntarily made. The second appellant was entitled to the benefit of such doubt, and his statements should not have been admitted in evidence. Apart from these

