IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: **AR253/15**

In the matter between:

TSEPISO STHEMBISO RAMYONYANE **FIRST APPELLANT**

BONGINKOSI ERIC NYAWOSE **SECOND APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: 28 June 2016

Kruger J (with Vahed J et Hemraj AJ concurring)

[1] The Appellants were convicted, in the High Court, Pietermaritzburg, of murder and robbery with aggravating circumstances. The minimum sentences were imposed, viz, life imprisonment in respect of the conviction of murder and fifteen years imprisonment in respect of the conviction of robbery with aggravating circumstances. With leave of the Court *a quo*, they appeal against their convictions.

[2] The State alleged that on the 17th October 2013, at approximately 18h30, the Appellants and their companions entered the home of Daniel Montague Knight ("the deceased") and his partner, Dilys Elizabeth Bucher. The assailants were armed with various weapons, including a firearm, monkey-wrench and a hammer. They all wore dark clothing and their faces were covered with balaclavas. They demanded firearms and money and in the process began assaulting the deceased. After tying up the deceased and Ms Bucher, the assailants ransacked the house and fled, taking with them various items, including a Beretta firearm, television set, video machine, DVD player, groceries, an Isuzu bakkie and a Toyota Land Cruiser.

[3] Ms Bucher later managed to free herself and she found the deceased, who had been tied up with the clothing ties, lying in a pool of blood. He had unfortunately succumbed to his injuries. The police were thereafter summoned as well as the family doctor, Dr Leon van Schalkwyk.

[4] The only evidence relied upon by the State in securing the convictions were:

(a) A confession made by both Appellants to commissioned police officers;

(b) A pointing out conducted by the Second Appellant and

(c) A confession allegedly made by the First Appellant to a Mr Thabiso Njabulo Dlamini ("Mr Dlamini") – who was warned in terms of Section 204 of the Criminal Procedure Act.

[5] The admission of the "confessions" and "pointing-out" were challenged by the defence and this led to a trial-within-a-trial being held.

[6] During the trial-within-a-trial, the Appellants alleged that they were brutally assaulted by the police at the time of their arrest. It transpired from the evidence that the Second Appellant was arrested first. This was after 6pm on the 20th October 2013. He alleged that he was assaulted by various officers who demanded to know the whereabouts of the firearm and the vehicles. He was then handcuffed and placed in a police vehicle. The police then proceeded to the home of the First Appellant. At the homestead they found both the First Appellant and Mr Dlamini. Both were assaulted and arrested. During the course of the assaults and in an attempt to prevent further assaults being perpetrated upon him, Mr Dlamini pointed

out an area where he alleged the First Appellant had buried the firearms. The assaults upon him ceased but not against the Appellants as he witnessed both Appellants being further assaulted by police.

[7] Not surprisingly, all the police officers who testified denied assaulting either of the Appellants or Mr Dlamini. They all denied witnessing or being present when the Appellants and/or Mr Dlamini were allegedly assaulted. They also did not witness any injuries on any of the Appellants or on Mr Dlamini. There are numerous contradictions and inconsistencies in the evidence of the police officers. For reasons which will become apparent later in this judgment, it is not necessary to outline these contradictions and inconsistencies in detail.

[8] During the course of the night of the 20th October 2013, the Toyota Land Cruiser was recovered. The police alleged that the Second Appellant, who was willing and co-operative, volunteered to show them where the vehicle was hidden. This was contradicted by the Second Appellant who alleged that he was forced to accompany the police in search of the vehicle. It transpired that in an attempt by Constable Stock to assault the Second Appellant, the window of the police vehicle was broken. The police officers, in an attempt to deny the assaults on the Second Appellant testified that the Second Appellant broke the window and attempted to escape from the moving police vehicle. This attempt whilst he was handcuffed behind his back. Notwithstanding this "attempt to escape", none of the police officers saw fit to charge the Second Appellant with this offence.

[9] Both Appellants and Mr Dlamini were later placed in the police cells. The following morning (21st October 2013) after a consultation with the investigating officer, the Appellants elected to make a confession and Mr Dlamini agreed to provide a statement and to become a witness in terms of Section 204 of the Criminal Procedure Act.

[10] Prior to making and recording their confessions, both Appellants were "examined" by Dr Leon van Schalkwyk. This examination took place at the police station in an office adjacent to the charge office. It is common cause that at least one of the police officers who was present during the "examination" by Dr van Schalkwyk, was alleged to have been one of the perpetrators of the assaults upon the Appellants. The police could offer no plausible explanation why the Appellants

were not taken to a District Surgeon or to an independent doctor for examination prior to and after making the confessions. Dr van Schalkwyk found no evidence of any injuries, save for "slight bruising" on the back of the First Appellant. His findings are in stark contrast to the evidence of Captain Zakwe (who recorded the confession of the First Appellant) who testified that it was clearly obvious that the First Appellant was in pain and that he had difficulty using his hand.

[11] The Court *a quo* ruled that the "confession" made by the Second Appellant was admissible as evidence. The "pointing-out" by the Second Appellant and the "confession" by the First Appellant were ruled inadmissible. In reaching this conclusion, the Court *a quo* found that the incorrect form was used to record the confession of the First Appellant and that the pointing-out "did not comply with the requirements for the admissibility of the admission". Notwithstanding an acceptance by the Court *a quo* that, contrary to the evidence of the police, the Second Appellant was indeed assaulted, the Court *a quo* was of the view that his confession was not as a result of the assault. This, with respect, is contradictory. The evidence clearly shows the nature of the assaults perpetrated upon the Second Appellant which assaults led him to conduct the pointing-out. There was no explanation forthcoming to explain his sudden change of heart a few hours later. The "pointing-out" and "confession" were all part of a continuing exercise facilitated by the constant assault and threats of assaults by the police officers. If the assaults were not perpetrated on the Second Appellant for the purposes of extracting a confession and a pointing out from him, why was it then necessary to assault him? The evidence did not reveal that he attempted to flee from the police at the time of his arrest or at any later stage. Having concluded that the Second Appellant and Mr Dlamini were severely assaulted, the Court *a quo* ought, in my view, to have ruled the "confession" made by the Second Appellant to be inadmissible.

[12] Notwithstanding its finding of assault perpetrated upon the Second Appellant and Mr Dlamini, in the face of denials by the police officers, the Court *a quo* nonetheless found that <u>all</u> the State witnesses (including the police and Dr van Schalkwyk) "acquitted themselves well" and that "they gave evidence in a clear, concise and bold manner". I disagree. The evidence reveals that the police officers were pathetic witnesses and the manner in which it appears that they conducted themselves, both at the time of the arrest of the Appellants and in testifying in Court,

can only be described as disgraceful. They deliberately lied in their attempts to support each other.

[13] The only evidence remaining against the First Appellant was his alleged "confession" to Mr Dlamini. As stated earlier in this judgment, Mr Dlamini testified that he was severely assaulted by the police. As a result he pointed out an area which had been recently dug up and which led to the recovery of certain items. The police officers denied that they assaulted Mr Dlamini (and the First Appellant who was with him) at the time of his arrest. However, the photographs taken by Mr Nkosinathi Dlamini corroborated the evidence of Mr Dlamini that they were indeed assaulted.

[14] Of importance is Mr Dlamini's testimony that at the time he made his "Section 204" statement, he was still afraid of the police and in particular that he would be further assaulted. He also denied that his constitutional rights were read and explained to him. When questioned by the defence counsel and the Court, the following exchange resulted:

> "CROSS-EXAMINATION BY MR RADEBE Only one question, M'Lord. Sir, if you were not arrested, or you were not also assaulted, would you have volunteered to make a statement and if so, agreed to come and testify?
>
> MNGUNI J Would you have come out on your own accord, and testify? Made a statement to the police about the incident - - - No, I would not have done that on my own accord, M'Lord." (page 326 lines 19 to 24)

[15] An analysis of Mr Dlamini's evidence also shows that he was very reluctant to testify. He continually answered questions by stating that he could not recall clearly. This, particularly in response to questions regarding details of what the First Appellant had allegedly confessed to him. He repeatedly stated that he could not recall clearly and could not remember and was virtually cross-examined by the prosecutor in an attempt to extract this evidence. What is of concern is that after the Court had taken the short adjournment, Mr Dlamini seemed to have regained his memory and testified in detail of what the First Appellant had allegedly confessed to him. It is indeed highly suspicious that he was "reminded" of the need to testify against the First Appellant.

[16] I am of the view that the “confession” to Mr Dlamini and indeed his statement and evidence in Court, were not freely and voluntarily obtained. As a result the Court *a quo* ought to have disregarded same.

[17] In the result there is no evidence against the Appellants and they ought, in my view, to have been acquitted. The State, on appeal, has rightly conceded that the Appellants were wrongly convicted.

[18] In the result, the appeal succeeds and the convictions and sentences against both Appellants is hereby set aside.

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KRUGER J

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VAHED J

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HEMRAJ AJ

DATE OF HEARING:	3 June 2016
DATE OF JUDGMENT:	28 June 2016
COUNSEL FOR THE APPELLANT:	E X Sindane
COUNSEL FOR THE RESPONDENT:	A Watt