THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 379/07

REPORTABLE

In the matter between:

BONGANI MTHEMBU **APPELLANT**

v

THE STATE **RESPONDENT**

Coram: Cameron, Maya et Cachalia JJA

Heard: 19 February 2008
Delivered: 10 April 2008
Corrected: 3 September 2008

Summary: The evidence of an accomplice extracted through torture, (including real evidence derived from it), is inadmissible, even where the accomplice testifies years after the torture.

Neutral citation: This judgment may be referred to as *Mthembu v The State* (379/2007) [2008] ZASCA 51 (10 April 2008).

JUDGMENT

CACHALIA JA

[1] This appeal, in the main, concerns the admissibility of evidence, obtained through the use of torture, from an accomplice. The question arises because the chief state witness against the appellant implicated him in several crimes through narrative and real evidence – but disclosed, when testifying at the trial more than four years later, that he had been beaten and tortured before leading the police to crucial evidence. The point at issue is whether that evidence can be used against the appellant.

[2] The appellant, a former a police-officer, was convicted in the Verulam Regional Court (Mrs Pillay) of theft of a Toyota Hilux motor-vehicle on 5 January 1998 (count 2), theft of a Toyota Corolla motor-vehicle on 3 February 1998 (count 3) and robbery of a steel box containing R60 000 in cash and also of a further amount of R8450 from the Maidstone Post Office at Tongaat (counts 4 and 5) on 10 February 1998. For the theft of the two vehicles, taken together, he was sentenced to eight years' imprisonment, and for the robbery to 15 years' imprisonment – effectively 23 years' imprisonment.[1]

[3] He appealed to the Durban High Court against his convictions and sentence. That court confirmed the convictions but reduced the sentence on counts 2 and 3 to five years' imprisonment and that on counts 4 and 5 to 12 years' imprisonment. The effective sentence was reduced to 17 years' imprisonment.[2] Leave to appeal was granted to this court.

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[1] The appellant originally faced seven charges. Only four are relevant to this appeal.

[2] The order indicates that the sentence is 12 years' imprisonment. And counsel for the State accepted that this was so. It is however clear from the judgment that the effective sentence imposed was 17 years' imprisonment.

[4] At the trial, the following witnesses testified for the State: Mr Sudesh Ramseroop, Sergeant Selvan Govender, Mr Luke Krishna, Mr Zamani Mhlongo and Mr Dorasamy Pillay. In addition to testifying himself, the appellant also called Mr Nkosinathi Zondo and Mr Sithembiso Philip Ngcobo to testify on his behalf. Not all their evidence is relevant for this appeal. The foundation upon which the convictions rest is the evidence of Ramseroop, who was warned as an accomplice in terms of s 204 of the Criminal Procedure Act 51 of 1977.

[5] Ramseroop was 32 years old at the time of these incidents. He had lived in the Emona area of Tongaat all his life and conducted business as a panel-beater from his home. He became acquainted with the appellant, who had left the police service to start a business as a taxi operator. The appellant often brought vehicles to him for panel-beating. He testified that towards the end of January 1998 the appellant, accompanied by Ngcobo, brought the Hilux in count 2 to him. The appellant asked him to repair and spray-paint the vehicle. They agreed on a price of R500. Two days later the appellant returned with a Mr D K Mhlongo, who he introduced to Ramseroop as his uncle from Hambanathi. The appellant informed him that Mhlongo wished to buy the vehicle. Two days later they returned to inspect it and the day thereafter they came back to collect the vehicle in return for payment of the agreed amount.

[6] On 5 February 1998 the appellant brought another vehicle to Ramseroop's home. This was the Corolla in count 3. On this occasion an unknown male accompanied him. Ramseroop noticed that the vehicle's ignition switch had been damaged. The appellant removed the registration-plates and placed them in the boot. He also asked Ramseroop to spray-paint the vehicle. At the appellant's request Ramseroop parked

the vehicle in his sunken lounge thereby concealing it. A few days later the appellant and his companion returned. He appeared, Ramseroop said, to be in a hurry. The appellant attached the registration-plates to the Corolla and drove the vehicle away. He returned later, parked the vehicle in the lounge and again removed the registration-plates. In the presence of Ramseroop's wife he also handed Ramseroop R300 in note denominations of R20. The appellant removed a metal box from the vehicle's boot and handed it to Ramseroop for disposal. After the appellant's departure, Ramseroop inspected the contents of the box and found that it contained paper clips and rubber bands. He decided to keep the box and hid it in the ceiling of his house.

[7] On 19 February 1998, at about midday, Sergeant Govender, who was stationed at the Tongaat Police Station arrived at Ramseroop's home. He was accompanied by five other police officers from the field unit. They were acting on information concerning a stolen vehicle. (Ramseroop's evidence was that this occurred on 10 February, but he was probably mistaken in this regard.) Ramseroop was outside his house at the time. Govender testified that he told Ramseroop that he was investigating the whereabouts of a stolen vehicle. In response Ramseroop spontaneously began telling him how the appellant had brought the vehicle to his home. Govender stopped him from completing his story and requested Ramseroop to first show him the vehicle. Ramseroop obliged and escorted him to his sunken lounge where the vehicle had been parked. After inspecting the vehicle and establishing that it had been stolen, Govender seized it, arrested Ramseroop and took him into custody. The main substance and sequence of this interaction Ramseroop confirmed in his evidence.

[8] Following Ramseroop's interrogation at the police station he disclosed information regarding the Hilux to the police. As a result of this disclosure, Govender accompanied other members of the field unit and a few detectives to Mhlongo's home at Hambanathi. Ramseroop was present. Mhlongo was not at home. Instead they found his son Zamani, who directed them to another residence. There they found Mhlongo and the Hilux which, according to the testimony of Dorasamy Pillay, the complainant in count 2, had been taken from him at gun-point. Mhlongo was arrested and the Hilux seized. The State was able only to prove a case of theft against the appellant as there was no evidence linking him to the actual robbery of the Hilux.

[9] On 21 February at 7 am, acting on further information from Ramseroop, Govender again accompanied some officers and Ramseroop to the latter's residence. There, Ramseroop removed the hidden metal box from the ceiling and handed it to them. This was the very box that had been taken from the post office during the robbery. Ramseroop was released later that day, after making a written statement to the police concerning these events.

[10] To sum up, Ramseroop's evidence implicated the appellant in the thefts of the Hilux and Corolla. His evidence regarding the metal box linked the appellant to the Maidstone post office robbery described below. To the circumstances leading to the discovery of the Hilux and the metal box, which assumed critical importance before us, I will return.

[11] The appellant denied involvement in any of the crimes. Regarding the Hilux, the appellant testified that he had merely been helping Mhlongo, who had since died, to facilitate a business deal with

Ramseroop for the repair of the vehicle. He asserted that Ramseroop had falsely implicated him in the crimes because the police had tortured him.

[12] Mr Luke Krishna's eye-witness testimony regarding the events at the post office placed the appellant at the scene of the robbery. He had been employed at the post office at the time of the robbery. He attended an identification parade at the police station on 20 May 1998, three and a half months after the incident, where he identified the appellant, from a line-up of 11 persons, as one of two persons who had participated in the robbery. He testified that the appellant entered the post office with one other person who stood at the door. He himself was behind the counter. The appellant was well-spoken and was wearing a blue cap, jacket and pants. The appellant approached him and asked him for five stamps. He then produced a firearm and demanded money, which had been delivered to the post office for the payment of pensions. At this stage the appellant was facing him. Krishna then went to the back of the post office to fetch the money, which was in a metal box. He returned and handed the box containing the money to the appellant. The appellant asked for more money and Krishna returned with two other boxes, but these were empty. The appellant then pointed his firearm at Krishna's assistant Mr Yugan Reddy, who was also behind the counter, and ordered him to hand over the money that was in the drawer. Reddy complied by throwing the bundled money at the appellant. The appellant and his accomplice then left with the money. The incident lasted approximately five minutes.

[13] The appellant confirmed that Krishna had identified him at the identification parade. But he denied that he had been one of the robbers. He claimed that Krishna was able to identify him at the parade only because he had seen him at the police station in the charge office on an earlier occasion. The learned magistrate rejected this claim, with good

reason. The identification parade, however, had several unsatisfactory features; to mention a few: the appellant was denied the presence of his legal representative; Krishna's evidence whether the other persons in the parade were of similar build, height, age and appearance to the appellant was unsatisfactory; there is no evidence that the persons on the parade were similarly dressed and Krishna was not told that the suspect may not be present. There was no evidence that Krishna had made a prior description of the robbers, which bore any resemblance to the appellant. The State, without explanation, failed to lead any other evidence regarding the circumstances under which the identification parade was held. The parade's reliability was not tested and therefore had little evidential weight.[3] For as Van den Heever JA stated:[4]

'[W]here such identification rests upon the testimony of a single witness and the accused was identified at a parade which was admittedly conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence, standing alone, can have little weight.'

[14] The learned magistrate and the court below were alive to the difficulty of relying only on Krishna's identification of the appellant. But they found that Ramseroop's testimony that the appellant had given him the metal box, which was proved to have been the very one taken during the robbery, constituted sufficient corroboration to link the appellant conclusively to the robbery.

[15] With respect to the theft of the Corolla (count 3), counsel for the appellant urged us to find that Ramseroop's evidence was insufficient to

[3] *S v Daba* 1996 (1) SACR 243 (E) at 249d-e.
[4] *R v Masemang* 1950 (2) SA 488 (A) at 493-494.

establish the appellant's guilt. He advanced two reasons for his submission: first that Ramseroop, as an accomplice, had an interest to falsely implicate the appellant, and secondly, because the state had failed to call Ramseroop's wife, who was clearly a material witness regarding the circumstances under which the appellant had brought the vehicle to their home, to testify.

[16] The fact that Ramseroop's wife did not testify does not mean that Ramseroop's evidence was inadequate to prove the case against the appellant on this count. When Ramseroop, before his arrest, spontaneously told Sergeant Govender that the appellant had brought the vehicle to his home, neither he nor the appellant were suspects. He had no reason to implicate the appellant at that stage. The appellant was well-known to him and had also provided him with an income from the vehicles which he had brought for repairs. The magistrate analysed the evidence carefully before concluding that the appellant was guilty on this count. I have no reason to reject her reasoning on this aspect. It follows that the appellant was correctly convicted on this count.

[17] I return to the circumstances leading to the discovery of the Hilux and of the metal box. It is common cause that after Ramseroop was taken into custody on 19 February, the police at Tongaat assaulted him severely. The assaults included torture through the use of electric shock treatment. Ramseroop's uncontested evidence was that he received a 'terrible hiding' on the evening after he had been taken into custody. Thereafter assaults continued until the morning of the 21st when he took the police to his home to show them where he had hidden the metal box. Regrettably, the magistrate did not investigate the extent, frequency and duration of his unlawful treatment. Ramseroop's cursory cross-

examination on this aspect was aimed only at establishing his unreliability as a witness, not whether the assaults and torture rendered his testimony inadmissible.

[18] The learned magistrate and the court below found that the assault and torture did not render Ramseroop's testimony unreliable – a conclusion I think was correct. However, neither the magistrate nor the court below was asked to consider the admissibility his evidence even though it is beyond dispute that the chain of events which resulted in the discovery of the Hilux and of the metal box was precipitated by his unlawful treatment.

[19] In this court the parties were requested to address us on the admissibility of Ramseroop's evidence. The appellant submitted that the evidence relating to the discovery of the Hilux and the metal box must be excluded because it was obtained in violation of Ramseroop's right not to be tortured. Counsel for the State conceded that the evidence revealed that Ramseroop had been tortured but she made no submissions regarding the admissibility of his evidence.

[20] It is necessary to record that Mr Zamani Mhlongo, who was called as a witness for the State, and Mr Sithembiso Philip Ngcobo, who gave evidence on behalf of the appellant, both testified that they had been tortured and assaulted as a result of which they made false statements to the police. Zamani was 16 at the time. His court testimony departed materially from the statement he had made to the police. This resulted in the court declaring him a hostile witness. Ngcobo testified that the police applied electric shocks to his testicles. The magistrate found that their

evidence could not be relied on because of their close relationship with the appellant.

[21] Ramseroop's oral testimony four years after these events was, though given under statutory compulsion, manifestly not given under duress. In cross-examination he denied that he implicated the appellant only because of the 'terrible hiding' the police had given him. The question that faces us is whether his evidence relating to the discovery of the Hilux and of the metal box was nevertheless 'obtained' within the meaning of s 35(5) of the Constitution and must, for that reason, be excluded. The section reads as follows:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[22] In the pre-constitutional era, applying the law of evidence as applied by the English courts, the courts generally admitted all evidence, irrespective of how obtained, if relevant.[5] The only qualification was that 'the judge always (had) a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused'.[6] And where an accused was compelled to incriminate him or herself through a confession or otherwise the evidence was excluded. However, real evidence which was obtained by improper means was more readily admitted (and also because its admission was governed by statute).[7] The reason was that such evidence usually bore the hallmark of objective reality compared with narrative testimony that depends on the say-so of a

[5] *S v Pillay* 2004 (2) SACR 419 (SCA) para 6 of the judgment by Scott JA.
[6] This statement of Lord Goddard in *Kuruma v R* [1955] 1 All ER 236 at 239, was approved by Rumpff CJ in *S v Mushimba* 1977 (2) SA 829 (A).
[7] See s 218 of The Criminal Procedure Act 51 of 1997 and its predecessors, s 274 of The Criminal Procedure and Evidence Act 31 of 1917 and s 245 of The Criminal Procedure Act 56 of 1955.

witness. Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, firearm, document or photograph – or the metal box in this case).[8] Thus, where such evidence was discovered as result of an involuntary admission by an accused, it would be allowed because of the circumstantial guarantee of its reliability and relevance to guilt – the principal purpose of a criminal trial.[9] As a rule, evidence relating to the 'fruit of the poisonous tree' was not excluded.

[23] There was however some resistance to this line of reasoning deriving from normative considerations. In *S v Sheehama* Grosskopf JA stated that it was a basic principle of our law that an accused cannot be coerced into making a self-incriminating statement. He thus held that s 218(2) of The Criminal Procedure Act 51 of 1977 did not authorise evidence of forced pointings out even though it arguably did so.[10] And in *S v Khumalo*[11] Thirion J said that involuntary statements made by accused persons are inadmissible against them, not only because they are untrustworthy as evidence but 'also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions'.[12] With the advent of the new constitutional order looming Van Heerden JA, in *S v January*; *Prokureur-Generaal, Natal v Khumalo*, confirmed this line of thinking when he observed that there has 'in this century . . . rightly been a marked shift in the

[8] *S v M* 2002 (2) SACR 411 para 31.
[9] *R v Samhando* 1943 AD 608; *R v Duetsimi* 1950 (3) SA 674 (A).
[10] 1991(2) SA 860 (A); Section 218(2) provides: 'Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.'
[11] 1992 (SACR) 411 (N).
[12] Quoting Lord Hailsham in *Wong Kam-ming v The Queen* [1980] AC 247 (PC) at 261.

justification for excluding . . . involuntary confessions and admissions, and it is now firmly established in English law that an important reason is one of policy'.[13] In making this observation he was able to depart from the reasoning in earlier cases, referred to above, which had placed their emphasis only on the relevance and reliability of the evidence. He thus held that proof of an involuntary pointing out by an accused person is inadmissible even if something relevant to the charge is discovered as a result thereof.[14]

[24] Evidence of statements emanating from third parties, unless confirmed through oral testimony, was excluded as hearsay. And when those persons did testify, the question whether they had been ill-treated or improperly induced to make statements was relevant only to the weight of their evidence, not its admissibility. I am not aware of any case where evidence of a third party's statement was held inadmissible because it was illegally obtained.

[25] I return to s 35(5) of the Constitution. In *S v Tandwa*[15] Cameron JA observed the clear and unmistakable departure from the pre-constitutional approach to the exclusion of improperly obtained in these terms:

'The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself

[13] 1994 (2) SACR 801 (A) at 807g-h.
[14] See generally D T Zeffertt, A P Paizes and A St Q Skeen *The South African Law of Evidence* (2003) p 500-505.
[15] [2007] SCA 34 (RSA) para 116.

unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.'

[26] To those observations I would add: public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term.[16] Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution.

[27] A plain reading of s 35(5) suggests that it requires the exclusion of evidence improperly obtained from any person, not only from an accused. There is, I think, no reason of principle or policy not to interpret the provision in this way. It follows that the evidence of a third party, such as an accomplice, may also be excluded, where the circumstances of the case warrant it. This is so even with real evidence. As far as I am aware, this is the first case since the advent of our constitutional order where the issue has pertinently arisen.

[16] *R v Collins* [1987] 1 SCR 265 para 31.

[28] I turn to how the evidence of torture should be approached in the light of the Constitution. On this matter the Constitution speaks unequivocally. Section 12 states that:

'(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) . . .

(b) . . .

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way;

(e) not to be treated or punished in a cruel, inhuman or degrading way.'

[29] There can be no doubt that the police violated all these rights in the manner that they treated Ramseroop, and probably other witnesses, after his arrest. On the face of it, the evidence obtained as a result of these violations ought to be excluded because of its 'stain' on the administration of justice.[17] For present purposes it is necessary to deal only with the electric shock treatment that Ramseroop was subjected to.

[30] The Convention Against Torture (CAT), which South Africa ratified on 10 December 1998, defines torture[18] to include:

'. . . [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity . . ..'

[17] *S v Tandwa* above para 120; *S v Pillay* 2004 (2) SACR 419 (SCA) paras 9 and 11 of the judgment of Scott JA.
[18] Article 1.

It is important to emphasise that the definition requires the act to be performed for the purpose of obtaining 'information or a confession'. This is the mischief at which the CAT is aimed.

[31] The CAT prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency. It is thus a peremptory norm of international law. Our Constitution follows suit and extends the non-derogation principle to include cruel, inhuman and degrading treatment.[19] The European Convention on Human Rights does likewise.[20] The prohibition against torture is therefore one of our most fundamental constitutional values. Having regard to this country's inauspicious pre-constitutional history, when the treatment of criminal suspects and other detainees often involved the use of torture, this is hardly surprising – for it is one of the most egregious of human rights violations. And it is a crime that the CAT requires all member states to investigate thoroughly and to ensure that perpetrators are severely punished.[21]

[32] In regard to the admissibility of evidence obtained as result of torture, Article 15 of the CAT cannot be clearer. It requires that:

'Each State shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.'

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[19] Section 37(5)(c).
[20] Article 3 and Article 15.
[21] Article 4 of the CAT provides:
'1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to any act by any person which constitutes complicity or participation in torture.
2. Each Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

The absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'.[22] As the House of Lords has recently stated, evidence obtained by torture is inadmissible, 'irrespective of where, or by whom, or on whose authority it is inflicted'.[23] The reason is because of its 'barbarism, illegality and inhumanity'.[24] In *People (at the suit of the A-G) v O'Brien*,[25] the Supreme Court of Ireland held that 'to countenance the use of evidence extracted or discovered by gross personal violence would . . . involve the State in moral defilement'. Lord Hoffman, in *A v Secretary of State (No 2)* had no doubt that that the purpose of the exclusionary rule is to uphold the integrity of the administration of justice.[26]

[33] I revert to the facts of this case. The Hilux and the metal box were real evidence critical to the State's case against the appellant on the robbery counts. Ordinarily, as I have mentioned, such evidence would not be excluded because it exists independently of any constitutional violation. But these discoveries were made as result of the police having tortured Ramseroop. There is no suggestion that the discoveries would have been made in any event. If they had the outcome of this case might have been different.

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[22] Although s 35(5) is concerned with the admissibility of evidence in criminal proceedings, the CAT's peremptory requirement that such evidence be excluded 'in any proceedings' is also applicable to our law. The absolute prohibition against torture in s 12 of the Constitution, which is not confined to criminal proceedings, also requires that the exclusionary rule be applied to 'any proceedings' in this country.

[23] *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71 para 51. This case involved the admissibility, before a Special Immigration Appeals Commission, of torture evidence acquired from a foreign intelligence agency without the complicity of British authorities.

[24] Nicolas Grief '*The Exclusion of Foreign Torture Evidence: A qualified Victory for the Rule of Law*' [2006] EHRLR Issue 2 at 206.

[25] [1965] IR 142 at 150.

[26] *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71 para 91.

[34] Ramseroop made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux and metal box was extracted through torture. It would have been apparent to him when he testified that, having been warned in terms of s 204 of the Act, any departure from his statement would have had serious consequences for him. It is also apparent from his testimony that, even four years after his torture, its fearsome and traumatic effects were still with him. In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably.

[35] It is important to point out this. Although the information regarding the Corolla was probably also contained in Ramseroop's statement, this evidence was discovered independently – before any constitutional violation.[27] It was as Ramseroop testified, and Govender confirmed, volunteered by the former. This evidence was therefore not obtained improperly. And in argument before us there was no suggestion that it was. This is so even though the statement containing the information about the Corolla, in addition to information on the other counts, was induced by torture. The Corolla evidence thus remained untainted.

[36] To admit Ramseroop's testimony regarding the Hilux and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the

[27] Ramseroop's statement is not part of the record.

administration of justice'.[28] In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.

[37] For all these reasons I consider Ramseroop's evidence relating to the Hilux and metal box to be inadmissible. Without this evidence the remaining evidence that the State presented is insufficient to secure convictions on count 2 (theft of the Hilux) and counts 4 and 5 (post office robbery).

[38] What remains is only count 3 (theft of the Corolla). Turning to the appropriate sentence: the appellant was sentenced to five years' imprisonment. However, he spent 23 months in custody awaiting trial, which must be taken into account in deciding on an appropriate sentence. I consider four years on this count to be appropriate.

[39] What has happened in this case is most regrettable. The appellant, who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have not only failed to investigate the case properly by not following elementary procedures relating to the conduct of the identification parade, but have also, by torturing Ramseroop and probably also Zamani Mhlongo and Sithembiso Ngcobo, themselves committed crimes of a most egregious kind. They have treated the law

[28] Per Lord Hoffman in *A v Secretary of State for the Home Department (No.2)* 2005 [UKHL] 71 para 87.

with contempt and must be held to account for their actions. I will accordingly request the registrar to ensure that this judgment reaches the following persons:

- The Minister for Safety and Security;
- The National Commissioner of the South African Police Service;
- The Executive Director of the Independent Complaints Directorate;
- The Chairperson of the Human Rights Commission;
- The National Director of Public Prosecutions.

[40] In the result the following order is made:

(i) The convictions and sentences on counts 2, 4 and 5 are set aside;
(ii) The conviction on count 3 is confirmed;
(iii) The sentence on count 3 is set aside and replaced with a sentence of four years' imprisonment.

A CACHALIA
JUDGE OF APPEAL

CONCUR:
CAMERON JA
MAYA JA