

**TO: THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**FROM: WEBBER WENTZEL ATTORNEYS ON BEHALF OF IMTIAZ CAJEE  
AND THE FOUNDATION FOR HUMAN RIGHTS**

**DATE: 22 June 2020**

**RE: Representations in terms of Section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 in respect of the decision not to prosecute Seth Sons and Neville Els**

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## **REPRESENTATIONS IN TERMS OF SECTION 22(2)(c) OF THE NATIONAL PROSECUTING AUTHORITY ACT OF 1998: NEVILLE ELS & SETH SONS**

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## INTRODUCTION

- 1 We represent Imtiaz Cajee (Cajee), the nephew of the late Ahmed Timol, who has a direct and substantial interest in the decision not to prosecute Seth Sons (Sons) and Neville Els (Els) for perjury committed in their testimony during the reopened Ahmed Timol inquest in 2017(the reopened inquest).
- 2 Cajee has over the course of 30 months been in correspondence with the NPA about the progress of the investigation and decision regarding Sons and Els.
- 3 We also represent the Foundation for Human Rights (FHR) a non-profit organisation established in 1996 which is committed to addressing the legacy of apartheid, support the transformation of South Africa and build a human rights culture using the Constitution.
- 4 FHR has an interest in the decision not to prosecute Sons and Els as it implicates the rule of law and concerns crimes that arose in the furtherance of Apartheid. FHR has supported and assisted many families who lost loved ones during the apartheid-era.
- 5 These representations are made in terms of section 22(2)(c) of the National Prosecuting Act 32 of 1998 (the Act) to review the decision of the Acting Director of Public Prosecutions (Pretoria), Adv G Baloyi, made on or about 21 May 2020 not to prosecute Els and Sons. A copy of this decision is reflected in Adv Baloyi's letter to Cajee dated 21 May 2020, which is annexed hereto marked "A". Our clients seek the reversal of this decision for the reasons set out below.
- 6 We have to place on record that it has taken the National Prosecuting Authority (NPA) more than 2.5 years (over 30 months) to make this decision. The time taken to reach this decision leaves a sense of shock and dismay. This matter can hardly be described as complex or unwieldy. The factual and legal issues

are simple and elementary. Moreover, there was a real urgency given the circumstances. Ahmed Timol was murdered in 1971 and the suspects and witnesses in this matter are all elderly. Accordingly, the NPA was acutely aware that time was a pressing factor. Yet the NPA dragged its feet notwithstanding the persistent and frequent enquiries made by Cajee with multiple NPA officials. A schedule of Cajee's enquiries is annexed hereto marked "B1" and "B2". In our respectful submission, such delay in these circumstances is inexcusable. We are instructed by our clients to advise you that they are regrettably of the view that the delay was aimed at eroding the prospects of a prosecution; alternatively, it was the product of gross neglect.

7 For the sake of convenience, we point out that the full record of the Reopened Inquest is available online at the URL contained in the footnote below.<sup>1</sup>

## **EVIDENCE OF TORTURE, ASSAULT AND ABUSE**

8 The Timol family placed considerable evidence before the reopened inquest of the brutal torture and abuse sustained by detainees at the hands of the Security Branch (SB) from the 1960s through to the 1980s, and in particular by detainees held on the 9<sup>th</sup> and 10<sup>th</sup> floor of John Vorster Square (JVS) between 23<sup>rd</sup> and 27<sup>th</sup> October 1971. These include the following statements (and in some cases the oral evidence):

8.1 Dr Salim Essop,<sup>2</sup> Dr Dilshad Jetham,<sup>3</sup> Prof Kantilal Naik<sup>4</sup> and Mohammad Timol<sup>5</sup> who were detained in the same time period as Timol.

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<sup>1</sup> Record of the Reopened Inquest into the death of Ahmed Essop Timol:

<https://www.ahmedtimol.co.za/ahmed-timol-2017-inquest/>; portions of the record of the first inquest are available at: <http://www.historicalpapers.wits.ac.za/?inventory/U/collections&c=AK3388/R/9141>

<sup>2</sup> Vol C, pp 22 – 58; Transcripts: Vol 1, p 36 – 98 (26 June 2017), p 100 – 134 (27 June 2017), Vol 2, p 135 -141 (28 June 2017).

<sup>3</sup> Vol C, pp 90 – 104; Transcript: Vol 4, p 264 – 328 (30 June 2017).

<sup>4</sup> Vol C, pp 105 – 117; Transcript: Vol 3, p 197 – 228 (29 June 2017),

<sup>5</sup> Vol C, pp 121 – 134.

8.2 Stephanie Kemp,<sup>6</sup> Shantie Tweedie (formerly Naidoo),<sup>7</sup> Snuki Zikalala,<sup>8</sup> Laloo Chiba,<sup>9</sup> Abdulhay Jassat,<sup>10</sup> Peter Magubane,<sup>11</sup> and Monica Dube<sup>12</sup> who were detained and tortured in the 1960s and 1970s and 1980s.

8.3 Alwyn Musson,<sup>13</sup> Hanif Vally,<sup>14</sup> Parmanathan Naidoo,<sup>15</sup> Ismail Momoniat,<sup>16</sup> Kevin Martin<sup>17</sup> and Rashidahmed Valli Moosa<sup>18</sup> who were assaulted and abused by SB officer Seth Sons in the 1970s and 1980s.

9 Types of torture included *inter alia* physical assault; placing a hessian bag over a detainee's head for suffocation; mule kicks; strangulation, electrocution, prolonged standing, assuming physically difficult positions, the helicopter/aeroplane treatment, sleep deprivation and derogatory and degrading treatment. A more complete list of the torture methods used by the SB is annexed hereto marked "C1"<sup>19</sup> and annexed as "C2" is a document titled "*Allegations of assault, torture and abuse by the Security Branch (1963 – 1984)*".<sup>20</sup>

10 Indeed, perhaps the most notorious and well-known fact of the role of the Security Branch during Apartheid was its use of vicious assault and torture

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<sup>6</sup> Vol H, pp 12 – 18, Transcript, Vol 5, p 400 – 419 (24 July 2017).

<sup>7</sup> Vol H, pp 45 – 52.

<sup>8</sup> Vol H, pp 53 – 62.

<sup>9</sup> Vol H, pp 63 – 75.

<sup>10</sup> Vol H, pp 76 – 95.

<sup>11</sup> Vol H, pp 95 – 101.

<sup>12</sup> Exhibit H18.

<sup>13</sup> Exhibit H21: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H21-Affidavit-Alwyn-Musson.pdf>

<sup>14</sup> Exhibit H22. <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H22-Affidavit-Hanif-Vally.pdf>

<sup>15</sup> Exhibit H23: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H23-Affidavit-Parmananthan-Naidoo.pdf> .

<sup>16</sup> Exhibit H24: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H23-Affidavit-Parmananthan-Naidoo.pdf> .

<sup>17</sup> Exhibit H25: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H25-Affidavit-Kevin-Martin.pdf>

<sup>18</sup> Exhibit H26: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H26-Affidavit-Rashidahmed-Valli-Moosa.pdf>

<sup>19</sup> Exhibit C14 in the Reopened Inquest: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/C14-Alleged-Torture-at-John-Vorster-Square-23-Oct-1971-%E2%80%93-27-Oct-1971.pdf>

<sup>20</sup> This document was annexed to the Timol family's Short Heads of Argument marked "B" at page 33: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/Family-heads-of-argument.pdf>

against political detainees. Significant evidence of assault and torture as routine treatment of political detainees at JVS in the 1980s also emerged in the ongoing proceedings of the Reopened Inquest into the death of Neil Aggett.<sup>21</sup> The Truth and Reconciliation Commission (TRC) found that the SB became infamous for its cruel, inhumane and illegal methods.<sup>22</sup> The TRC found that during this period the state committed a host of gross violations of human rights in South Africa. These included, amongst other violations, extra judicial killings and torture.<sup>23</sup>

11 In its final report released on 21 March 2003 the TRC found the following in respect of police responsibility for torture:

**“16. The Commission found in its five-volume Final Report that torture was systematic and widespread in the ranks of the South African Police (SAP) and that it was the norm for the Security Branch of the SAP during the Commission’s mandate period.**

**17. The Commission also found that the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.”<sup>24</sup>**

12 The Commission made its findings on torture based on evidence received from victims through the human rights violations process, perpetrators in amnesty applications and evidence given before the Commission by senior politicians and security force officials of the former government. In addition, local and international human rights groups made several submissions to the Commission, based on the studies they had carried out during the apartheid

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<sup>21</sup> Reopened Aggett Inquest Record: <https://www.ahmedtimol.co.za/dr-neil-aggett-2020-inquest-records/>

<sup>22</sup> TRC Report, Vol 2 - *State Security Forces between 1960 and 1990*: Appendix, Page 316: <http://sabctrca.saha.org.za/originals/finalreport/volume2/volume2.pdf>

<sup>23</sup> TRC Report, Vol 5 Ch. 6, Findings and Conclusions, p 222: <http://sabctrca.saha.org.za/originals/finalreport/volume5/volume5.pdf>

<sup>24</sup> Paragraphs 16 and 17 of Volume Six, Section Five, Chapter two of the final report of the Truth and Reconciliation Commission of South Africa Report released on 21 March 2003. See <http://sabctrca.saha.org.za/reports/volume6/section5/chapter2/subsection3.htm>

period.<sup>25</sup> The Commission received over 22 000 statements from victims alleging that they had been tortured. In most instances, the torture had been at the instance of members of the security forces.<sup>26</sup>

- 13 According to the TRC, human rights groups estimated that more than 73 000 detentions took place in the country between 1960 and 1990. The Commission found that it was established practice for torture to accompany a detention. Detention, arrest and incarceration without formal charges were commonplace in South Africa at that time.<sup>27</sup> The Commission found that the former state perpetuated a state of impunity by tolerating and sanctioning the practice of torture.<sup>28</sup>
- 14 It is apparent that abuse, assault and torture were standard means of extracting information from detainees by the SB from at least as early as 1963 through to its dissolution in the early 1990s. Security detainees were held incommunicado without access to lawyers, private doctors and families. The isolation of detainees allowed for their abuse, and the cover-up of police crimes since they were the only witnesses.
- 15 SB officers routinely perjured themselves to conceal the truth of the abuse of detainees. This has since been confirmed by the testimony of many policemen and SB officers before the TRC's Amnesty and Human Rights Violation committees. Indeed, even in this case, Sergeant Joao Rodrigues testified that he was asked by Major General Christoffel Andries Buys, the investigating officer, to fabricate a version that he had fought with Timol before he committed suicide, in order to explain his pre-fall injuries caused by the torture.<sup>29</sup>

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<sup>25</sup> *Id* paragraph 21.

<sup>26</sup> *Id* paragraph 22.

<sup>27</sup> *Id* paragraph 24.

<sup>28</sup> *Id* paragraphs 25 to 49. See also Volume Two Chapter Three of the Interim TRC Report released in 1997 at :[http://www.news24.com/Content\\_Display/TRC\\_Report/2chap3.htm](http://www.news24.com/Content_Display/TRC_Report/2chap3.htm)

<sup>29</sup> Rodrigues oral evidence, Vol 9, p 675 line 10 – p 677, line 10; p 683, line 12 – p 684, line 9; p 719, line 22 – p 720 line 10.

16 Almost without exception SB members committed themselves to a conspiracy of silence. Obviously false testimony of police witnesses was invariably accepted by inquest Magistrates. Police versions that deceased detainees were treated with care and consideration were readily accepted by the courts notwithstanding evidence of pre-death injuries on their bodies. The TRC also concluded that collusion had taken place between police and prosecutors, who collaborated with police to undermine the cases of victims and/or their families.<sup>30</sup>

17 Police officers who lied under oath during Apartheid-era inquests and trials to protect themselves and their colleagues did so with total impunity. This impunity persisted with the political interference that saw the suppression of virtually all the cases referred by the TRC to the NPA;<sup>31</sup> and is set to continue with the present approach of the NPA.

## ROLE OF NEVILLE ELS

18 In October 1971, Ahmed Timol (Timol) and Salim Essop (Essop) were arrested at a roadblock in Roodepoort and taken to Newlands police station. WO Els was a SB member stationed at John Vorster Square who was on standby duty that night. WO Kleyn phoned Els and told him of the arrest and the pamphlets found in Timol's vehicle. Els took charge of the pamphlets and phoned senior officials Colonel Piet Greyling ("Greyling") and Captain Carel Johannes Dirker ("Dirker").<sup>32</sup> Els had knowledge of pamphlet bombs and specialised in explosive devices. Els claimed that he never saw Timol again.<sup>33</sup> A summary of Els's version as provided in his testimony is annexed hereto marked "D". The full transcript of his evidence can be downloaded from the URL in the footnote

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<sup>30</sup> Vol 5, Ch. 6, Findings and Conclusions, p 253, para 158 sub-para b.

<sup>31</sup> *Rodrigues v. National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159 (June 3, 2019)), paras. 21–24 and 55–65, [www.saflii.org/za/cases/ZAGPJHC/2019/159.html](http://www.saflii.org/za/cases/ZAGPJHC/2019/159.html)

<sup>32</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 Para 33

<sup>33</sup> *Ibid* Para 181

below.<sup>34</sup> Els made a sworn statement in the first inquest, which was marked as exhibit E and is annexed hereto marked “E”.<sup>35</sup>

19 Salim Essop testified that he sustained unrelenting brutal torture in the first 3 days of detention, which ultimately left him in a comatose state.<sup>36</sup> The Court found that Timol would have been subject to the similar treatment.<sup>37</sup> Els conceded under cross examination that it was a tactic of the SB to extract as much information in the hours and days following arrest through “*intense interrogation*” in order to go after “*collaborators*”, but he claimed, disingenuously, that this involved no torture.<sup>38</sup>

### ***The torture of Kantilal Naik***

20 Professor Kantilal Naik (“**Naik**”) was arrested in October 1971 and alleged that Els was present when he was interrogated and tortured. He was subjected to the ‘helicopter treatment’ that resulted in the temporary loss of use of both his hands.<sup>39</sup>

21 The summary of the case docket into the assault complaint of Naik revealed that at least 17 interrogators questioned him around the clock for days.<sup>40</sup> Els, who was one of the interrogators, testified that he “*would not call [sleep deprivation] torture*” and that it was justified in order extract information.<sup>41</sup>

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<sup>34</sup> Transcript Vol 9B, pages II (673) - XXXX (673): <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/Transcript-I01-2017-VOL-9B-1.pdf>

<sup>35</sup> This affidavit is available on the internet:

[http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AK3388/AK3388-B2-01-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AK3388/AK3388-B2-01-jpeg.pdf)

<sup>36</sup> Oral Testimony, Vol 2 p 122 line 17-21

<sup>37</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652, paras 262 and 263

<sup>38</sup> Oral evidence, Vol 9B, p ZZZ (673), line 13 - p AAAA (673), line 23.

<sup>39</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 Para 332. See Naik affidavit at Vol C from para 15: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/C-affidavits-and-medical-reports.pdf> at p108

<sup>40</sup> Exhibit C12, Summary of case docket JVS ROM 1408/11/71: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/C12-PR1.pdf>

<sup>41</sup> Oral Testimony, Vol 9B, VV (673), line 13; p QQQ (673), but at p 12 – p SSS (673), line 6 Els conceded that sleep deprivation for 4 or 5 days could be torture.

22 During his detention, Naik had fortnightly visits from a magistrate. At one of these visits he complained about his injuries and showed the magistrate his right hand which was badly damaged and was in a sling.<sup>42</sup> This complaint resulted in an internal investigation relating to his torture. During the investigation several members of the SB were implicated including Els.<sup>43</sup>

23 The Court found Professor Naik to be a credible witness.<sup>44</sup> Els admits that he did interrogate Naik but denied assaulting him or witnessing any abuse of him. Naik's detention file points to the fact that Els was present when Naik was tortured, more particularly when the helicopter method was being used on him.<sup>45</sup> A copy of pages 1 – 6 and 10 of Naik's detention file is annexed hereto marked "F".

***Only heard of torture and assault in the media***

24 Not only did Els deny assaulting or torturing anybody himself but he claimed he never abused a single detainee in his entire career with the Security Branch.<sup>46</sup> He then took that claim to a higher level by claiming, utterly disingenuously, that he was not even aware of any abuse, assault or torture and simply picked up such allegations from the media, as per the following extracts from the transcript of his evidence:

**Vol 9B: Line 29, page RR – line 4, page SS:**

**You would have seen with the Truth and Reconciliation commission, the TRC that a number of policemen applied for amnesty regarding torture. --- Yes.**

**Mr Paul Erasmus gave evidence in this court that it was common practice that people were sometimes assaulted. --- If he was aware of it and it happened in his presence, it could be.**

**But you were never aware of it and you do not know nothing about**

<sup>42</sup> Naik affidavit, Vol C, p110, paras 26.

<sup>43</sup> Naik detention file, exhibit G3, pp4 – 15, reference to Els is on p10, para A.16. <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/G3-Kantilal-Naik-%E2%80%93-Directorate-of-Security-File.pdf>

<sup>44</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 Para 257

<sup>45</sup> Prof Naik detention file, exhibit G3, p10, para A.16 (see also C12); read with paras 18 – 22 of Naik's affidavit, Vol C, p 108.

<sup>46</sup> Oral Testimony Vol 9B (1) Page RR (673) Line 16 and 17

it? --- I am definite on that point, that I would not have assaulted or otherwise tortured a detainee.

Yes, that is not what I am asking whether you would do it, I am asking whether you were aware of it? --- It was in media, in press, it was knowledge available.

But from walking on the 9<sup>th</sup> floor, possibly bring a visit to the 10<sup>th</sup> floor, you have never observed anything of the sort? --- In the periods that I did walk in the building and where interrogation was taking place, I cannot recall seeing it or knowing about it, although it was common knowledge.

That is an interesting answer. If you say it was common knowledge that it happened? --- You mentioned that it was common knowledge, yes it is in the press, you hear it daily.

**Vol 9B: Line 20, page VV:**

Of what type of torture were you aware of? --- I was only aware of torture as revealed in the press and the media. What was mentioned then was what I would say, that is what I have heard, that is what I have read. I was not aware of it taking place in my presence, in my company.

**Line 24, page WW – line 8, page XX:**

**COURT:** Thank you. Mr Els you say that you were aware of the torture and assaults from the media, reports in the media, is that what you are saying? --- That is what I said, M'Lord.

And as members of the security branch, was there an occasion where, with your colleagues you discussed these allegations that were in the media about the torture and assaults, did you discuss these? --- It was spoken amongst members as a conversation, yes, M'Lord.

And what was the mood of the conversation? What was it about? -- - It would have been casual, not serious.

**Vol 9B: Lines 7 – 12, page OOO:**

What about electrocution or electric shock treatment? --- That, as I have explained has been in the media quite often. But, ... [intervene]

Are you aware of any security branch officer who had been involved in applying electric shocks to a detainee? --- No, I am not aware.<sup>47</sup>

25 Judge Mothle summed up the evidence on Els as follows:

183. Asked whether he knew anything about the assault on detainees, Els stated that he had only heard from the media that detainees were assaulted. He himself has never witnessed this. He was further shown police records which indicated that on the evening of Saturday 23 until Sunday morning, 24 October when Naik was subjected to torture through the “helicopter method”, Els was one

<sup>47</sup> See also Transcript Vol 9B, Line 22-page MMM - line 14-page VVV

of the interrogators. His response to that evidence was that he could not recall. In fact, throughout his evidence, his response to questions was that he could not recall any of the instances put to him. It was later put to him that he could have been one of the interrogators of Timol as evidence showed that they changed teams during interrogation. He responded that he could not recall. ....

332. Els should be investigated for misleading the Court that he only knows of the allegation of assault on detainees from the media. The police file records reflect that he was in attendance as one of the interrogators when Naik was subjected to the “helicopter” method of torture for which he lost the use of his hands.

### ***The torture of Sydwell Cukula***

26 While making bland denials that he was ever involved in assaults and indeed only hearing of such allegations in the media, it is noticeable that Els chose not to disclose to the Reopened Inquest Court that he was the subject of a civil claim for assault launched by one Sydwell Cukula.<sup>48</sup> Also accused of assault was Maj A B Cronwright and W/O N J Deetlefs<sup>49</sup>. A copy of pages 121 – 129 of the personal file of Neville Els, which deals with this complaint, is annexed hereto marked “G”.

27 Cukula stated that he was assaulted and tortured between 6 and 9 May 1980, first at a police station near Baragwanath Hospital and then at John Vorster Square. He alleged that he was punched in the head and face, lifted by police and dropped on his back, and he sustained to electric shocks, including on his genitals.

28 Dr Norman Jacobsen, the Senior District Surgeon examined Sydwell on 14 May 1980 and found a left subconjunctival haemorrhage, left periorbital bruising, 1cm abrasion on the lower lip, perforation to right ear (healed) and tender over

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<sup>48</sup> Siviele Els: S Cukula Teen Die Minister Van Wet En Orde. Ref: O. W :50969R/8(1). Pages 121 – 129, Neville Els personal file: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/J3-Neville-Els%20%99-police-file.pdf>

<sup>49</sup> Multiple assault allegations have been made against Cronwright and Deetlefs in the case of Neil Aggett and elsewhere.

lumbar and sacral areas.<sup>50</sup> These injuries appear to be consistent with Mr Cukula's account of assault and abuse. We assume that the Acting NDPP and his team did not read Els' personal file or attempt to trace and interview Mr Cukula.

29 The claim of Els that he was never involved in any abuse, or indeed even witnessed abuse, and moreover only heard of such things in the media, rings particularly hollow in the light of this evidence. He was the subject of an investigation regarding serious allegations of assault, abuse and electrical shock treatment and even signed an undertaking relating to the provision of state legal representation on 25 November 1980.<sup>51</sup>

### **ROLE OF SETH SONS**

30 Sons was a member of the SB stationed at JVS. A summary of Son's version as provided in his testimony is annexed hereto marked "H". The full transcript of his evidence can be downloaded from the URL in the footnote below.<sup>52</sup> He testified at the reopened inquest that he was a leader of a unit of black SB members.

31 In October 1971 he was requested by Captain Dirker to accompany him on an errand and they drove to Timol's home. On arrival, Sons says he remained in the car and Dirker and others went into the house and later came back with a typewriter and other items.<sup>53</sup>

32 On their return to JVS, Sons used the west entrance to access the building. On his way to the elevator, he heard people say that a person fell from the top floors. He went back to his office on the 9<sup>th</sup> floor. On being questioned by the

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<sup>50</sup> Page 126 of Annex G.

<sup>51</sup> Page 128 of Annex G.

<sup>52</sup> Transcript Vol 15, pages 1030 - 1084: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/Transcript-I01-2017-VOL-15-16.08.2017.pdf>

<sup>53</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 Para 203

Court as to why he did not enquire as to who fell, he repeatedly stated that he had a phobia of seeing people with fall injuries that would turn his stomach. He did not want to make such enquiries. The Court reminded him that he had described himself as a leader of a unit operating from the 9<sup>th</sup> floor, and that the person who fell could have been a member of his unit. Under the circumstances the Court would have expected that a natural reaction of any person in his position would be to inquire as to who fell from the upper floor of the building.<sup>54</sup>

33 Sons denied ever assaulting anyone, indeed he testified that he only heard of allegations of assaults and torture of detainees at JVS through the newspapers. Examples of such extracts from his testimony include:

**Vol 15, p1038 lines 8 – 14 (evidence in chief)**

**Was u bewus gedurende u tyd by die veiligheidspolisie, van enige aanranding of marteling van aangehoudenes deur polisiebeamptes? --- Nee, U Edele. U Edele, ek moet op korreksie sê dat daar was tyd tot tyd nadat mense losgelaat was, was daar sprake van aanrandings wat plaasgevind het.**

**Vol 15, p1044 lines 10 –**

**MR PRETORIUS:** Right, u het gesê as ek nie uitbrei daaroor nie, dan sal u nie weet nie. Ek wil dit aan u stel, destyds het daar maar aanrandings plaasgevind tydens die ondervragings, nie waar nie? --- Ek weet nie daarvan nie, U Edele.

Ja, in u getuienis in hoof het u ook gesê as hulle vrygelaat word, dan het die bewerings eers gekom. Het u so 'n getuienis in hoof gegee? -- - Dit is korrek, U Edele.

Siviele eise wat teen van die lede van die polisiemag ingestel is, het u ooit daarvan gehoor? --- Ja, ek het al daarvan gehoor, U Edele.

In hierdie hof het ons getuienis gehad van Dr Nike waar hulle sy hande vasgebind het en met 'n besemstok het hulle hom opgehang dat sy hande verlam geraak het. Het u al van hierdie helikopter metode gehoor? --- Nee, U Edele.

Tydens die Waarheids en Versoeningskommissie het 'n aantal lede ook getuig onder andere, Jeff Benzien oor hoe hulle mense 'getube' het. Weet u van die metode van tube? --- Nee, U Edele.

So u basiese weergawe is eintlik u het net gehoor van sulke aanrandings, u weet nijs daarvan nie? --- Dit is so, U Edele.

U het nooit by 'n kantoor verby geloop wat jy iemand hoor skree of gekla of gehuil het nie? --- Nee, U Edele.

**Het jy Hanif Wally ondervra? --- Ekskuus?**

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<sup>54</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652, Para 204

Het jy Hanif Wally ondervra? --- Hanif... die naam, die naam klink bekend, U Edele.

Het jy mense ondervra? --- U Edele, bitter min mense, U Edele.

Kom ons probeer 'n getal daarvan sit. Bitter min mense, half dosyn, 6 mense ondervra? --- Dit kan wees. .....

MR PRETORIUS: Ja, u woordgebruik is besonders. Sensitiewe ondervragings metodiek, kan u vir ons uitbrei daarop? Wat is sensitiewe ondervragings metodiek? --- Ja, U Edele dit is nie 'n geval van rond strom nie, U Edele. Dit is wanneer jy die inligting uit 'n persoon uit kry sonder enige geweld, sonder enige dade van misdryf.

Ja, dis vir my interessant dat u pertinent nou by u antwoord byvoeg, sonder enige geweld, of sonder enige dade van misdaad. Ek wonder hoekom voel u dat dit relevant is? --- Ja, ek dink die antwoord pas mooi by die vraag, U Edele.

Kom ek vra vir u, het julle ooit geleer van 'Good cop, bad cop'? --- Ekskuus, U Edele?

Is u ooit in hierdie sensitiewe ondervragings metodiek geleer van 'Good cop, bad cop?' Goeie polisieman versus 'n slegte polisieman? -- O, dit kom altyd ter sprake.

#### Vol 15, p1060, lines 8 – 11

Ek wil dit ook net aan jou stel vir 'n persoon wat by die Veiligheidstak gewerk het sou u wel kennisgedra het van aanrandings, en sou u meer bewus gewees het van aanrandings alhoewel uself nie noodwendig daarby betrokke was nie stel ek dit in alle regverdigheid aan u? --- U edele as ek nuuskierig was het ek seker baie meer uitgevind u edele.

#### Vol 15, p1066, lines 6 – 12

MR VARNEY: Mr Sons please listen to this question carefully. Have you ever in your policing career witnessed an assault by a policeman on a detainee? --- In the cells yes you see that happening.

So you yourself have witnessed assaults in the cells? --- No M'Lord.

So let me ask the question again have you personally seen or observed an assault on a detainee? --- Not that I know of M'Lord.

#### Vol 15, p1067, line 3 – p 1069, line 20

Again Mr Sons I want you to listen very carefully to the next question. As a policeman throughout your career have you Mr Sons have you personally have you been involved in any assault, or any abuse of any detainee at any time? --- No M'Lord.

Are you certain about that? --- Maybe my brain has rusted like my age M'Lord.

COURT: Has your age rusted?

MR VARNEY: Are you saying that your memory might be a bit rusty? --- Pardon?

Your memory might be a bit shaky? --- Yes it could be it could be.

Well let us see if we can help you with your memory .....

I want to return to a name that was put to you by Mr Pretorius Hanif Vally. You testified earlier that you could not recall this particular name. -- - Well I cannot remember the name but it rings a bell.

So do you recall that Mr Billings and Mr Harry Persad arrested Mr Vally in 1980? --- I cannot remember that.

We will be putting up an affidavit from Mr Vally and he will say that you actually searched his house, and following the search you took him back to John Vorster Square. --- I cannot remember that M'Lord.

And on arrival at John Vorster Square when you began to question him you took away his spectacles, his glasses. --- I cannot remember that.

Mr Vally will say that while in that interrogation room with you and your Colleagues he was forced to stand naked. --- I cannot remember that.

Did you ever require anybody to stand naked during interrogation? --- Not that I can remember.

Mr Vally says that thereafter he was assaulted by way of being slapped and kicked. --- The answer is again I cannot remember that M'Lord.

Does the name Arwen Musson does that ring a bell? --- No M'Lord it does not ring a bell.

Because Mr Arwen Musson will be giving us an affidavit which he will say that on the morning of June 1983 Mr Harry Persad came to his home in Bosmont and arrested him? --- No I cannot remember that incident M'Lord.

He will say that he was active in a group called Action Youth, do you remember that organisation Action Youth? --- M'Lord that was an organisation that was years back I cannot remember or recall it M'Lord.

Yes it was an organisation active in the Coloured and Indian areas mobilising the youth. But Mr Musson will say further that you were in the car when he got into that vehicle and was taken to John Vorster Square. --- I cannot remember that M'Lord.

He will say that he was questioned by you and your Colleagues on the 10th floor and that before you left you assaulted him by using an open hand and hitting him on his head twice? --- I cannot remember that.

Vol 15, p1073, line 5 – p1074, line 18

MR VARNEY: Mr Sons my Colleague Mr Pretorius has asked you whether you have heard of or are familiar with certain kinds of assault and torture that were perpetrated. There is evidence that these acts of torture were perpetrated against detainees at John Vorster Square. I want to put to you a few other methods of torture. I will tell you up front that all these methods that I will be putting to you detainees have alleged, detainees were detained around the same time as Mr Timol have alleged that they suffered such torture at John Vorster Square between the 23rd and the 27th of October. As I put this to you, you can tell me whether you have heard of such torture. Detainees being punched, kicked, or slapped. --- No M'Lord.

Standing on detainees toes. --- No M'Lord.

Dragging or pulling a detainee by the hair? --- No M'Lord.

Threatening a detainee with death or more torture? --- No M'Lord.

Placing a hessian or plastic bag over a detainees head in order to suffocate that person? --- No M'Lord.

Applying of electric shocks? --- No M'Lord.

The giving of mule kicks? --- No M'Lord.

Do you know what a mule kick is? --- Kicking backwards.

Kicking backwards, and there is evidence before this Court that detainees were kicked on the upper part of their legs repeatedly it was known as mule kicks. Dangling a detainee by the ankles? --- No M'Lord.

Have you ever heard of a detainee slipping into unconsciousness? --- No M'Lord.

Urinating on a detainee? --- Pardon.

Urinating on a detainee? --- No M'Lord definitely not.

Making a detainee stand on one leg with an arm raised high? --- No M'Lord.

Forcing a detainee to do half spots with hands raised high? --- No M'Lord.

Forcing a detainee to sit on an imaginary chair? --- No M'Lord.

Forcing a detainee to stand on a sheet of A4 paper for a prolonged period? --- No M'Lord.

Depriving a detainee of food and water? --- That was not allowed M'Lord.

Not allowing a detainee to go to the bathroom and forcing that detainee to urinate on oneself? --- No M'Lord.

**Vol 15, p1078, lines 10 – 20**

In response to a question that Mr Pretorius put to you whether you have heard of any assault or abuse. You said to him that from time to time there was talk that detainees had been assaulted. Can you advise this Court who was this talk amongst? Who was involved in talking about assaults? --- Yes if you open up a newspaper you realise that there is somewhere where they are talking about the assaults.

And so this talk would be amongst your Colleagues? --- No M'Lord that is said in the newspapers.

Now would your Colleagues talk about what was in the newspapers? --- Yes the news in the newspapers.

***Sons implicated in abuse by five detainees***

34 Five other former detainees filed affidavits regarding Sons participation and/ or presence in assaults on detainees:

34.2 Ismail Momoniat (Momoniat) is a former activist who testified that on his first day of detention in April 1980 at JVS, he was taken to the cells by Captain Sons. Sons threatened that he would make him eat pig meat.<sup>55</sup>

34.3 Momoniat believes that Sons would definitely have been aware of the beatings or torture at JVS. "This is because one could easily hear people

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<sup>55</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 Para 228

when they were being assaulted or tortured, and sometimes one could even see assaults taking place through stained glass partitions. It is simply not true that a long-serving and dedicated security policeman like Captain Sons would not have heard or seen any assaults on detainees, particularly since he operated or had access to the same security branch floor at John Vorster Square.”<sup>56</sup>

34.4 **Parmananthan Naidoo** grew up in a family of political activists and later also became an activist. After the death of Timol he became one of the founders of Ahmed Timol Memorial Committee. He retired as ANC chief whip in the council of the City of Johannesburg in August 2012. Naidoo stated that he was arrested by Sons and other members of the SB at his house in the presence of his family. He was insulted and threatened all the way to JVS. He was taken to the 10<sup>th</sup> floor where Majors Cronwright and Arbee assaulted him in the presence of Sons. He was held by the hair and his head was banged onto the desk.<sup>57</sup>

34.5 **Mr Kevin Martin** (Martin) stated in his affidavit that he was arrested during July 1975 on his way to school. He was taken to the 9<sup>th</sup> floor of JVS and tortured by Lieutenants Sons, Visser and Sergeant Magoro. He was struck by Visser with his fists and when he fell, both Visser and Sons repeatedly lifted him up by his arms and legs and dropped him on his back and head until he almost passed out. Sons then held him down as Visser sat on his chest and repeatedly kicked him with the heel of his shoe. Thereafter Sons pulled Martin’s pants down and squeezed his private parts. Martin stated further that he was tortured for an hour and then taken to a cell to heal without medication.<sup>58</sup>

34.6 **Alwyn Donovan Graham Musson** (Musson): In June 1983 Musson was arrested with his father. Sons who took him to the 10<sup>th</sup> floor of JVS after he was separated from his father on arrival. Sons gave him a pen and

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<sup>56</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652, para 229

<sup>57</sup> *Ibid*, para 232

<sup>58</sup> Exhibit H25 <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H25-Affidavit-Kevin-Martin.pdf> at page 2 para 6.

paper to provide him with the names of other activists who were part of Action Youth and left the office. Soon thereafter a white member of the Security Branch came in and threatened to throw him out of the window if he did not provide the names. *“Sons returned to the office after about half an hour and became angry when he noticed that I had not written down anything, He then slapped me on the sides of my head with an open hand.”*<sup>59</sup>

34.7 **Hanif Mohamed Vally** (Vally) participated in the 1980 student protests and was arrested and taken to JVS by SB members with Sons. He was later accompanied by more police officers, including Sons to search his flat and car. He was taken back to JVS where he was interrogated several times and Sons was part of the team. Vally recounts how he was stripped naked in the first session of the interrogation and Sons took off his spectacles and other policemen slapped and kicked him. Mr Paul Erasmus was present when he was assaulted.<sup>60</sup>

35 In respect of the evidence of Seth Sons (and other SB officers) Judge Motle concluded the following in his judgment:

**206.** As with other two members of the Security Branch who testified, Sons stated that he does not know of any assaults on detainees and that he has read about these in the newspapers. He denied when it was put to him the names of people who will testify that he in fact assaulted them when he detained them. When confronted with this evidence, he suddenly suffered loss of memory and stated that he could not remember some of these incidents.

**207.** After Sons testified, the Court received five affidavits from former detainees who allege that they were either assaulted by Sons or assaulted by members of his team in his presence.

**261.** The evidence of assault and other forms of torture of detainees presented in the 2017 re-opened inquest is so overwhelming, that the denial and lack of knowledge thereof by the three former Security Branch police officers who testified is disingenuous. Further, the fact that each one of them testified during the 2017 re-opened inquest that they knew nothing about assault apart from what they read in the media, is a demonstration that they were regurgitating a standard response,

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<sup>59</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 para 233

<sup>60</sup> *Ibid*, para 2

seemingly prescribed to all members of the Security Branch. Else, Sons and Rodrigues's conduct calls for censure. Their conduct must be investigated further with a view to raise appropriate charges.

## INVESTIGATION AND DECISION NOT TO PROSECUTE

36 Mothle J, in delivering judgment in the reopened inquest, ordered the NPA to investigate Sons and Els for perjury committed during the 2017 proceedings:<sup>61</sup>

**“Els, Sons and Rodrigues contradictions call for censure. They must be investigated with a view to raise appropriate charges”<sup>62</sup>**

**“There is sufficient evidence before this court to hold that the security branch tortured those arrested within a day or two of Timol. The torture continued over the weekend in the same building.”<sup>63</sup>**

.... **“Els should be investigated for misleading the Court that he only knows of the allegation of assault on detainees from the media. The police file records reflect that he was in attendance as one of the interrogators when Naik was subjected to the “helicopter” method of torture for which he lost the use of his hands.”<sup>64</sup>**

**“Sons should also be investigated for testifying under oath that he heard of detainees’ assault from the media. There are five witnesses who filed affidavits to dispute his statement.”<sup>65</sup>**

37 On 21 May 2020, our clients received the NPA decision not to prosecute Sons and Els, more than 30 months after the matter was referred by Judge Mothle to it for investigation.

38 Mothle J did not order that Sons and Els be investigated for assault, the crime already having prescribed. It is entirely unclear why the NPA saw fit to make an

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<sup>61</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652 para 262

<sup>62</sup> *Ibid* Para 261

<sup>63</sup> *Ibid* Para 262

<sup>64</sup> *Ibid* Para 332

<sup>65</sup> *Ibid* Para 333

utterly pointless decision in this regard when neither the judge nor the family sought a prosecution for an obviously superfluous charge of assault.

***No consideration of the charge of attempting to obstruct the course of justice***

39 It is equally perplexing, given that fabrication of evidence was involved, that no consideration was given to charging Els and Sons with an additional charge of defeating or obstructing the course of justice, or attempting to do so. This would seem to be a most significant lapse on the part of the Acting DPP. There is nothing in the decision to suggest that the Acting DPP applied his mind to the possibility of such a charge. In this regard, we note that the judgment referred to investigations being carried out with a view “to raising appropriate charges.”

***No evidence of any coherent investigation***

40 The reasons provided by the Acting DPP do not set out what investigations were carried out and what interviews were conducted. No explanation for the length of time taken to conclude the investigation was provided.

41 It is particularly disturbing that the testimony and statements of detainees asserting that they were assaulted by Sons and Els were not evaluated in the reasons for the decision not to prosecute. One cannot assess the offence of perjury in isolation. The 5 witnesses who implicated Sons in assault are not mentioned at all in the reasons. Shockingly, it is quite evident that they were not consulted or interviewed by the NPA.

***Failure to consider the public interest***

42 The reasons of the Acting DPP do not disclose whether the public interest criterion set out in the NPA's Prosecution Policy was considered.<sup>66</sup> The investigation and prosecution of crimes committed by apartheid-era perpetrators who spurned the truth and reconciliation process are manifestly in the interests of justice. The people of our country cannot begin to heal the deep wounds inflicted by the apartheid system until such time as the truth is revealed and justice is served for atrocities committed. If we are to give meaningful effect to Nelson Mandela's demand of "never again" then such cases cannot be disposed of in the manner that this matter has been.

43 The failure to act expeditiously, seen together with the refusal to prosecute Els and Sons, sends a powerful signal. It invites apartheid-era security policemen to continue with their charade in courts and to glibly fob off questions on torture with bland denials. It invites them to continue with the pretence and to do so with the virtual guarantee of complete impunity. Indeed, the approach makes a mockery of South Africa's post-apartheid administration of justice.

**THE CLAIM THAT ELS WAS NOT ON DUTY**

44 Paragraph 5 of the Acting DPP's reasons states that 'there is evidence' that Els was not on duty the day Prof Naik was tortured:

**"Regarding the assault allegations against Mr Neville Els by Mr Kantinal Naik, there is evidence which indicates that at the time the complainant was assaulted, Mr Els was not on duty and thus not in the presence of the complainant."**

45 The Acting DPP prefers not to disclose the evidence that apparently proves that Els was not present when Naik was tortured. No indication of what this evidence might be is supplied. Is it documentary evidence, a sworn statement

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<sup>66</sup> NPA Prosecuting Policy, at page 6, section C, para 1.

or something else? Has its veracity been tested? Who supplied the evidence? Was it Els himself, who has been found by a court to have lied under oath? Why did this alleged evidence not emerge during the inquest? The family is left guessing and is simply expected to accept that this is the end of the matter.

46 The following account is reflected in Naik's detention file<sup>67</sup> at page 5:

**Indierman KANTILAL CHHAGANLAL NAIK sal verklaar dat: Hy aangehou word kragtens die Wet op Terrorisme te John Vorsterplein, Johannesburg.**

**Drie Blanke mans hom om 10 vm. op 24.10.71 oorgeneem bet vir verdere ondervraging tot om 1 nm. Een van hulle by die tafel geskryf het terwyl die ander twee hom ondervra het en hom terselfdertyd oor 'n stok wat oor sy elmboe en tussen sy knie deurgesteek was, tussen twee tafels opgehang het. Hy drie keer op genoemde wyse gehang en heen en weer geswaai was vir periodes van ongeveer drie tot vyf minute as gevolg waarvan sy linker-hand effe verlam geraak het en sy regterhand erg verlam. Hy ook gekneusde gewrigte opgedoen het en die vel van sy voorarms af gekom het as gevolg van die hangery. Die fris geboude Witman hom ongeveer vyf houe met die gebalde vuis hard op sy bors geslaan het en ongeveer vyftien houe met die plathand op sy rug. Dit baie seer was en hy gevoel het dat sy rug opgeswel was. Hy deur die betrokke Witmans blykbaar verkeerdelik aangesien was vir een KANTILAL VALAB en hy derhalwe onskuldig aangerand is.**

**Hy by drie geleenthede deur Landrosse in diesel besoek was, maar geen klagtes van aanranding aan hulle gemaak het i.v.m. die betrokke lede nie. Hy op 23 November 1971 tydens die vierda besoek van n Landdros, die klagte aan Landdros BRINK gerapporteer het, wie hom by~ vorige geleenthed gevra het of hy klagtes van aanranding het, toe hy geen klagte ingedien het nie. Hy nie voorheen die klagte aan enige persoon gerapporteer hot nie. Hy tot die besluit oorgegaan het daar hy gevrees het hy so beseer was dat hy die gebruik van sy hande tot~ mate kan verloor.**

**Die behandeling van Fisioterapie vanaf 27.10.1971 sy beserings amper genees het. Hy nie weer na 24.10.71 aangerand was nie en goeie behandeling daarna van die Veiligheidspolisie ontvang het. Hy nie die name van die betrokke persone ken nie, maar instaat is om hulle op~ uitkenparade uit te wys.**

<sup>67</sup> Naik detention file, exhibit G3, pp4 – 15, reference to Els is on p10, para A.16.

<https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/G3-Kantilal-Naik-%E2%80%93-Directorate-of-Security-File.pdf>

**A.15 Sy beserings goeie vordering maak. Hy sy aanrandera vergewe het en die klagte verdere oorweging skenk, daar hy altyd getwyfel het of hy n klagte moes indien.**

**A.23 Hy nie wil voortgaan met die klagte van aanranding nie. Hy tevrede is met die behandeling wat hy ontvang en nog verder sal ontvang.**

**A.33 Hy deur Kolonel VAN RENSBURG op 5.1.1972 versoek was om~uitkenparade op 7.1.72 te John Vorsterplein byte woon om sy aanranders uit te wys. Hy nie die uitkenparade wil bywoon nie en ook nie verlang dat on ui tkenparade gehou word nie in die lig van sy brief waarin hy die klagte van aanranding teruggetrek het nie.<sup>68</sup>**

47 At page 10 of Naik's detention file it was evident that Els had declared (presumably under oath) that he was present in the interrogation room during the late night of 23 October 1971 and the morning of 24 October 1971.

**AI6: A/O. NEVILLE ELS, Veiligheidspolisie, John Vorster plein, sal verklaar:-**

**Dat hy en Kaptein van HEERDEN die aangehoudene vanaf 10.20 nm. op 23.10. 1971 tot om 7 vm. op 24.10.71 ondervra het, Aangehoudene altyd met sy hande in~ gevoude posisie gestaan of gesit het. Hy geen kennis dra van 'n aanranding op aangehoudene nie. Laasgenoemde ook nie on aanranding aan hom rapporteer het nie.**

48 This is the precise period during which Naik says he was brutally tortured, *inter alia*, by way of the helicopter method. And yet we are advised by the Acting DPP that there is evidence that contradicts Els' own version given to investigators in 1971 that he was there, which was also confirmed official records. In the circumstances whatever is in the possession of the Acting DPP must be disclosed for close scrutiny as there is no apparent reason to suggest that the entries quoted above are incorrect. Indeed, Naik's detention file was made available to the Els' legal team at the Reopened Inquest and at no point did they raise an objection that the reference to Els at page 10 was wrong or false.

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<sup>68</sup> See also exhibit C12; read with paras 18 – 22 of Naik's affidavit, Vol C, p 108.

49 There is no reason to doubt Naik's evidence that he was tortured on the night of 23 October and morning of 24 October 1971, even if he did withdraw charges, which was a common occurrence as detainees lived in fear and intimidation and did not wish to prolong their detention.

50 The reasons of the Acting DPP are alarmingly devoid of any reference to or consideration of the contents of the Naik detention file, and it must be assumed that the file was not consulted by the NPA.

51 Mothle J recorded the following in his judgment:

**Asked whether he knew anything about the assault on detainees, Els stated that he had only heard from the media that detainees were assaulted. He himself has never witnessed this. He was further shown police records which indicated that on the evening of Saturday 23 until Sunday morning, 24 October when Naik was subjected to torture through the "helicopter method", Els was one of the interrogators. His response to that evidence was that he could not recall. In fact, throughout his evidence, his response to questions was that he could not recall any of the instances put to him. It was later put to him that he could have been one of the interrogators of Timol as evidence showed that they changed teams during interrogation. He responded that he could not recall.<sup>69</sup>**

## **OLD AGE AND MEMORY**

52 Another ground set out by the Acting DPP is that the incident happened in 1971, some 46 years prior to their testimony and Sons is 80 years old and Els is 82 years old and accordingly "the long effluxion of time and their advanced age will militate against a finding that they are deliberately lying."

53 In the first place it needs to be pointed out that the alleged perjury and/ or attempt to defeat the course of justice does not only relate to what took place over a few days towards the end of October 1971, as the Acting NDPP seems

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<sup>69</sup> Reopened Inquest into the death of Ahmed Timol ZAGPPHC 652, paras 183 and 184.

to suggest. As mentioned above both Els and Sons denied involvement and/ or knowledge of torture during their entire policing careers. Indeed, they both claimed only to hear claims of torture in the media/ newspapers. To the extent that effluxion of time is relevant, the relevant period runs throughout their policing careers.

54 According to Sons' personal file he joined the SAP in 1958 and retired in 1993 with the rank of Colonel.<sup>70</sup> He was a policeman for some 35 years. It is unclear when he joined the Security Branch but since he was already with the SB in 1971, it is safe to assume that he was with the SB (and its successor the Criminal Intelligence Services) for at least 22 years. According to Els' testimony he joined the SAP in 1952 and was transferred to the SB during 1966/7 and he resigned in 1979.<sup>71</sup> However his police file confirms that he resigned in June 1981 and he applied for reemployment in 1985, which was turned down.<sup>72</sup> Els was a policeman for 29 years and it would appear that he was with the SB for a period of 15 years. These are the time periods in which Sons (35 years) and Els (29 years) claim not to have known of assaults and torture perpetrated by the police, aside from media/ newspaper reports.

55 The South African Prosecution Policy makes no reference to old age as a factor mitigating against a decision to prosecute, so it is unclear on what basis this became a factor in the Acting DPP's decision. We submit that prosecutors are compelled to exercise their discretion within the confines of the Prosecution Policy. Under "circumstances of the offender" the Policy notes:

**Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.<sup>73</sup>**

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<sup>70</sup> Exhibit J7, page 1: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/J5-Seth-Sons%20police-file.pdf>

<sup>71</sup> Transcript Vol 9B: page KK (673)

<sup>72</sup> Exhibit J3, Neville Els Police File: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/J3-Neville-Els%20police-file.pdf>

<sup>73</sup> At page 7.

56 However, this factor is not an issue since the alleged crimes (perjury/ defeating ends of justice or attempting to do so) only took place during the Reopened Inquest in 2017.

57 In any event, South African case law holds that age and infirmity are not a bar to the pursuit of justice but are factors to consider at the sentencing stage (*S v Hewitt 2017 (1) SACR 309 (SCA)* and *S v Zinn 1969 (2) SA 537 (A)* at 542B-C)):

**“regarding his age, whilst courts have considered oldness as a mitigating factor, it is certainly not a bar to a sentence of imprisonment”. Our courts have, prior to this case, also taken the position that old age is not a bar to imprisonment.”**

58 See also paras 83 to 88 of the recent full bench decision in *Rodrigues v National Director of Public Prosecutions of South Africa and Others [2019] 3 All SA 962 (GJ); 2019 (2) SACR 251 (GJ)* which confirmed that old age and infirmity, on their own, do not prejudice an accused's right to a fair trial, but are factors to be considered at sentencing.

**“there is also no evidence that the alleged poor memory of the Applicant and other witnesses is likely to taint the fairness of the trial. If anything, that remains a neutral factor as it applies equally to the State and ultimately, it is the State that carries the burden of proving guilt beyond reasonable doubt.”**

**“age and infirmity are not grounds upon which the applicant can singularly rely as a form of prejudice. These are grounds which, generally, a trial court must consider at sentencing.”**

59 The European Court of Human Rights has expressly held that “*advanced age is not a bar to prosecution, pre-trial detention or a prison sentence in the Council of Europe's member States.*” (*Papon v France*, European Court of Human, Application No. 6466/01, Page 4).

60 Similarly, in Australia in *R v Austin* [1995 84 A Crim R] the court refused a stay application brought by an 87-year-old man, with various health conditions, who was charged with various sexual offences committed nearly 50 years earlier.

61 Perhaps most tellingly the Acting DPP does not point to any evidence of ill health or memory loss on the part of Sons and Els. He refers to no medical records to this effect that have been supplied by Els and Sons. The ground is based upon nothing more than the ages of the suspects and the long effluxion of time since 1971. It accordingly amounts to speculation on the part of the Acting DPP.

### **CLAIM THAT SONS NOT PROPERLY UNDER OATH**

62 The next reason is set out at paragraph 14 of the Acting DPP's letter:

**Another technicality is the fact that the Judge only warned Mr Sons about the import of the oath, viz, to tell the truth, well into his evidence, record p. 1051, lines 17-22 and he mentioned that his legal representative did not explain that to him. Perjury is committed only if the false statement is made under oath, and the import of an oath having been explained. A witness is only competent to testify if he/she is able to appreciate the difference between truth and untruth, see section 162 of Act 51 of 1977. Mr Sons was not properly put under oath.**

63 The assertion that Sons was not "properly put under oath" is plainly incorrect. Sons was placed under oath at the commencement of his evidence on 2017-08-16 as reflected at Vol 15, page 1030 from line 20. Sons was under oath for the full duration of his evidence:

I01/2017- ef 27  
2017-08-16 SONS

**COURT:** No, no it affected most people and disrupted court proceedings, but that is fine. Mr Sons? Swear him in.

**CLERK:** U volle name en van asseblief?

**GETUIE:** Seth Sons.

**CLERK:** Het jy 'n beswaar teen die aflê van die eed?

**GETUIE:** Nee.

**CLERK:** Sweer u dat die getuienis wat u gaan nou aflê is die waarheid, die volle waarheid en niks anders as die waarheid sal wees? So help my God.

**SETH SONS:** (verklaar onder eed)

64 What happened at page 1051 from line 17 is what happens routinely when judges have reason to believe that a witness may not be testifying truthfully. Such a reminder does not in any way suggest that Sons was not under oath. See excerpts pasted below.

I01/2017 – nh  
2017-08-16

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SONS

**COURT ADJOURNS COURT RESUMES**

**MR PRETORIUS:** M'Lord we are just looking for the Interpreter quickly if the Court will just bear with us, and Advocate Nell will just quickly see for the Interpreter M'Lord.

**COURT:** Yes. Mr Pretorius there is something that I need to say to this witness which I have not said before if you could give me that opportunity?

**MR PRETORIUS:** M'Lord exactly M'Lord.

**COURT:** Yes. Meneer Sons u is nog onder eed.

**GETUIE:** U Edele.

**HOF:** Is u nog onder eed?

**GETUIE:** Dit is korrek.

**SETH SONS:** v.o.e.

**HOF:** Ek wil hê u moet nou luister wat ek gaan sê. Ek gaan vir u iets sê u moet luister wat ek gaan sê, nê hoor jy my? --- Dit is korrek u edele.

Ja. Kyk die is 'n doodsondersoek nê, dit is 'n doodsondersoek. --- Ja u edele.

Verstaan u dit? --- Ja u edele.

En aan die einde van hierdie doodsondersoek ek moet sekere bevindings maak verstaan u? --- Dit is korrek.

Do you want to interpret that Mr Interpreter?

**INTERPRETER:** I will try my best M'Lord. At the end of the Inquest I am going to make certain Findings, en een van daardie bevindings is te doen met die oorsaak van die dood. --- Ja u edele.

U verstaan? --- Dit is korrek.

En as ek tot die gevolgtrekking kom dat daar mense is wat betrokke is in die oorsaak van die dood ek moet die name van daardie mense in die bevindings byvoeg? --- Ek verstaan u edele.

U verstaan? --- Dit is korrek.

Nou dit is iets wat ek van vooraf vir u moes gesê het maar ek het geen kennis gedra van jou getuienis nie want u het nie getuig voor die eerste doodsondersoek, is ek reg? Die eerste doodsondersoek in 1972 u het nie getuig daar nie, is ek reg? --- Ja u edele.

Want ek het nie jou beëdigde verklaring gesien in al die papiere nie? --- Ek was nie betrokke daarby nie u edele.

Ja, nou die twee kollegas van jou wat hier al voorheen getuig het Meneer Rodrigues en Meneer Nell, of Meneer Els ek het ook vir hulle gesê dat ek nou tot die gevolgtrekking kom dat Meneer Timol is dood as gevolg van die gedrag van sekere lede van die Veiligheidstak ek gaan name noem, verstaan u dit? --- Ek verstaan u edele.

**Gevollik u dra nou die risiko want u was 'n lede van die Veiligheidstak, en u getuienis u sê dat op 'n stadium u het Kaptein Dirk vergesel na Meneer Timol se huis toe, is dit korrek? --- Dit is korrek u edele.**

**Nou ek verwag van u om ons die waarheid te sê verstaan jy dit? --- Ja u edele.**

**Want as jy ons nie die waarheid sê nie die moontlik bestaan dat u dra die risiko en ek kan aanbeveel in die bevinding dat u betrokke was i die dood van Meneer Timol. --- Ek verstaan u edele.**

**Dit is die risiko. So u moet versigtig wees met u weergawe verstaan u dit? --- Ek verstaan.**

**Ek is seker jou Prokureur het dit vir jou gesê. Het jou Prokureur dit vir jou gesê? --- Nee u edele.**

**Hy het nie? Nou verstaan u wat ek sê? --- Nee ek verstaan u edele.**

**Van nou af as u nou getuig u moet dit in jou gedagte hou verstaan u dit? --- Dit is korrek u edele.**

**Mr Pretorius you may proceed.**

65 As a senior ranking police officer who retired with the rank of colonel, who spent 35 years in the police, Sons would have been acutely aware of the implications of giving false evidence. While he claimed that his attorney did not advise him of the risks of testifying untruthfully, this does not alter the fact that Sons would obviously have known of the risks. It does not appear that the attorney has confirmed this claim. In addition, Sons was represented by an experienced criminal counsel who would have intervened if it was apparent to Counsel that his client was ignorant to this degree.

66 The Acting DPP appears to suggest that s 162 of the Criminal Procedure Act of 1977 (CPA) was not complied with. Section 162 reads as follows:

**162 Witness to be examined under oath**

**(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:**

**'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'**

**(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.**

67 The oath was administered to Sons in accordance with s 162. The Acting DPP does not resort to s 164 but he may have had this section in mind as it deals with a presiding judge admonishing a witness to speak the truth. It reads as follows:

**164 When unsworn or unaffirmed evidence admissible**

**(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.**

**(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence**

68 This clause does not have application in this instance since Sons had already taken the oath and confirmed to the judge in this exchange that he was still under oath. Accordingly, there was no legal obligation on the part of Judge Mothle to admonish the witness, which he only did as a matter of abundant caution. To the extent that the admonishment had any legal impact, we note that most of Sons' testimony took place after the admonishment, not before it.<sup>74</sup>

69 In relation to s 164 of the CPA see S v B 2003 (1) SA 552 SCA. (Paragraph [15] at 562F/G - 563D):

**s 164 required a finding that a person did not understand the nature and import of the oath or the affirmation due to ignorance arising from youth, defective education or other cause. The finding by the Court a quo that the fact that a finding was required necessarily implied that an investigation had to precede the finding was too narrow an interpretation of the section. The section did not expressly require that an investigation be held and an investigation was not required in all circumstances in order to make such a finding. For example, it could happen that when an attempt is made to administer the oath or to obtain the affirmation it came to light that the person involved did not understand the nature and**

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<sup>74</sup> Mr Sons' testimony is recorded in Vol 15 of the transcript between pages 1030 and 1084, some 54 pages. The admonishment took place at page 1050-1. There is some 20 pages of evidence before the admonishment and some 32 pages after the admonishment.

import of the oath or the affirmation. The mere youthfulness of a child could justify such a finding. Nothing was required more than that the presiding judicial officer had to form an opinion that the witness did not understand the nature and import of the oath or the affirmation due to ignorance arising from youth, defective education or other cause. Although preferred, a formally noted finding was not required.

70 S v Ndelela 1984 (1) SA 223 (N) at page 225 has bearing:

“Nor is it for judicial officers to doubt mero motu the respect witnesses have for the binding nature of the oath, to impute to them a scepticism on the score which they have never expressed or indicated. It is for each witness himself to decline to take the oath. Unless he does so, he must be assumed to regard it as binding. That seems to be the effect of s 163 (3) of the Act. Judicial officers have no discretion in the matter. Section 162 (1), which applies to every witness covered neither by s 163 nor by s 164 (which makes special provision for someone who from ignorance arising from youth, defective education or other cause does not understand the nature of the oath), stipulates in peremptory terms that the oath must be administered to him, and it prohibits absolutely his examination as a witness unless such is done.”

71 Given Sons’ senior rank and long experience in the police there was absolutely no reason for Judge Mothle to doubt his understanding of the oath or impute any scepticism. Sons took the oath and it was accordingly binding on him throughout his testimony, notwithstanding the Judge’s reminder to him of the risks involved.

72 In any event the giving of false evidence in courts by Security Branch officers is hardly novel. Indeed, it was the *modus operandi* required of SB officers in inquests under apartheid<sup>75</sup> and it appears that this practice is still routinely pursued by most former SB officers who appear in more recent inquests.

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<sup>75</sup> Exhibit H7, affidavit of Frank Dutton page 32, para 89 to 91: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/H7-Affidavit-Frank-Dutton.pdf>; exhibit C, affidavit of George Bizos, page 5, para 17: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/C-affidavits-and-medical-reports.pdf>

## CLAIM THAT SONS AND ELS DID NOT TESTIFY IN FIRST INQUEST

73 In the final grounds for declining to prosecute, the Acting DPP points out that Els and Sons did not testify or make statements in the first inquest in 1972, and therefore had to rely on their memory. Adjunct to this claim is the assertion that since they had not made earlier statements in the first inquest that section 319(3) of the Criminal Procedure Act 51 of 1977 (CPA) will not apply as it cannot be “shown that they have deviated from their previous statements.” According to the Acting DPP this section deals with the making of conflict statements under oath.

74 Section 319(3) does not deal with the issue of inconsistent statements. It deals with the reservation of questions of law.<sup>76</sup> In any event, the ground raised is oddly curious since neither the family nor Judge Mothle recommended invoking the CPA clause dealing with inconsistent statements against Els or Sons. It would seem to be another superfluous reason not to prosecute, which regrettably smacks of padding.

75 Compounding matters is the stark fact that Els did make a sworn statement before the first inquest which has always been part of that record as exhibit E.<sup>77</sup> It is annexed hereto marked “E”. While not much turns on this statement as it only deals with the collection pamphlets found in Timol’s vehicle, it raises a very serious question. It points to the poor quality of the investigation in this case.

76 Since Els’ statement was one of the first exhibits put up in the first inquest and was also part of the reopened inquest – and indeed was available on the internet – one has to ask whether the Acting DPP and his team consulted with the record in any depth over the 2.5 years it took to reach a decision.

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<sup>76</sup> The Acting DPP may have had in mind s 190 of the CPA dealing with the impeachment or support of credibility of witnesses, which in subsection (2) refers to the making of inconsistent statements.

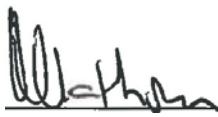
<sup>77</sup> This affidavit is available on the internet:

[http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AK3388/AK3388-B2-01-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AK3388/AK3388-B2-01-jpeg.pdf)

Regrettably, the inference to be drawn is that, at best, it was a rushed last-minute cursory perusal. This in turn points to the manifest unreliability of this decision.

## **CONCLUSION**

- 77 We are of the respectful view that none of the reasons put up by the Acting DPP for declining to prosecute in this matter withstand scrutiny. Regrettably we have come to the view, that even after a 2.5-year delay, no serious investigation was launched into these two cases.
- 78 We repeat our concern, that failing to hold former Security Branch officers accountable for misleading the court and lying under oath, will simply invite others to do the same. It will also extend the total impunity Security Branch officers enjoyed under apartheid to the new democratic order.
- 79 We accordingly request that you exercise your powers in terms of s 22(2)(c) of Act 32 of 1998 and reverse the decision not to prosecute Neville Els and Seth Sons.



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