

## **THE STEVE BIKO MEMORIAL LECTURE**

### **EVIL UNDER THE SUN: THE DEATH OF STEVE BIKO**

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Today is the 34<sup>th</sup> anniversary of the death of Stephen Bantu Biko. He was 30 years of age. I read of his death in the newspaper the following day. I had never met him. Many, perhaps most, white people in South African had never heard of him. I at least had heard of him as a militant young black leader who espoused The Black Consciousness philosophy. And I had heard reports from some of my colleagues at the Bar that as a witness for the defence at the trial in Pretoria of some young black activists he had made a strong impression on an initially unsympathetic judge. That was all. So I admit to having been astonished at the extraordinary reaction to the news of his death.

The bare facts, as they first come out were that he had been arrested for breach of a banning order confining him to the district of King Williamstown, that he had been in the custody of the

Security Branch of the South African Police at Port Elizabeth, had become “unwell”, had been sent to Pretoria and had died there in a prison cell. I have said the reaction was extraordinary. Steve Biko was not the first man to have died while in the custody of the Security Branch. He was, as far as these things were known, the 44<sup>th</sup>. But this death was reported internationally. In Washington the chairman of the Senate Foreign Affairs Committee called the death an outrage. In the United Nations it was described as tragic. In South Africa thousands of black students demonstrated, with the usual hundreds of arrests. Desmond Tutu, then Bishop of Lesotho, expressed the sense of loss felt within and beyond the black community, Chief Mangosuthu Buthelezi said “only a country as mad as South Africa can waste such talent”.

The sense of outrage was hardly dampened by the first response of the South African government, The Minister of Police, Mr. Jimmy Kruger, speaking in the congenial atmosphere of the Transvaal Congress of the Nationalist Party stated that Biko had been on a hunger strike. One of the delegates to the great amusement of his fellows congratulated Mr. Kruger for being so democratic that those who wanted to starve themselves to death were allowed by him to do so. Mr. Kruger then made his never-to-

be-forgotten statement “I am not pleased nor am I sorry. Biko’s death leaves me cold.”

There was of course no truth at all in the story of a hunger strike.

The wave of protest and condemnation did not die down. International pressure forced the Prime Minister, Mr. Vorster to promise a full enquiry. It took the form of an inquest which opened two months later in Pretoria in the Old Synagogue – a deconsecrated building converted into a courtroom some years before especially to accommodate major political trials.

The Chief Magistrate of Pretoria presided at the inquest. There were several sets of advocates engaged - for the police, for the district surgeons who had attended Steven Biko, for the prisons department and, representing government interests generally, the Attorney General. There were three of us representing the widow and the mother of Steve Biko – myself, George Bizos and Ernie Wentzel. Our instructing attorney was the lively and efficient Shun Chetty. We were given all of the many affidavits made by members of the Port Elizabeth Security Branch who had had custody of

Steve Biko and by the district surgeons who had seen him. The Chief Magistrate did not restrict our cross-examination of the police or the doctors. Further, the government pathologist had agreed that two pathologists who had been engaged on behalf of the family could observe and participate in the autopsy which was carried out on the day after Steve Biko's death. The two pathologists were Dr. Jonathan Gluckman and Professor Neville Proctor, an internationally known neuropathologist.

The inquest began on the 14<sup>th</sup> November 1977 and ran for two weeks. I do not propose to tell the full story of the inquest. George Bizos has given a masterly account of it in his book, "No One To Blame", I shall try to give the essentials of what came to light at the inquest.

Steve Biko who, as I have said, was confined by ministerial order to the King Williamstown District, was arrested at a road block outside that area on the 18<sup>th</sup> August together with his friend Peter Jones. It is believed that they had been to Cape Town to visit political supporters of their movement. Steve Biko was taken to a Port Elizabeth prison and kept there until 6<sup>th</sup> September. On that day he was transferred to the headquarters of the Security Branch

of the police, which were in a Port Elizabeth office building. He was held there under the statute which permitted a police officer to detain indefinitely for interrogation any person whom he believed had committed an offence under the Terrorism Act or had knowledge of such an offence. There had been some inflammatory leaflets distributed in the Eastern Province and the Security Police presumably believed that he was responsible for them. In any event they were anxious to induce him to admit some connection with them. No such connection was ever proved and those who knew Steve Biko best have always disputed it. At all events, on the 6<sup>th</sup> September he did not tell the police anything they wanted to hear. On that day he was a fit and healthy man. On the morning of the 7<sup>th</sup> he was seriously ill. He was seen on that and subsequent days by two district surgeons and a private consultant. He showed obvious signs of neurological damage, but he was never hospitalised. On the night of the 12<sup>th</sup> September he was sent to a Pretoria prison. By the next morning he was dead.

There was never any doubt even before the inquest began of the true cause of death. The story of a hunger strike was a clumsy fabrication. The cause of death was extensive brain injury caused

by blows to the head. The pathologists, those employed by the State and those engaged by the Biko family, all agreed on this.

What then were the real issues at the inquest? First, the police throughout denied that Biko had been assaulted. Consequently, much of the police evidence was directed to finding a cause for his brain injuries which did not incriminate them. The second issue was the manner in which Steve Biko was treated throughout his detention.

On the first issue, there was a story to which all the officers who were present on the morning of the 7<sup>th</sup> September adhered. On that morning Biko was taken from the mat on which he had lain all night under guard and in shackles and was taken to the interrogation room. There he was seated on a chair. When the Major, who was in charge of the interrogation, began to question him he sprang up and attacked the Major with such fury that it took the Captain who was also present and three other officers to subdue him. In the course of that violent struggle, so it was said, he had bumped his head on the wall and fallen to the floor, fighting furiously throughout. After he was brought under control he was taken back to his mat where he was again placed in leg irons. That

bump against the wall was the cause of the brain injuries found post mortem, so the police maintained. The incident was referred to as a scuffle.

Before the inquest affidavits had been sworn by every person who had had any contact with Biko during his detention. Unfortunately for the police none of these affidavits, 28 of them in all, had made any mention of the alleged bump of his head against the wall. Nor, it transpired from the evidence, had the three doctors who had examined Biko while he was in detention ever been told of any bump on the head. The Security Police Colonel in command in Port Elizabeth had never mentioned either to the doctors or in his five affidavits that Biko had suffered a bump on his head.

This Major who had been in charge of the interrogation was hardly a star witness. He was naturally asked by the advocate for the police if he could give any reason for Biko's wild outburst. He said that what had provoked Biko's fury was that he, the Major, had shown him sworn statements made by the friend who had been arrested with him at the roadblock, that these statements had seriously inculpated him, and that that was what had enraged him. The police advocate then asked him to produce those statements

to the court. He did so. But we at once saw what the Major and his counsel had overlooked. All of the statements were dated after Biko's death.

Further, the bump on the wall version was utterly destroyed by the expert medical evidence. Professor Proctor and Dr. Gluckman had expressed the firm opinion that the brain injuries suffered by Biko must have resulted in a period of unconsciousness of at least 10 to 20 minutes. They were supported in their view by Professor Simson, head of the department of anatomical pathology at the University of Pretoria. The state pathologist Professor Laubser, did not dispute this. Yet the evidence of all the officers was that Biko fought, as one of them put it, like a wild animal throughout. Their evidence under cross-examination eliminated even the shortest period of unconsciousness.

Looking at these facts from what I hope is an objective distance, I have no doubt that between the evening of the 6<sup>th</sup> and the early morning of the 7<sup>th</sup> September Steve Biko suffered a number of heavy blows to the head, inflicted by one or more of the Security Branch officers who had charge of him. This assault was probably carried out with some instrument which left no external



injury such as – and here I guess – a sandbag or loaded length of hosepipe. The latter object was known from later evidence to have been used on other occasions by the Security Branch in Port Elizabeth.

Many years later the Major made an application for Amnesty to the Truth and Reconciliation Commission. It was a strange application (ultimately rejected) because he did not admit to any misdeed. But he did describe the instructions given to him by his superiors regarding Biko. “We should break him down in order to obtain information from him”. Steve Biko was hardly an easy man to break down. This was not his first experience of detention. One of his earlier spells of Security Branch detention had lasted 101 days during which he had not yielded an inch to his interrogators. So the blows which caused his death were doubtless somebody’s idea of breaking him down.

How was Steve Biko treated after he had received his injuries? He was stripped naked, his legs shackled and fixed to a grille, handcuffed for most of the time. He staggered, mumbled unintelligibly, did not take food or water, did not ask to go to the toilet, and was left lying on his urine-soaked blanket. The shackling

and the nakedness were ordered by the Colonel. When asked why he had given such orders he replied that it was to prevent escape. When asked why, for decency's sake this shackled man should not have been allowed to wear a pair of underpants he replied that it was to prevent him from using them to commit suicide. This ludicrous answer was typical both of this officer's disregard for the truth and of his contempt for the most basic human rights of any person unfortunate enough to fall into his power.

It was obvious to this Colonel that there was something seriously wrong with Biko. He therefore later on the 7<sup>th</sup> September sent for the District Surgeon. The District Surgeon arrived and after an examination wrote out a certificate for the Colonel. This doctor said in his evidence that he had noticed Biko's slurred speech and staggering gait. He had also noticed a swollen lip with a cut in it. The possibility of a head injury had occurred to him, he said, but he asked no questions of either Biko, or the Colonel. The certificate he wrote out for the Colonel stated simply that he could find no evidence of any abnormality or pathology on Mr. Biko. He left him as he found him.

Why should an experienced district surgeon have been prepared to give such a misleading certificate? The answer became clear. The Colonel had decided to take the line that Biko's slurred speech, his staggering, his incontinence were shammed, to avoid interrogation, and he firmly turned the doctors' minds in that direction. He persisted even when the Senior District Surgeon, who was called in to examine Biko the next day, found a clinical sign that pointed strongly in the direction of neurological damage. The Colonel still insisted that Biko was shamming even after the consulting physician who had been called in by the Senior District Surgeon, carried out a lumbar puncture which showed blood cells in the spinal fluid. This pretence was kept up to the end.

The physician recommended that Biko be kept under close observation in a hospital. The Colonel refused to allow this. Instead Biko was sent to the sick bay in a local prison, under the care of a medical orderly.

On the afternoon of the 11<sup>th</sup> September he was found lying on the floor with froth on his mouth. He was described by the Colonel himself as being in a semi-coma. At this late stage panic set in. The Colonel remained unwilling to send him to a local hospital – for

reasons which are not hard to guess, so it was decided to send him at once to Pretoria Central Prison. As no air ambulance was available he was sent by road.

Steve Biko was placed on mats in the back of a Land Rover from which the rear seats had been removed. The Captain whom I have already mentioned was in charge. The Land Rover was driven 700 miles through the night. There was no medical orderly with them. Biko was kept naked throughout the journey. According to the Captain that was to make it harder for him to escape. No medical reports were brought to Pretoria. Instead the Pretoria officials were told falsely that the Port Elizabeth doctors had found nothing wrong with Mr. Biko and that he was probably shamming. Yet the medical orderly at the Pretoria prison at once saw that he was seriously ill, and feared for his life.

That afternoon, the 12<sup>th</sup> September, Steve Biko died, lying on a mat in the Pretoria Prison Hospital. At the inquest we described it without, I think, any rhetorical exaggeration as a miserable and lonely death.

At an early stage of the inquest the Chief Magistrate had told Counsel that he expected that by reason of the many issues in the case it would take him some time to prepare a reasoned verdict. In fact the verdict came on the morning after the inquest had ended, and contained no reasons. It took at most three minutes to deliver. The Chief Magistrate found that Stephen Bantu Biko had suffered extensive brain injuries probably sustained during a scuffle with police officers on the morning of the 7<sup>th</sup> September: and that the evidence did not prove that the death was brought about by any act involving or amounting to an offence on the part of any person.

So once again nobody was to blame. Given the history of previous inquests into deaths of detainees the verdict, perverse as it was, was by no means a surprise to us. To quote Ecclesiastes again “If thou seest the oppression of the poor and the violent perverting of judgment and justice in a province, marvel not at the matter.”

But many did marvel. The verdict caused outrage in South Africa and beyond. It flew in the face of all the evidence. Its formal result was to exonerate all the officers. They were not disciplined or even reprimanded for the manner in which they had treated Biko

after he had sustained his injuries. On the contrary the Colonel was promoted to Brigadier and so in due course was the Captain.

In our closing address in the inquest court we said this:

“Any verdict which can be seen as an exoneration of the Port Elizabeth Security Police will unfortunately be interpreted as a licence to abuse helpless people with impunity.”

Unfortunately we were right. Over the following ten years more than 30 people died while in detention by the Security Branch or having passed through their hands.

So what do we take from this lamentable tale? Above all the tragedy of the loss of a man of courage, and of talents, a man of promise who might have become a man of destiny.

What of the inquest itself? It had at least exposed to the world and, more important, to many in South Africa whose eyes, ears and hearts had been closed, the cruelty and inhumanity inseparable from the regime of apartheid. It was a practical demonstration that apartheid was not a social experiment which might or might not succeed but was an exercise of power based

only on force. The attitude of those who exercised that power was summed up in the comment of the Minister on Biko's death and by the equally cold-hearted statements of the Major and the Colonel at the inquest. The Major said that he felt bad about Biko's death because "he was worth much more to us alive than dead". The Colonel said that he was upset when he learnt of Biko's death because "it was a disaster for us that he could not be brought before a court and unmasked."

The present South African Constitution has as its foundation the concept of "ubuntu". This word has been translated as "a feeling of common humanity". If a concept may be defined by its opposite, the feelings expressed by the Minister, the Major and the Colonel are the exact opposite of ubuntu.

These events are, in the words of the poet, "old unhappy far off things, and battles long ago". Apartheid is gone forever. Under the new Constitution of South Africa such things, we trust, cannot happen. But it may still be worth considering how they could have happened under the old dispensation. The conduct which brought about the death of Steve Biko was of course completely unlawful. No statute permitted murder, assault or deliberate medical neglect.

There were laws which punished such things, there were courts and lawyers. So how could such things have been done and done with impunity?

If a simple answer is to be given it is the Terrorism Act of 1967, an act ostensibly designed to combat terrorism, but terrorism so widely defined as to catch nearly all meaningful black political activity. Existing statutes had given Ministers huge and draconian powers over individuals and communities. But the difference in the Terrorism Act was that it put absolute power directly into the hands of the police. Section 6 of that Act authorised the police without judicial warrant to arrest and detain any person whom any senior police officer had reason to believe either had committed an offence under the act or had any knowledge of such offence. The object of the detention was interrogation, and there was no limit to the period of detention. The act expressly provided that no court could pronounce on the validity of a detention under the act, or order the release of a detainee. So habeas corpus was excluded. Moreover, a detainee was held incommunicado. He could not see or even write to a lawyer, a doctor of his own choice or members of his own family. Sometimes reports of assaults on detainees leaked out, and applications for interdicts to stop abuse occasionally



reached the courts. But the independence of the judiciary had been undermined by a policy of political appointments to the Bench. In all too many cases executive-minded judges sympathetic to the objectives of the government refused to intervene in cases concerning detainees, anxious only to ensure that court proceedings should not interfere with the interrogation process. Officers of the Security Branch who abused detainees knew that they had nothing to fear from their superiors, and little from legal proceedings.

That is why, writing about Biko's death, Alan Paton could say "Any black who thinks he has a right equal to the white man ... to share equally in its government of South Africa will end up in detention. But there is a possibility more grave than that, the possibility that he may die there."

In the Truth and Reconciliation Commission and elsewhere there has been some evidence and much speculation about the extent to which ministers of the government knew of the fatal assaults, perpetrated by the Security Branch. With so many deaths, over so long a period it is hard to believe that responsible ministers did not know how section 6 detainees were treated. If

any did not know it was through what lawyers call diligence in ignorance.

Nor was it easy to publicise the treatment of detainees. During those years the press was for the most part surprisingly free to criticise government action. However, the Nationalist government passed an act which made it a criminal offence to publish any false statement about the police or about prisons unless the publisher could show that he had taken due care before publishing it. That may not sound unreasonable, but its practical effect was far-reaching. Even if a newspaper had a sworn statement from an ex-detainee alleging assault or torture it could be sure that it would be disputed in court by the Security Branch officers concerned, with every chance that some equivalent of the Chief Magistrate of Pretoria would decide in their favour. As to taking due care before publishing, in the leading case under this statute the judge held that “due care” required a newspaper to give the authorities advance notice of its proposed publication and await their comments. The chilling effect on the press was inevitable. The facts about the treatment of Steve Biko could be safely published only because they were disclosed in the inquest.

Now South Africa has a constitution with a comprehensive Bill of Rights which protects every individual from abuses of executive power. It is enforced by the Courts and particularly by the Constitutional Court of South Africa – undoubtedly one of the great successes of the new constitution. One cannot now visualise anything like section 6 of the old Terrorism Act. Such a law would be quickly struck down by the Courts. This is a country under the rule of law.

Nonetheless a glance around the modern world shows us that nowhere can the rule of law be taken for granted. In the United States the 200 year old Bill of Rights has not prevented Guantanamo Bay. In the great democracy of India its Constitution and its distinguished Supreme Court have not prevented episodes of oppressive executive power. I do not claim any special political expertise but my belief is that in modern constitutional democracies threats to the rule of law do not come so much from sweeping acts of legislation as from seemingly limited but incremental encroachments. I most certainly do not claim any qualification to comment on South African politics. However, as a lawyer who over a long, some would say too long, period has practised in different countries I shall venture a few very general observations.

It is a truism that a free, independent and critical press is essential to the rule of law. So first I would say beware of any law which seeks to regulate the press. Statutory regulation, however reasonable it may look, will inevitably stifle both reporting and comment. The apartheid era press law is a clear example. It penalised only false statements and required of the press only reasonable care. But the actual and intended result was censorship of reporting on police and prisons. Still more dangerous would be any extension of the Official Secrets Act beyond its traditional scope of protecting military secrets which could be of use to an enemy. Any more general definition of official secrets would inhibit legitimate investigative journalism.

I would also beware of any measure which directly or indirectly undermines the independence of the judiciary. This may take different forms. It may take the form of cutting down the jurisdiction of the courts. Or it may take the form of appointments to the Bench for political reasons. Diversity of the Bench is of real value, and merit may often be a matter of opinion, but the aim, even if not immediately attainable, should be to make merit the sole criterion for judicial appointment. A succession of political

appointments undermines the respect for the judiciary as an institution.

It was famously said by one of the authors of the Constitution of the United States that the judiciary in its nature is the weakest branch of government. Its power in the long run depends on its commanding the respect of society as a whole. The courts are rightly open to public criticism. Judgments of the courts may legitimately be subjected to strong criticism, even criticism which many of us would think unfair. Appointments to the Bench like any other acts of government must also be open to reasoned criticism. But scurrilous and ill-founded attacks on the integrity and motives of the courts as a whole or of individual judges undermine respect for the judiciary and so undermine the rule of law. Such attacks should be deprecated by all democrats and the motives of those who make them should be viewed with the utmost suspicion. They are particularly damaging when they come from persons within or close to government.

That is the end of my sermon. Let me return to Steve Biko.

After the inquest I read some of his writings. I have recently re-read some of them. Even today, over thirty years on, in a radically changed society, their power is extraordinary. You find in them a combination of eloquence, insight, political passion and political pragmatism. The Steve Biko Foundation is to be congratulated for keeping alive not only his memory but also the principles on which his actions were founded. I shall not venture to summarise his political philosophy, but I shall try to say what I have taken from my reading.

Steve Biko's definition of Black Consciousness in the fewest words would be "self-respect, pride in one's own people and culture and, above all self-reliance." Blacks in South Africa, he asserted must look to their own efforts to achieve freedom, not rely on the assistance of other groups. Blacks must never be complicit in their own oppression. He was quite uncompromising in this. He had hard words for those such as Kaiser Matanzima who took office in the so-called Bantu homelands. He regarded even ordinary black policemen as having sold their souls. He acted on his own principles. As a student at the University of Natal he had been active in the National Union of South African Students, a body which was of course strongly opposed to apartheid, and whose

white leaders had often attracted the attention of the Security police. Yet in 1968 he led a breakaway of black students from Nusas to form the South African Students Organisation. His writings at the time show that he had no ill-will towards Nusas. His thinking was epitomised in the Saso slogan – “Blackman, you are on your own.”

In his later political work he continued to attract a following among young blacks and much of his writing and speeches continued to be addressed to them. His message, tough, uncompromising and militant as it was, was entirely free of rancour or any expression of racism. Speaking immediately after his death Bishop Desmond Tutu said that of all young blacks involved in working for change he was the least infected by racism. Here was a true youth leader who was a moral inspiration to his followers. It would be sad if such a man and what he stood for were to be forgotten.

Now that much which Steve Biko lived and died for has come to pass, his words have not lost their resonance. His forthright analysis was that the struggle in South Africa was not a class struggle but a racial one. He said that on the one side was white

racism and “the antithesis to this must ipso facto be a strong solidarity amongst the blacks. But out of these two situations he said one could hope to reach some kind of balance – “a true humanity where power politics will have no place”. And he concluded one article in these words –

“Blacks have had enough experience as objects of racism not to wish to turn the tables. While it may be relevant now to talk about black in relation to white, we must not make it our preoccupation, for it can be a negative exercise ...

We have set out on a quest for true humanity, and somewhere on the distant horizon we can see the glittering prize ... in time we shall be in a position to bestow upon South Africa the greatest gift possible – a more human face.”

He would, I think, have endorsed Ubuntu as the foundation of a new South African constitution.

This evening we remember Stephen Bantu Biko – his life, a South African beacon, his death, a South African tragedy.

Sir Sydney Kentridge Q.C.

Cape Town

12<sup>th</sup> September 2011