

76/85

477/84

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

<u>ISAAC MASUKU</u>	1st Appellant
<u>GEORGE MADEBA</u>	2nd Appellant
<u>HEBRON MATLATSI</u>	3rd Appellant
<u>ESROM MBATHA</u>	4th Appellant
<u>BENJAMIN MAYO</u>	5th Appellant

AND

<u>THE STATE</u>	Respondent
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CORAM: JANSSEN, CORBETT, TRENGOVE, GROSSKOPF, JJA et
NICHOLAS, AJA

HEARD: 24 May 1985

DELIVERED: 30 May 1985

J U D G M E N T

NICHOLAS, AJA

In the late afternoon of 29 September 1982

DAVID SIFUNDA

DAVID SIFUNDA and four other new arrivals were admitted to Cell A 11 at the Modderbee prison. Some hours later SIFUNDA was dead. He had sustained fourteen broken ribs, and there were multiple stamp abrasions on the upper part of his body and on his head. The cause of death was found on post mortem examination to be "multiple injuries; asphyxia due to the inhalation of stomach contents."

Arising out of the death, nine men were charged with murder. One of them (who had been charged as accused No 2) died before the trial in the Springs Circuit Local Division before HEYNS J and assessors. Of the rest, five (being accused Nos 1,6,7,8 and 9) were convicted of murder without extenuating circumstances and

sentenced

sentenced to death. No 3 was found not guilty and Nos 4 and 5 were found guilty of common assault. With the leave of the trial judge, each of accused Nos 1,6,7,8 and 9 now appeals against the finding that there were no extenuating circumstances and against the death sentence. I shall for the sake of convenience continue to refer to the appellants individually as accused Nos 1,6,7,8 and 9.

All of the persons charged were members of the Big 5 prison gang. It appears from the State evidence that this and other gangs (such as "26", "28" and "Air Force") are endemic in South African prisons. Each of them has its objects, its code of laws, its hierarchy of ranks and offices, its methods and procedures, and its language which is intelligible only to the initiated.

Its

Its members are distinguished by tattoos on arm, hand or body.

The Big 5 tattoo is the figure 5. It has about 10 ranks, each with a corresponding number.

Cut 1 - private is the lowest rank; Cut 24 - prime

minister is one of the highest. Other ranks include

field marshal,, major, doctor and magistrate. Ac-

cused No 1 held the rank of prime minister and search-

light - 24, and No 2 was defence force - 21. The other

accused held lesser ranks.

When a meeting is held, the members sit around what is called the "general map". This is a piece of cloth marked with ZZ and other signs and symbols.

At a meeting any decision is taken by the highest ranking person

person present. There is no debate or voting.

Any order by the leader must be carried out. The

member concerned has no choice. If he refuses, or

fails to execute the order, he is disciplined: he may

be suspended, or given hard work to do, or assaulted,

or even murdered.

The Big 5 and 28 gangs are bitter enemies, and

it is a rule of the Big 5 that when a member of 28 is

found in their cell, he must be assaulted.

Cell A 11 is a communal cell with about fifty

sleeping places. It is some 18 paces long and 5 paces

wide. It consists of a sleeping area and a toilet

area. These are separated by parallel transverse walls

with

with a gap between them.

In summary the following were the facts surrounding the killing of SIFUNDA as told by the State witnesses.

After the inmates of cell A 11 had been checked on 29 September 1982, the warders withdrew and the cell-door was locked. The new arrivals were taken one by one to the toilet area by accused Nos 2 and 3. There they were obliged to strip and they were searched for money and tobacco. When SIFUNDA had been searched, accused No 2 announced to the inmates of the cell that among the newcomers there was a member of the 28 gang. No 1 accused then said that if there was a member of the 28 gang in the cell he should be killed. No 2 pointed

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to SIFUNDA, and No 1 opened his shirt and saw the 28
tattoo on the left side of his chest. Accused No 4
then came forward and ordered SIFUNDA to put his fin-
ger on the floor and turn around it in circles.
While he was doing so No 4 kicked him on the ribs, and
No 5 came and struck him with part of a broom.

No 1 intervened, saying that the man should not
be killed in that way. He directed No 2 to bring the
general map of the Big 5 gang. This was done, and
all of the persons charged, together with another Big 5
member, VICTOR THABO, sat in a circle around the map.
No 1 addressed the meeting, saying that a member of the
28 gang should not be present in that cell, and that he

should

should be killed. No 1 selected five persons to

carry out the order. They were accused Nos 6,7,8 and 9 and

VICTOR THABO. One of the five caught hold of

SIFUNDA and dragged him to the toilet area. All five

there joined in assaulting him: they struck him with their

fists, tripped him so that he fell to the floor, kicked

him with booted foot, and trampled on him. While this

was going on, SIFUNDA was screaming, "Why are you killing

me? What have I done to you?"

After a while No 8 came out and reported to No 1

that they had now finished with this man from the 28 gang.

No 1 went into the toilet area to look at SIFUNDA and said:

"Ja, daardie mense het gewerk. Hulle het
gedoen soos ek hulle gevra het om te doen."

He

He told No 2 to again bring the general map of the Big 5 gang. The members re-assembled. No 1 selected two persons, Nos 6 and 7, to take the responsibility for the assault. He stood up and, addressing the inmates of the cell, warned them that if anybody reported what he had seen to the gaol authorities he would (himself) be denounced as SIFUNDA's assailant or be killed.

No 1 pressed the alarm button in the cell in order to summon the warders. After some time, Major Massyn (the officer commanding Modderbee prison) and other prison officers arrived. No 1 spoke to Major Massyn outside the cell, and when they returned Nos 6 and 7 came forward and said that they were responsible for the assault on the deceased. On Major Massyn's instructions

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the two of them carried SIFUNDA out of the cell to the mortuary.

The trial Court found that No 1 ordered accused Nos 6,7,8 and 9 and VICTOR THABO to assault the deceased and that they carried out the instruction.

HEYNS J said that it was unnecessary for the trial Court to decide whether No 1's order was merely to assault the deceased (as was said at one stage by No 8) or whether it was to kill him (as was said by the State witnesses MABASO and MAHAU), and continued:

"They had to trample on him and kick him and hit him. He must have known they had boots on because he could see that. He and all these five assailants must have known that if five persons assault a human being in this way it might result in his

death

death.

Even if accused No 1 had not given a direct order to kill the deceased, he was reckless and disregarded the possibility that if the persons whom he ordered to assault the deceased were not stopped in time they might kill the deceased and the Court finds that at no time did accused No 1 issue an order to stop the assault on the deceased"

The judgment of the trial Court in regard to extenuating circumstances was brief and uninformative:

"... the Court finds that in respect of accused no. 1 it is unanimous in finding that there are no mitigating circumstances as far as he is concerned.

As far as accused nos. 6,7,8 and 9 are concerned, the Court is not unanimous in its findings. By a majority the Court finds that there are no extenuating circumstances as far as they are concerned. The member who is in the minority finds that in respect of these four accused,

nos.

nos. 6,7,8 and 9, extenuating circumstances do exist on the ground that these persons acted under the orders of accused no. 1.

Bearing in mind that the decision taken at the meeting of the gang in the cell was arrived at by no. 1 alone and not in a manner where everybody present took part in the decision, the minority member has regard to the evidence of Captain Chiloane as set out at pages 156 to 157 of the record and is of the view that since a member of the Big Five gang has no choice but to carry out an order given by the leader, this minority member is of the view that these four accused did not act on their own accord to attack the deceased, but acted on the instructions of no. 1 and this element constitutes a mitigating circumstance in their case. However, as I have already said, the majority decision is that there are no extenuating circumstances as far as these four accused are concerned."

The principle is well settled that the question

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as to the existence or otherwise of extenuating circumstances is essentially one for decision by the trial Court; and that in the absence of misdirection or irregularity, this Court will not interfere with a finding that no extenuating circumstances were present, unless it is one to which the trial Court could not reasonably have come.

In the present case, HEYNS J did not give any reasons at all for the majority finding of the trial Court. This was not in accordance with section 146 of the Criminal Procedure Act, No 51 of 1977. Prior to the enactment of that section, there was no provision in the Criminal Procedure Code for the delivery of a judgment when a Judge sat alone or with assessors, but in practice "such a judgment

ment (was) invariably given and it (was) clearly
in the interests of justice that it should be given".

(Rex v. Majerero 1948(3) SA 1032(A)). See also R v Van

der Walt 1952(4) SA 382(A), R v Huebsch 1953(2) SA 561(A),

S v Immelman 1978(3) SA 726(A) at 729). Section 146

gave statutory authority to the established practice.

It imposed on a trial judge a duty to give the reasons

for the decision or the finding of the court on a ques-

tion of fact; and where he sits with an assessor or with

assessors and there is a difference of opinion in regard

to a question of fact, the trial judge must give the reasons

for the decision of the member of the court who is in the

minority. As a result of HEYNS J's non-compliance with

section

section 146, this Court does not have before it material which might have shown that the trial Court overlooked important features or misdirected itself. But that does not, I think, mean that this Court is obliged to assume that there was no misdirection or irregularity in the process of reaching the decision: to make such an assumption might well have the result of a failure of justice.

The question then is, how should this Court approach the matter.

There are two cases decided in this Court in which the trial Court had in effect given no reasons for its finding that no extenuating circumstances existed:

S v Hlolloane 1980(3) SA 824(A), and S v Ngoma 1984(3)

SA 666)A) at 673. In neither of them, however, was section 146 referred to.

In my view, where s. 146 has not been complied with, this Court is obliged, if an appellant's right of appeal is not to be frustrated, to consider the question of extenuating circumstances afresh, and I proceed to do so in the light of the evidence.

The way in which the question should be approached has often been stated. See for example

S v Ngoma (supra ubi cit) where CORBETT JA said:

"The determination of the presence or absence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced

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the accused's state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what he did; and (3) whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the trial Court passes a moral judgment. (see S v Babada 1964(1) SA 26(A) at 27-8; S v Letsolo 1970(3) SA 476(A) at 476G-H; S v Sauls and Others 1981(3) SA 172(A) at 184C-D; S v Smith and Others 1984(1) SA 583(A) at 592H-593C.)

The following were relied on as extenuating circumstances in the case of No 1 accused:

- (a) He was found guilty of murder on the basis of dolus eventualis: he did not desire to kill the deceased.
- (b) Being prime minister he was himself obliged

to

to follow the rules of the Big 5, one of which was that a member of 28 who entered a Big 5 cell had to be assaulted; and if he had not given the order he would himself have been disciplined by the gang.

(c) He did not himself actively engage in the assault on the deceased: he merely gave the instruction to assault him.

In regard to (a) the finding of the trial Court is set out in a passage from the judgment which is quoted above. From this it appears that the trial Court did not find it necessary to decide whether No 1's instruction was to kill SIFUNDA, or whether it was merely to assault him

him. Presumably therefore the trial Court dealt with

No 1 on the basis that his intent to kill took the form

of dolus eventualis. On the facts of this case I

do not think that that could serve to constitute ex-

tenuation. What No 1's order condemned SIFUNDA to

was a prolonged, brutal and agonizing assault and the

fact that he may not have had a direct intention to kill

does not make his conduct less blameworthy morally.

In regard to (b), it is clear from No 1's own evidence that as prime minister he gave orders and that

his orders had to be obeyed. That that was so is also

shown by the facts of the case: when Nos 4 and 5 on their own initiative started assaulting SIFUNDA, and No 1 inter-

vened

vened, saying that the man should not be dealt with in that way, his order was immediately obeyed; and when No 1 selected Nos 6 and 7 to take the responsibility for the death, they did as they were told without question.

No 1's evidence as to what would have happened to him if he did not give the order to assault was weak and unconvincing:

"What would have happened to you personally if you did not give the instruction? -- Even if I did not give them instruction on their own these people should assault him.

I know you have said that but would anything personally have happened to you? Would you have been -- well, would anything personally have happened to you if you did not carry out this Big Five rule may be to assault a member of 28 if they come

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into a Big Five cell? -- Yes.

What? -- They should demote me or otherwise they should assault me.

Can they do that to the prime minister? -- Yes, they have got that right to demote me or to assault me.

Because you did not carry out this rule? -- correct."

In my view ground (b) was not established.

In regard to (c), it is true that No 1 did not himself join in the actual assault. But this does not in any way reduce his moral blameworthiness. He was the author of the crime and the directing mind behind it. Nos 6,7,8 and 9 were his instruments in perpetrating it, in pursuance of an order which, according to the code of the gang, had to be obeyed.

In my view, therefore, it has not been shown that

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the trial Court erred in finding that no extenuating circumstances existed in the case of No 1 accused.

Nos 6,7,8 and 9 all held subordinate ranks in the Big 5. Nos 6,8 and 9 were privates. No 7 was

a cut above them - "cut 2, hekman". None of them

took any part in the making of the decision to assault

SIFUNDA. It was as gang members that they carried

out the order given by No 1. Capt. Chiloane, who

was head of the observation centre at Modderbee prison

and who had made a special study of prison gangs, was a

witness called by the State. He spoke inter alia of

the general map, around which meetings were held: any

decision taken when the general map is opened, is the law -

it is binding on all; on the general map a new member

takes

takes an oath that he will do everything he is ordered to do; if ordered to kill, he must kill - he has no choice.

CHILOANE himself knew of many cases where a member who had refused to carry out an order had been assaulted or even

killed. That is supported by the evidence of the

main witness for the State, whose evidence was accepted

by the trial Court. Asked what would have happened

to a member of the Big 5 if he had refused to assault or

kill SIFUNDA he replied

"I think should one man be ordered to sort of kill an inmate and he refuses all the soldiers would be ordered to kill him."

And asked what would have happened if one of the members

were to have given the alarm in cell A 11 while the de-

ceased

ceased was being assaulted, he replied,

"He would have been killed and nothing else. No one in this particular cell could have done as he pleases."

These facts and circumstances referred to could have influenced the state of mind of these accused in the commission of the crime, and they could serve to constitute extenuation. Counsel for the State pressed us with the observation of HOLMES JA in S v Bradbury

1967(1) SA 387(A) at 404 H:

"As a general proposition a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence or fear as an extenuation."

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The learned judge of appeal was, however, dealing with the case of a free man living in a free society. I do not think that the general proposition necessarily applies to a convicted prisoner, who for half of each 24-hour period is locked in a communal cell without effective communication with the prison officers, and is largely at the mercy of his fellow prisoners (who are often dangerous and ruthless men) and who joins a gang as a measure of self-protection.

The probability is strong that these circumstances would have influenced the state of mind of each of these accused in executing No 1's order. And that they did so in fact appears from the evidence which they gave in mitigation, but which was not referred to in the trial

Court's

Court's judgment in regard to extenuating circumstances.

No 6 said that he took part in the assault because "that was the rules from accused No 1. On that particular day I was still a soldier" and that if he had disobeyed the instruction "that was the intention from them to hit or to assault me".

No 7 said:

"What motivated me is that I was afraid that I would also be assaulted and trampled upon by the Big Five gang. What happens is that if you disobey orders you are made to lie down by the gang and the soldiers are then ordered to trample upon you, whether there are six or nine soldiers, and they all have to do this."

No 8 said that he joined in the assault because of an order issued by No 1 in his capacity as prime minister

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ter. If he had failed to obey, he would have been assaulted "by the soldiers and they would trample on me as well"...

No 9 said that if he had not killed SIFUNDA they would have killed him - "if I did not kick I would then also be made to lie down".

In regard to the third leg of the enquiry, I am of the opinion that the influence operating on the minds of these accused was such as to reduce their moral blameworthiness.

In S v Mongesi en Andere 1981(3) SA 204(A)

JOUBERT JA said at 212:

"Hierdie Hof het reeds in ander sake daarop gewys dat die bestaan van 'n

gevangenis

gevangenis-subkultuur nie per se 'n versagtende omstandigheid is nie. Waar 'n gevangene daarop aanspraak maak dat die gevangenis-subkultuur in sy geval 'n versagtende omstandigheid is, rus die bewyslas op hom om die Hof op 'n oorwig van waarskynlikhede te oortuig dat die gevangenis-subkultuur in die omstandighede van sy betrokke geval sy geestesvermoëns of gemoedstoestand subjektief beïnvloed het toe hy die moord gepleeg het. (Kyk S v Petersen en Andere 1980(1) SA 938(A) te 945)."

Accused Nos 6,7,8 and 9 have, on the facts proved in the present case, discharged that onus. In respect of these accused therefore the conviction will be altered to "Guilty of murder with extenuating circumstances."

The question then is whether this Court should itself pass sentence, which it has power to do under sec-

tion

tion 322 of the Code. It was pointed out in S v Robinson

1968(1) SA 666(A) at 679, that this course is preferable,

unless there are cogent considerations against it.

Counsel for the State did not draw our attention to any

such consideration in the present case, and we shall

follow that course.

I do not think that the facts of this case call
for the imposition of the extreme penalty. It seems
clear that the appellants joined the Big 5 largely for
reasons of self-preservation and not primarily to engage
in violence. Having joined, they became subject to
pressures which it was difficult, if not impossible, to
resist - if they had done so, their lives would have been

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at risk. In the circumstances, justice will be met with long sentences of imprisonment.

The crime of which the appellants have been convicted excites revulsion and calls for condign punishment: they brutally did to death a defenceless man, whose only misdeed was membership of a rival gang.

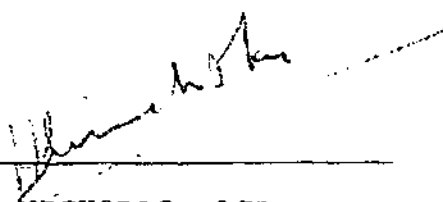
Gang murders in South African prisons are unhappily of frequent occurrence, and the element of deterrence is of preponderating importance. The sentence on each of these accused will be one of fifteen years imprisonment.

The appeal of No 1 accused is dismissed.

The appeals of accused Nos 6,7,8 and 9 are upheld to the extent that for the convictions and sentences imposed in the Court a quo there is substituted in each case:

"Guilty

"Guilty of murder with extenuating circumstances. Sen-
tenced to fifteen years imprisonment."


H C NICHOLAS, AJA

JANSEN, JA
CORBETT, JA
TRENGOVE, JA
GROSSKOPF, JA

Concur