

SOUTH AFRICA / JUDGMENT

S v Masina and Others (695/89)

[1990] ZASCA 90; [1990] 2 All SA 568 (A) (13 September 1990)

[1990] ZASCA 90

COURT

Supreme Court of Appeal

BEFORE

Joubert, Smalberger, Milne, Eksteen, Friedman

CASE / FILE NUMBER

695/89

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Case no. 695/89. /MC

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

Between: OBED MASINA First Appellant
FRANS TING-TING MASANGO Second Appellant
NEO GRIFPITH POTSANE Third Appellant

and

THE STATE Respondent

CORAM : JOUBERT ACJ et SMALBERGER, MILNE, EKSTEEN JJA et FRIEDMAN AJA.

HEARD: 15 August 1990.

DELIVERED: 13 September 1990.

JUDGMENT

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FRIEDMAN AJA:

The three appellants, together with a fourth accused, were charged before DE KLERK J and two assessors in the Transvaal Provincial Division, sitting at Delmas, with 49 counts, which included four counts of murder. They refused to plead to any of the charges on the grounds that they were members of Umkhonto we Sizwe, the military wing of the African National Congress (ANC), and that as soldiers they should not stand trial in a civilian court. A plea of not guilty was accordingly entered on the record. The appellants took no part in the proceedings, save that first appellant

subsequently made a statement to the court to which reference will be made later. On 1 March 1989, after a number of witnesses had been called by the State, the appellants were convicted on a

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number of counts ranging from malicious injury to property to attempted murder arising out of land and limpet mine explosions caused by them. They were at the same time convicted on the following counts of murder, these being the only relevant counts for the purposes of this appeal:

First appellant was convicted of murdering Orphan Chapi (also known as Hlubi) on 25 January 1978. First and second appellants were convicted of murdering Seun Joseph Vuma on 16 March 1986. First, second and third appellants were convicted of murdering David Lukhele and Elizabeth Dlodlu on 6 June 1986.

The decision of the trial court convicting the appellants was unanimous. After first appellant had made the statement

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referred to above and after evidence had been led at the instance of the appellants' families, in regard to extenuating circumstances, the majority of the court a quo, comprising the two assessors, found that the appellants had not discharged the onus of establishing extenuating circumstances. DE KLERK J dissented from this finding. He was nevertheless bound by it and the three appellants were accordingly sentenced to death on 27 April 1989. The appellants were thereafter granted leave by the trial judge to appeal to this Court on the question of whether extenuating circumstances existed. While this appeal was pending the Criminal Procedure Act no 51 of 1977 ("the Act") was amended by the Criminal Law Amendment Act no 107 of 1990 ("the amending Act"). The amending Act was promulgated on 27 July 1990 and save for the provisions of sections 5, 16, 17 and 18 - none

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5. of which is relevant to the present appeal - came into operation on the date of promulgation. One of the main objects of the amending Act was to abolish the compulsory imposition of the death sentence and to vest the trial judge with a discretion to impose that sentence in appropriate circumstances. The amending Act also re-defined the powers of this Court in considering an appeal against a sentence of death. Under sec 277 of the Act, prior to amendment, the court was obliged to impose the sentence of death on an accused convicted of murder, except where, inter alia, the court was of opinion that there were extenuating circumstances. By sec 4 of the amending Act sec 277 of the Act was repealed and a new section substituted therefor. Sub-sec (2) of the new section reads as follows :

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"(2) The sentence of death shall be imposed -

- (a) after the presiding judge conjointly with the assessors (if any), subject to the provisions of section 145(4)(a), or, in the case of a trial by a special superior court, that court, with due regard to any evidence and argument on sentence in terms of section 274, has made a finding on the presence or absence of any mitigating or aggravating factors; and
- (b) if the presiding judge or court, as the case may be, with due regard to that finding, is satisfied that the sentence of death is the proper sentence."

By sec 11 of the amending Act, a new section (section 316A) was inserted in the Act. The new section provides that an accused who has been sentenced to death, shall have an automatic right to appeal to this Court against his conviction or sentence.

Sec 13(b) of the amending Act added a new sub-

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section (sub-sec 2A) to sec 322 of the Act. The new sub-section reads as follows:

"(2A) Upon an appeal under section 316A against the sentence of death, the Appellate Division may -

- (a) confirm the sentence of death; or (b) if the Appellate Division is of the opinion that it would not itself have imposed the sentence of death, set aside the sentence and impose such punishment as it considers to be proper."

Sec 20(1)(a) of the amending Act provides as follows:

"20. (1) Any criminal case which commenced before the date of commencement of this section, and any appeal, application or proceedings in or in connection with such a case -

- (a) shall be continued and concluded as if sections 4 and 13 (b) had at all relevant

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times been in operation."

This section makes it clear that the intention of the legislature was that sections 4 and 13(b) of the amending Act should operate retroactively. Although the new sub-sec (2A) to sec 322 which was introduced by sec 13(b) of the amending Act, refers to appeals under sec 316A (the new section granting an automatic right of appeal where a sentence of death is imposed), it is clear from the amending Act as a whole and sec 20(1)(a) in particular, that the intention of the legislature was that sections 4 and 13(b) should apply to an appeal such as the present, which was not brought under the new automatic right of appeal section (sec 316A) but under sec 316 of the Act. The present appeal falls within the ambit of sec 20(1)(a) of the amending Act: it is an appeal in connection with a criminal case which commenced before the date of

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commencement of sec 20, i.e. before 27 July 1990. This appeal must therefore be dealt with "as if sections 4 and 13(b) had at all relevant times been in operation". The amending Act involves an entirely new approach to the imposition of the death sentence for murder, both from the point of view of a trial court and from that of this Court. As far as a trial court is concerned the most important difference between the old as compared with the new procedure, is that the term "extenuating circumstances" has been abolished and in its place there has been introduced the concept of "mitigating or aggravating factors" ("strafversagtende of -verswarende faktore"). An extenuating circumstance is any fact associated with the crime which reduces the moral blameworthiness of the accused. (See *S v McBride* 1988 (4) SA 10(A) at 19-20 where the authorities are reviewed). The term "mitigating factor"

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has a wider connotation than an extenuating circumstance: it can, for example, include factors unrelated to the crime, such as the accused's behaviour after the crime has been committed, or the fact that he has a clean record. The definition of "aggravating circumstances" in sec 1 of the Act has been deleted by sec 1 of the amending Act. The words "aggravating factor" must, for the purposes of the amending Act, be given their ordinary meaning, and would therefore include any factor which, objectively speaking, makes the crime "worse", e.g. behaviour after the crime was committed, or a bad record. See the Shorter Oxford English Dictionary sv "aggravate". As far as this Court is concerned, it now exercises, in appeals against the death sentence, an independent discretion. Under the Act the question whether

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or not there were extenuating circumstances was essentially a matter for the trial court and this Court would not, in the absence of any misdirection or irregularity, interfere with a trial court's finding that there were no extenuating circumstances. Under the amending Act if this Court is of opinion that it would not itself have imposed the death sentence, it may impose "such punishment as it considers to be proper". During the course of the argument on this appeal, the question arose as to whether, since the trial judge would probably not have imposed the death sentence had sec 4 of the amending Act been in operation, and since this appeal has to be dealt with as if sec 4 had been in operation at the date on which the appellants were sentenced to death, this Court is obliged, without more, to set aside the sentence of death. I do not, however, consider that the

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fiction created by sec 20(1)(a) of the amending Act can properly be applied in this manner. The trial court considered whether extenuating circumstances were present; it did not make a finding in regard to "mitigating or aggravating factors", nor was the trial judge called upon to consider, with due regard to such a finding, whether the sentence of death was "the proper sentence" or not. On a proper construction of sec 20(1)(a) of the amending Act, what this Court is required to do in a case such as the present where the sentence of death was imposed by a trial court before the amending Act came into operation, is to deal with the appeal as if sections 4 and 13(b) had

been in operation at all relevant times. The manifest object of this section was to endow this Court with the power to set aside a death sentence if it is of the opinion that it would not itself have imposed it. (Sec 13(b) of the amending Act.)

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As sec 4 of the amending Act did not exist when sentence was passed in this case, there has been no finding by the trial court "on the presence or absence of any mitigating or aggravating factors". However, in deciding this appeal as if sec 4 had been in operation, this Court must itself decide, in the light of such mitigating or aggravating factors as appear to it to have been established on the record, whether it would itself have imposed the death sentence. If this Court comes to the conclusion that it would not have done so, it may set aside the death sentence and "impose such punishment as it considers to be proper". (Section 13(b) of the amending Act.)

Mrs van der Walt, who appeared for the respondent, suggested that as the trial court had not been called upon to make a finding in regard to mitigating or aggravating factors and as the State had not had an

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opportunity of placing evidence before the trial court on the existence of aggravating factors, this Court should set aside the sentence and remit the matter to the trial court in terms of sec 20(3) of the amending Act. I do not agree that that would be an appropriate course to follow in the present case. Firstly, it is difficult to conceive of any additional evidence of aggravating factors that the State could lead. Mrs van der Walt was unable to suggest any. Secondly, if the trial court should again impose the death sentence, the matter would, under the automatic appeal section, again come before this Court, in which event the remittal at this stage would have amounted to an exercise in futility. All the evidence is on record and this Court is therefore in a position to decide whether the death sentence should be confirmed, or - if not - what sentence it considers to be "proper".

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I turn now to the facts. I shall start with the murder of Orphan Chapi (Hlubi) by first appellant. According to a confession made by the first appellant on 16 September 1986 he left the Republic in 1977 for Swaziland, having been assisted to do so by a recruiting agent of the ANC. At the ANC camp in Swaziland, to which he was taken, he met one Solomon Similane ("Solly") whom he had known previously. While in this camp, first appellant decided to join Umkhonto we Sizwe (MK). He informed Solly of his decision and Solly undertook to make the necessary arrangements. He asked first appellant if he (first appellant) knew any policemen in Soweto and if it would be possible to eliminate them. First appellant replied affirmatively and it was then arranged that he should go to Angola for a "crash course". Having completed this course, which lasted some three months and during which he was

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trained in the use of firearms and explosives and also received training in "politics", first appellant was sent to Swaziland where he was equipped with a pistol and sent back to Soweto. He did not succeed in finding Hlubi and so returned to Swaziland where he again met Solly at whose suggestion he returned to the Republic in order to try again. This time he was successful: he shot and killed Hlubi as the latter was getting out of his motor car in front of his home in Soweto. Hlubi was a policeman. According to the evidence of Simon Potsane, third appellant's father, Hlubi was regarded as a ruthless murderer and the public of Soweto were jubilant when they heard that he was dead. After the murder of Hlubi first appellant returned to Swaziland and was sent for more intensive training at various camps in Angola and Zambia. He came into contact

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with Chris Hani, MK's military commissar, who appointed him as chief of the assassination unit. Arrangements were subsequently made for him and second appellant to return to the Republic, which they did, armed with AK 47 rifles, hand-grenades and pistols. According to first appellant's confession dated 23 September 1986 he and second appellant were to search for a certain policeman, "Pinkie Vuma". They located Vuma at his home in Mamelodi where they shot and killed him. This is confirmed by second appellant in his confession dated 23 September 1986. There second appellant explained why he had killed Vuma. He stated -

"Ek wil nou sê hoekom ek vir die Sinky (sic) doodgemaak het. Dit is lank dat die Sinky mense doodmaak. Dis lank dat hy maak dat die mense gevang word. Omdat ek 'n lid van die ANC is, en h werknemer van die mense het ek besluit dat hy ge-

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elimineer moet word."

As far as the third and fourth murders are concerned, the decision to kill Lukhele was taken because of a pamphlet which had come into second appellant's possession, the authorship of which was attributed to Lukhele. In this pamphlet, Lukhele, who was an opposition member in Kangwane, was alleged to have encouraged the killing of people by the police and to have advocated the retention of the police and the Defence Force in black townships. He was also alleged to have expressed himself in favour of the incorporation of Kangwane into Swaziland, which was contrary to ANC policy. The "order" to eliminate him was received from ANC officers in Botswana. The actual shooting of Lukhele was carried out by third appellant. In his confession dated 1 October 1986 third appellant explained that he had gained entry to

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Lukhele's house and that he had shot Lukhele and that Elizabeth Dlodlu, who was sitting near Lukhele, was shot accidentally. It was not his intention to kill her. From confessions by first and second appellants it is clear that they were parties to both killings. In his confession dated 16 September 1986 first appellant sets out his personal circumstances. He worked for eight years for a firm in Doornfontein. As a result of an injury to his arm received in a robbery, he decided to

resign from his work and return to school. He returned to school where, in 1974, he passed form 1. In 1975 he passed form 2. He was in form 3 in 1976 when the school boycotts commenced, as a result of which he was unable to write his examinations. In June 1977 the boycotts started again, and as he put it: "dis toe dat ek besef daar is nie toekoms in Suid-Afrika want as 'n mens wil leer is dit nie moontlik nie want

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die kinders staak. In Desember 1977 is ek toe die land uit." From second appellant's confession dated 15 September 1986 it appears that he left the Republic for Mozambique in 1979 and there joined the ANC. He attended various camps in Angola and spent some time in the German Democratic Republic (East Germany) where he received training in the use of firearms as well as "conspiracy". Third appellant received a similar training. According to his confession dated 16 September 1986 he left the Republic in 1977. He arrived in Lesotho where he joined the ANC and thereafter received training in Angola as well as in East Germany. Third appellant also spent some time in Zambia where he worked in the political section of the ANC. After the appellants had been found guilty and before evidence was led in mitigation, first appellant read

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out a lengthy statement. In that statement, which was clearly intended to be made not only on his own behalf, but also on behalf of second and third appellants, first appellant explains that the ANC "and those they represent" turned to the armed struggle as a last resort after years of non-violent resistance to apartheid proved fruitless. In this context he quoted the following words of the late Chief Albert Luthuli, a former leader of the ANC:

"Who will deny that thirty years of my life have been spent knocking in vain, patiently, moderately and modestly at a closed and barred door? What have been the fruits of my many years of moderation? Has there been any reciprocal tolerance or moderation from the government? No! On the contrary, the past thirty years have seen the greater number of laws restricting our rights and progress until today we have reached a stage where we have almost no rights at all."

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First appellant added:

"It was only when all other forms of resistance were no longer open to us that we turned to the armed struggle."

He went on to explain his position as follows:

"I, myself, am a survivor of the Soweto revolt of 1976, where I suffered the trauma of seeing hundreds of innocent children and young people, including my own relatives and friends, drop dead from Police gunfire. That event shocked us all into the realisation that the life of the black person has no value under apartheid, and will have none until the system is destroyed. Indeed the slaughter has continued, and many more have been killed or hanged since 1976. The trauma

of the Soweto killings has been with us ever since. The actions which we undertook were not for private gain nor prompted by revenge. These actions were taken by ourselves as soldiers in the army of the African National Congress acting generally under

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instructions and orders from our leaders."

Three witnesses were called at the instance of the appellants' families, namely Prof Bundy, professor of history at the Universities of Cape Town and the Western Cape; Mr Potsane, third appellant's father and Father Rici, a Catholic priest. It is unnecessary to deal with the evidence given by these witnesses. Suffice it to say that it appears, particularly from the evidence of Father Rici, that there was deep frustration amongst the students which led to the riots in Soweto on June 16, 1976. It also appears, particularly from the evidence of Father Rici, that following the riots of June 16, 1976, the black community's perception of the police was one of mistrust. In a very careful and well considered judgment DE KLERK J made a number of findings, based on the appellants'

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statements and confessions and in the light of all the evidence before the court which included that of police witnesses who testified as to the modus operandi of the ANC. DE KLERK J's findings may be summarised as follows:

1. The appellants believed themselves to be soldiers, generally under the command of their leaders in the ANC, fighting a war of liberation for their people. 2. The appellants were highly trained members of MK. 3. They were indoctrinated, whilst being trained, to believe that their actions and conduct of this nature were fully justified and necessary. 4. The indoctrination was intensive and was of a political as well as a military nature. 5. They were all loyal, dedicated members of the ANC who were acting under the instructions and orders of their

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superiors, carrying out the missions which they had been sent to perform.

6. The cumulative effect of the unrest during 1976, the poverty and frustrations experienced by black people at that time and the general hostility which existed between the police force and the black community was so traumatic that it could radicalize even moderates. 7. On the probabilities and in all the circumstances the situation which existed in 1976 and thereafter was the direct reason for the decision taken by the respective appellants to leave the Republic, to join the ANC and to undertake the functions assigned to them.

In the light of these findings DE KLERK J came to the conclusion that extenuating circumstances existed in the case of all the appellants. He expressed himself as follows:

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"My oordeel skryf aan my voor dat die persoon wat onder langdurige intense en intensiewe beïnvloeding gebuk gegaan het, by wie die geloof gewek is dat sy optrede die van 'n soldaat en vryheidsvegter is, iemand wat ingeprint is dat selfs sluipmoord toelaatbaar is op spesifieke persone en dit glo, moreel minder verwytfbaar is as die persoon wat nie onder daardie beïnvloeding gebuk gegaan het nie. Dit is my oortuiging met betrekking tot al die moordaanklagte hier ter sake."

In respect of the fifth finding, it needs to be mentioned that the evidence does not reveal that the appellants were mere puppets who were obeying the orders of their superiors in the ANC without thought or questioning. Although they were under the general command of their leaders, they themselves identified as targets for assassination, people whom they considered, in accordance with ANC policy, to be appropriate victims. Subject to this rider, I agree with all the findings of the trial judge.

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The assessors, in their judgment, accepted that the factors relied on by the judge could constitute extenuating circumstances. However, they advanced two reasons for finding that those factors did not constitute extenuating circumstances. Firstly, they held that there was no factual basis for a finding that the appellants' minds had been influenced by those factors. Secondly they found that, even if the appellants had been influenced by those factors, the influence was not of such a nature that it would be regarded by the community as less reprehensible. ("Dat dit na die oordeel van die gemeenskap (nie) die morele laakbaarheid van die moorde verminder (nie)"). Both these findings amount to misdirections. In arriving at their first finding the assessors merely applied an objective test, namely, whether a reasonable man would have considered appellants' actions to be less reprehensible for the reasons advanced by the judge.

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They failed to apply the threefold enquiry, viz (1) whether there were at the time of the crime, circumstances which could have influenced appellants' mental faculties or state of mind; and if so (2) whether such factors did subjectively influence the appellants; and

- (3) whether this subjective influence did, according to the objective judgment of the court, render the appellants' crimes less blameworthy. See *S v Monqesi en Andere* 1981(3) SA 204 (A) at 207 E-H. Although the test for extenuating circumstances was an objective one, this involved the ascertainment of, inter alia, the subjective state of mind of the appellants. The subjective aspect of the enquiry was, as SCHREINER JA stated in *R v Fundakubi & Others* 1948(3) SA 810(A) at 818, "of very great importance". See also McBride's case, supra at 19 E-F. As far as the assessors' second finding is concerned, it is not a question of whether the community would have viewed

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appellants' conduct as less reprehensible, but whether the court so viewed it. The interests of the community were not relevant at the stage when the court was considering whether extenuating circumstances were present or not. See *S v Witbooi* 1982(1) SA 30(A). Respondent's counsel very correctly conceded that in both these respects the assessors had misdirected themselves. Be that as it may, however, the factual findings of the learned judge a quo do, subject to the qualification mentioned, constitute mitigating factors. Political considerations can, depending on the circumstances, constitute mitigating factors. See *S v Mkaba and Others* 1965(1) SA 215 (A) at 217 and McBride's case, supra at 25 E-F. In the circumstances of the present case the factors mentioned by the trial judge, which formed the basis for his finding that extenuating circumstances were present, do

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constitute mitigating factors. There are, on the other hand, also factors present which are aggravating. As DE KLERK J pointed out, both Vuma and Hlubi were killed purely because of their reputations as members of the police force and without their having been given an opportunity to defend themselves. The same applies to Lukhele. The murders were all (with the exception of that of Mrs Dlodlu) premeditated and committed in cold blood. The trial judge said of appellants' conduct :

"Hulle optrede sal deur alle beskaafde mense as afskuwelik gebrandmerk word"

He went on, however, to state :

"Volgens my oordeel egter, is die omstandighede wat op hulle gemoedere ingewerk het sodanig dat dit hulle blaamwaardigheid merkbaar verminder, ongeag

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hoe blaamwaardig hul optrede steeds mag wees. Ek is dus van oordeel dat hierdie versagtende omstandighede beduidend genoeg is om die verpligte oplegging van die doodstraf ontoepaslik te maak en dat h vonnis binne die diskresie van die hof gevra word."

I agree with this approach. Having regard to both the aggravating and mitigating factors referred to above, I do not consider that the sentence of death was the proper sentence in this case. It is therefore necessary to consider what a proper punishment would be. The appellants were each sentenced to an effective period of 25 years imprisonment in respect of the other counts on which they were found guilty. Having regard to the serious nature of these four murders, a very substantial period of imprisonment is clearly warranted. A proper sentence, in my view, would be one of 25 years imprisonment in respect of each of the four murders.

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AMENDED ORDER

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However, the cumulative effect of such sentences and those which appellants are at present serving, renders it necessary to order that the sentences imposed in respect of these murders should run concurrently with their present sentences. In the result the appeals of the appellants against their sentences of death succeed as follows:

1. In the case of the first appellant there is substituted a sentence of 25 years imprisonment on each of counts 13, 14, 15 and 16.
2. In the case of the second appellant there is substituted a sentence of 25 years imprisonment on each of counts 14, 15 and 16.
3. In the case of the third appellant there is substituted a sentence of 25 years imprisonment on each of counts 15 and 16.
4. In respect of each of the appellants, all such sentences are to run concurrently with each other and with the sentences at present being served by them.

G. FRIEDMAN AJA.

JOUBERT ACJ SMALBERGER JA MILNE JA CONCUR. EKSTEEN JA

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