

SOUTH AFRICA / JUDGMENT

# S v Payi (16/86) [1986]

## ZASCA 15 (14 March 1986)

[1986] ZASCA 15

## COURT

Supreme Court of Appeal

## BEFORE

Joubert, Trengove, Jacobs

## CASE / FILE NUMBER

16/86

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CLARENCE LUCKY PAYI Appellant

AND

THE STATE Respondent

Coram: JOUBERT, TRENGOVE et JACOBS, JJ A Heard: 28 February 1986 Delivered: 14 March 1986

JUDGMENT JACOBS, J A :

The appellant appeared as accused 2 with one

Sipho Bridget Xulu, who was accused 1, before Kriek, J and two assessors in the Court a quo on various charges.

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The charges and the allegations in respect of each charge were the following:

1 Murder of one Johnson Langa, a Black male. (In the evidence he was generally referred to as Ben Langa.)

2 Conspiracy to murder one Modise Faith Matloapane (referred to as Faith) in contravention of section 18(2)(a) of Act 17 of 1956.

3 Contravention of section 54(1) of Act 74 of 1982(Terrorism).There were also three charges under the Arms and Ammunition Act, 1969, against both accused but these were withdrawn by the State before plea.

Mr Findlay, assisted by Mr Southwood, appeared for both accused. (They also appeared for appellant before this

Court .... / 3

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Court.) Both accused pleaded guilty on counts 2 and 3 and were on their pleas, as amplified by statements filed in terms of section 112(2) of Act 51 of 1977, found guilty on those two counts. Both accused also pleaded guilty to murder on count 1 but added qualifications to their pleas that there were ex-tenuating circumstances present. The State was however not prepared to accept the qualifications with regard to extenuating circumstances and therefore set out to prove the guilt of both accused as if they had pleaded not guilty. Certain witnesses were then called by the State and certain formal admissions made on behalf of both accused and it is not in dispute that the State succeeded in proving the guilt of both accused on count 1 and that they were both correctly found guilty of murder. The only remaining issue was the existence

or .... / 4

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or otherwise of extenuating circumstances in relation to count 1. Both accused gave evidence and they were the only witnesses on this aspect. The Court a quo in the end unanimously arrived at the conclusion that there were no extenuating circumstances and accused were sentenced as follows: Count

1. Each accused sentenced to death.Count 2. Each accused sentenced to Eight
  - (8) years imprisonment. Count 3. Each accused sentenced to Eight (8) years imprisonment of which half was ordered to run concurrently with the sentence imposed on count 2.
- Applications on behalf of both accused for leave to appeal against the trial Court's finding that there were no extenuating circumstances and against the death sentences imposed

in .... / 5

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in respect of count 1 were refused by Kriek J but this Court granted leave to appellant to appeal against the above finding and the resultant death sentence but it refused to grant such leave in respect of the aforesaid Sipho Xulu to whom I shall refer to as accused 1.The facts and circumstances leading to the death of the deceased are summarised by the learned trial judge as follows:

"(a) Each Accused was recruited into an organisation known as the African National Congress (which I will hereafter call the ANC).

- (b) Each Accused underwent military training outside the borders of the Republic, preparing for armed conflict with the South African Defence Force inside the borders of the Republic.
- (c) The deceased was a member of the ANC but the high command of that organisation suspected him of having supplied it with false information. On the day they were brought back into the Republic from

Swaziland .... / 6

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Swaziland, the Accused were instructed by the Regional Chief of Security of the ANC to eliminate the deceased, which they subsequently did. Both accused fired at the deceased from short range and both shots were fatal, the one into the head and the other into the chest. (e) The killing of the deceased was therefore a planned execution because of his supposed disloyalty to the ANC."

I now turn to the background of the appellant as

testified to by him and the reasons given by him as to why he

took part in the killing of the deceased. His father died when he was very young and his mother died when he was about

10 years old. He was then brought up by an aunt and lived in KwaMashu near Durban where he attended school. In 1980 when he was about 16 years old and in standard 8, which he had failed the year before, there were school boycotts and protest meetings by the scholars mainly about "teachers' salaries

and .... / 7

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and the installation of electricity in schools". During this

period appellant met one James Mavuso, whom he trusted and

had a high regard for, who told him about the ANC and asked

him to join that organisation. After giving the matter some

thought he eventually agreed because, as he said, he wanted to contribute towards the struggle of the people to live well and be legally equally treated. According to what James told him he would achieve the aforesaid objects by joining the ANC. Thereafter James arranged for himself, appellant and another person to leave the country for Swaziland where they joined the ANC. That was in March 1981. Appellant stated that he knew when he left to join the ANC that he would be trained in the use of firearms, and he subsequently indeed underwent such training in Angola and East Germany where he was sent

from .... / 8

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from Swaziland. In 1984 he was sent back to Swaziland where he met accused 1 for the first time. Appellant was then 19 years old and this was also his age when the crime was committed. Accused 1 was then 24 years old. Now accused 1 told the Court that he left the Republic for Swaziland during January 1983. At that stage he had known the deceased, Ben Langa, for some time and the deceased had from time to time been urging him to join the ANC. He eventually agreed and left for Swaziland where he received basic instructions in the use of firearms and was thereafter sent to Angola where he received further training. He returned to Swaziland in May 1984 where he met appellant. Accused 1 told the Court, and appellant confirmed this, that the appellant received orders to return to the Republic

and ... . / 9

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and they were given instructions by a high ranking officer of the ANC as to what to do after entering the country. They were inter alia to conduct a recruiting campaign, train recruits and establish a communication network with ANC agents in South Africa. On the day they left Mbabane, and this was also confirmed by appellant, the Regional Chief of Security of the ANC told them that there was a person in Pietermaritzburg who had done the ANC a lot of harm. This officer said that the person in question had supplied false information to the ANC in Swaziland and that one of their, the accused's, tasks was to kill the person concerned. From further discussions with this officer it appeared that the person in Pietermaritzburg referred to was in fact Ben Langa the deceased. Accused 1 testified that he could hardly believe

what .... / 10

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what he heard because Ben Langa was one of the persons who had persuaded him, accused 1, to join the ANC and he regarded Ben Langa as a "comrade". However, from the information the Regional Chief gave him he was convinced that the deceased was in fact a traitor and from that moment he detested the deceased. Appellant also stated in evidence that having heard what the deceased was supposed to have done he too was quite satisfied that the deceased should be killed. Accused 1 also testified, and again appellant confirmed this, that they were also instructed by the Regional Chief to kill any other person they consider to be hostile to the ANC. The conspiracy to kill the person Faith referred to in count 2, apparently arose from this instruction.

Accused 1 further testified, and this again was

confirmed .... / 11

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confirmed by appellant, that they arrived in Pietermaritz-burg about mid-May 1984 where they met a certain person (whose identity the Court ordered not to be revealed and was referred to as "A") who was known to accused 1 before he left the country in 1983. This Mr "A" brought them into contact with one George Martins and as a result of what Martins told them the four of them decided that Faith who apparently also played quite a significant part in the first accused's leaving the country for military training, could no longer be trusted and should also be eliminated. By that time "A" had already informed accused 1 and appellant that he knew Ben Langa and knew where he stayed. However that may be, on the evening of 20 May 1984, i e very shortly after their arrival in South Africa, accused 1 and appellant together with "A"

and..... / 12

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and Martin set: off to kill first the person Faith and then Ben Langa. Accused 1 and appellant were each armed with a pistol. When they arrived at Faith's house they observed that he had a visitor and decided not to confront him that evening. They then drove to the deceased's house. "A" remained in the car some distance away while accused 1, appellant and Martin proceeded to the house on foot. Appellant and Martin knocked on the door of deceased's room and entered when the door was opened for them by the deceased. On a signal from Martin accused 1 also entered whereupon accused 1 and appellant each fired one shot at deceased, accused 1 with a Mackarov pistol and appellant with a Lugar pistol. The shot fired by appellant struck the deceased in the face and the one fired by accused 1 struck the deceased in the chest.

Both .... / 13

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Both shots were fatal. The three of them then returned to the car where "A" was waiting and the four of them left. I may just pause here to say that although accused 1 and appellant were only arrested some 16 days after they had shot the deceased no further steps were taken to kill Faith. Accused 1 gave as a reason for this that they were too busy "doing other things" and appellant's reason was that they did not think about it again. Appellant stated that he shot the deceased because he had to carry out the orders given by the Regional Chief of Security. In his evidence accused 1 stated that in the organisation (ANC), a "soldier" who had been given an instruction by a superior officer must carry it out without asking for reasons. The maximum penalty for disobedience was the

firing .... / 14

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firing squad since the ANC was run like an army on military lines. Accused 1 said that he outranked the appellant since he himself held the rank of commander of a unit whilst appellant was a "commissar" or deputy commander of such unit. The "unit" referred to apparently being people they were going to recruit and train after arrival in South Africa. Accused 1 stated that the

final decision in relation to any matter lay with him but he and appellant first compared views before acting and during the time that they were together appellant's views never differed from his own. In answer to questions by Mr Roberts, for the State, appellant stated that before he left South Africa he thought he would be trained to fight the South African Defence Forces soldiers on his return and did not think he would have to kill

unarmed .... / 15

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unarmed persons but he also said that even if he had known that he would be expected to kill unarmed persons he would nevertheless have joined the ANC. When he was asked how he felt about having killed the deceased, he said he felt nothing and did not regret it. He killed the deceased because he had taken an oath to obey instructions and not because of fear of a firing squad or of accused

1. It had not crossed his mind what would happen to him if he was caught for killing the deceased. He did not think about the possibility that he might be sentenced to death although he had heard about some of his "comrades" having been sentenced to death. He stated that in doing what he did he was not motivated by accused 1 since he had already been motivated in Angola.

He ..... / 16

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He also stated that if he had known the area where the deceased lived he would have been prepared to carry out the task of killing the deceased on his own. He also stated that after entering the Republic he performed certain work independently of accused 1 and gave as an example an instance when he, accompanied by "A", went to reconnoitre a suitable site for arms caches or a so-called "Dead Letter Box" and he found a site which he considered suitable at a bus-stop near the new Supreme Court in Pietermaritzburg. This, broadly speaking, was the evidence given by appellant, and by accused 1 in so far as it affects appellant, on the issue of extenuating circumstances. In his heads of argument Mr Findlay made the submission "that the Trial Court misdirected itself when it found

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that, to the extent that the fact of Appellant having received military training and having been indoctrinated politically might have constituted an extenuating circumstance, it was cancelled out by the cold blooded killing of the deceased and the Appellant's callous attitude to the deceased's death". In support of the above submission the following cases were referred to: *S v Smith and Others* 1984 (1) S A 583 (A) at 595 B - H and *S v Ndwalane* 1985 (3) S A 222 (A) at 227 D - 228 H.

Now the actual passage in the judgment on which the above submissions are based reads as follows:

"We do not consider that the fact of their having received military training and having been indoctrinated politically constitutes an extenuating circumstance.

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To the extent that it may have been such, it is cancelled out by the cold-blooded killing of the deceased and their callous attitude towards his death even now. "

Now it is quite clear that the Court a quo's finding on this particular aspect is contained in the first sentence of the above passage which followed upon a lengthy discussion by the Court of Mr Findlay's submission that the two aspects namely the military training and the so called political indoctrination constitute extenuating circumstances. The Court's conclusion was that the circumstances advanced do not constitute extenuating circumstances. In his judgment on the application for leave to appeal Kriek J again makes it quite clear that that in fact was the Court's main finding. Whether, if the second sentence in the passage

quoted .... / 19

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quoted, and on which Mr Findlay relied, had stood alone it would have constituted a misdirection, is not necessary to decide. Mr Findlay in fact conceded that if the first sentence of the passage from the judgment which I have quoted is regarded as the Court a quo's actual finding then his submission that the Court misdirected itself loses much of its force. I am satisfied that there was in fact no misdirection. Now, as has been said many times, the jurisdiction of the Appeal Court is strictly limited on an issue such as the present. The decision as to the existence or otherwise of extenuating circumstances is, in the first instance, essentially one for the trial Court, and, in the absence of any misdirection or irregularity, this Court will not

interfere .... / 20

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interfere with a finding that no extenuating circumstances were present, unless it is one which the trial Court could not reasonably have come to. In his argument, and he called this his main argument, Mr Findlay asked this Court to find that the trial Court had erred. He mentioned five factors which he submitted taken either individually or cumulatively constitute extenuating circumstances and submitted that the trial Court's finding that they do not, is one to which no reasonable Court could have come to. The main factors mentioned by counsel were:

- (a) the background of the appellant prior to his recruitment into the ANC;
- (b) the indoctrination he underwent from the time of

his .... / 21

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his recruitment;

- (c) the murder had a political connotation and appellant was only carrying out orders given by a person in authority over him in the ANC; (d) the killing was not of an innocent bystander; (e) the appellant was 19 years old at the time when the crime was committed.

Mr Findlay elaborated on the above contentions but in essence his submissions were merely a repetition of his argument before the Court a quo which argument was recorded and formed part of the record of appeal. The Court a quo carefully considered and analysed the evidence and in its judgment dealt with these submissions and unanimously came to the conclusion that no extenuating circumstances were present.

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I have again carefully considered the factors mentioned above. As has been stated in many cases the determination of the presence or absence of extenuating circumstances involves a threefold enquiry. Those are (see *S v Ngoma* S A 1984 (3) 666 (A) 673 G - H):

"1 Whether there were at the time of the commission of the crime facts or circumstances which could have influenced 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."

Requirement (3) above was phrased by Joubert J A

in *S v Monangasi en Andere* 1981 (3) 5 A 204 at 207 G as follows:

"Of die subjektiewe beïnvloeding van beskuldigde se geestesvermoens of gemoedstoestand van so 'n aard was

dat..... / 23

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dat die beskuldigde se optrede volgens die objektiewe oordeel van die Hof daardeur minder verwythbaar word."

The trial Court approached the matter on the above lines and I certainly cannot say that its finding is one to . which no reasonable Court could have come. There is accordingly no more to be said about the matter.

The appeal is dismissed.

H R JACOBS, J A

JOUBERT, J A ) concur TRENGOVE, J A )

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