SACHS J ABRIDGED JUDGMENT (CONCURRING)

S v Basson

[110] I concur in the majority judgment, but wish to add supplementary reasons on one aspect. It concerns the quashing by the trial court of certain charges against the respondent, Dr Basson, and deals with the question of the constitutional significance of conduct amounting to a war crime.

[111] The questions before us have to be determined in the complex historical and jurisprudential situation in which the South African state has moved from perpetrating grave breaches of international humanitarian law to providing constitutional protections against them. Issues which in another context might appear to be purely technical concerning the interpretation of a statute or the powers of a court on appeal, in my view, take on profoundly constitutional dimensions in the context of war crimes.

[112] Nothing shows greater disrespect for the principles of equality, human dignity and freedom than the clandestine use of state power to murder and dispose of opponents. It follows that any exercise of judicial power which has the effect of directly inhibiting the capacity of the state subsequently to secure accountability for such conduct goes to the heart of South Africa's new constitutional order. When the depredations complained of are of such a dimension as to transgress the frontier between ordinary state-inspired criminal violence and war crimes, the engagement with the core of the Constitution becomes even more intense.

[113] It is in this context that the interim Constitution provided for the establishment of the Truth and Reconciliation Commission (the TRC). Its objective was to build a bridge between the past and the present and enable an appropriate balance to be achieved between all the public and private interests involved. The respondent has not chosen to have recourse to the TRC process. We are accordingly left to deal with this matter on the basis of applying the

ordinary principles of law and statutory interpretation as viewed and developed in the light of the Constitution.

[114] The very enormity and intricacy of the legal issues requires that the analysis be undertaken with the utmost rigour and dispassion. The need for objectivity is eloquently highlighted by Cassese in the Preface to his seminal work on international criminal law:

"[O]ne should never forget that this body of law, more than any other, results from a myriad of small or great tragedies. Each crime is a tragedy, for the victims and their relatives, the witnesses, the community to which they belong, and even the perpetrator, who, when brought to trial, will endure the ordeal of criminal proceedings and, if found guilty, may suffer greatly, in the form of deprivation of life, at worst, or of personal liberty, at best. Law, it is well known, filters and rarefies the halo of horror and suffering surrounding crimes. As a consequence, when one reads a law book or a judgment, one is led almost to forget the violent and cruel origin of criminal law prescriptions. One ought not to become oblivious to it. To recall it may serve as a reminder of the true historical source of criminal law. This branch of law, more than any other, is about human folly, human wickedness, and human aggressiveness. It deals with the darkest side of our nature. It also deals with how society confronts violence and viciousness and seeks to stem them as far as possible so as 'to make gentle the life on this world'. Of course the lawyer can do very little, for he is enjoined by his professional ethics neither to loathe nor to pity human conduct. He is required to remain impassive and simply extract from the chaos of conflicting standards of behaviour those that seem to him to be imposed by law."

[115] In the present case our country's relatively rapid transformation from predator state to protector state has intensified "the chaos of conflicting standards" to which Cassese refers. The resolution of the conceptual tensions involved can only be found in the Constitution and its values and in the duty imposed on the state to protect those values. In a fraught area like this it is particularly important to avoid forms of consequential reasoning which lack a principled foundation. The crucial question is not whether consequences influence reasoning but the nature of the consequences which may be involved. In my view, if the desire to avoid potentially painful consequences results in the filling in of gaps in legal reasoning, or places unacceptable strain on principled legal logic, the integrity of the law is

imperilled. But if the consequences at issue relate to the constitutional legal order itself or to rights protected by that order, they become integral to rather than destructive of rigorous legal analysis. In the present case I believe the consequences of the decision of the trial court to quash the charges, and the subsequent refusal of the Supreme Court of Appeal (the SCA) to entertain an appeal against that decision, do impact directly on the legal order as envisaged by the Constitution, particularly insofar as war crimes may be involved. They touch on central features of our constitutional democracy. As such they are determinative of the issue before us at this stage, namely whether the questions raised in the application for leave to appeal, are constitutional matters.

[116] I believe that three substantial, sequential and interrelated constitutional questions arise in connection with the quashing of the charges and the refusal of the SCA to entertain an appeal from the trial judge's decision. The first is whether the conduct charged could be characterised as a war crime as understood by international humanitarian law. If the answer is affirmative, the second question is whether and to what extent this could impose a special constitutional responsibility on the state to prosecute the respondent. The third is whether the quashing of the charges by the trial court followed by the refusal of the SCA to entertain an appeal against this decision, without reference to the fact that the prosecution of war crimes was involved, manifested a failure to give effect to South Africa's international obligations as set out in the Constitution.

[117] I deal first with the question of whether the conduct alleged in the charges that were quashed should be seen as constituting war crimes. Cassese defines a war crime as follows:

"War crimes are *serious violations* of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict. As the Appeals chamber of the ICTY [International Criminal Tribunal for the former Yugoslavia] stated in *Tadić (Interlocutory Appeal)*, (i) war crimes must consist of 'a serious infringement' of an international rule, that is to say 'must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'; (ii) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; (iii) 'the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule' (§ 94); in other words, the conduct constituting a serious breach of international law must be criminalized.

. . .

War crimes may be perpetrated in the course of either *international* or *internal* armed conflicts, that is, civil wars or large-scale and protracted armed clashes breaking out within a sovereign State."

[118] The charge sheet against the respondent alleged in count 31 that he had been involved in a conspiracy in Pretoria to murder members of South West African People's Organisation (SWAPO) in Namibia (then referred to as South West Africa), in contravention of section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956. The material facts which accompany the charge sheet provide the substance of the allegations against him. Count 31 reads:

"1. In 1979/1980 it was found that as a result of pseudo-operations which the SADF carried out in the then South West Africa (Namibia), there was an overpopulation of captive SWAPO members in the detention facilities. A decision was taken in defence headquarters in Pretoria that SWAPO members who had become too many to be handled and represented a security risk, should be killed and their bodies gotten rid of. It was decided that an aeroplane (PIPER SENECA) should be bought clandestinely and that it would be employed to cast the remains of the SWAPO captives who were killed into sea.

2. As a result of problems encountered with the first SWAPO members whose deaths were engineered, Dr. Basson was instructed to help kill the persons.

3. The accused began to supply JJ Theron with TUBERINE and SCOLINE (both muscle-relaxants). The accused explained that if a person is injected with these agents such person in this situation basically asphyxiates. His lungs do not function because the lung muscles are inactive because of the agents. Later KETALAAR (a narcotic agent) was also provided. In most cases the Accused provided these agents to JJ THERON, but in his absence other doctors who worked under him and on his instructions provided the agents to other persons involved in the operation. The SWAPO members and persons from their own forces, who had to be killed, were overdosed with the above agents which brought about their death.

4. Theron went ahead to kill a large number of SWAPO members who had been identified (about 200 persons) in the above manner and to get rid of their remains in the sea.

5. The accused also provided THERON with cool-drink with sedatives to surreptitiously cause people to fall asleep. THERON, on his part, gave the cool-drinks with the sedatives to co-workers such as DJ PHAAL, T FLOYD and ICJ KRIEL.

6. The accused informed THERON that they had experimented with various cool-drinks. THERON personally bought the cool-drinks and delivered them to the accused. The accused showed THERON where a small hole was drilled into the cool-drink. The sedative was injected with a thin syringe into the cool-drink. With the use of skilful soldering process the little hole was covered so that it would be invisible. The accused on ten occasions delivered contaminated cool-drink to THERON. From time to time there was to be feedback to the accused about the effectiveness of the cool-drink.

7. Contaminated beer was also delivered to THERON in a similar manner. The beer also contained a sedative and THERON received such beer on about twelve occasions.

8. The accused also delivered to THERON pills that were indented with a deep V. Usually 10-15 of the pills were handed over and the accused delivered them five or six times. These pills also caused potential victims to fall asleep if they took them.

9. In furtherance of the above conspiracy a series of incidents took place. The state will inter alia rely on the occasion where the accused and THERON killed 5 black male persons (hereafter called the deceased) who were in detention at Fort Doppies, SWA.

10. The accused gave the above-mentioned detainees the pills to drink. The five refused to take the pills and hid them away in the legs of the chairs in the place where they were being held.

11. The accused and Theron looked through a one-way window in a neighbouring observation room, and saw the deceased hide the pills.

12. The accused went into the cell again and persuaded the five persons to take the pills, which they did.

13. As a result of the medicine the five persons fell asleep. The accused and THERON injected them with tuberine and scoline which the accused supplied.

14. The accused used the opportunity to see if THERON administered the injections correctly.

15. When the five were dead the accused, THERON, and other persons unknown to the State, helped load the bodies onto an aeroplane.

16. While the accused sat in front of the aeroplane, they flew out to sea, and went on to throw the five bodies into the sea."

[119] The charge sheet further alleged in count 61 that in 1989 the respondent furnished cholera bacteria to poison the water supply of a SWAPO refugee camp in order to manipulate the outcome of pending elections in Namibia. The material facts appended to count 61 read:

"1. Before the election in Namibia/South West Africa, the CCB decided that all forces must be brought together to influence the outcome of the election. All the different regions of the CCB members were told to direct their activities to South West Africa/Namibia.

2. RNL had the capacity to cultivate the Vibrio Cholera-Bacterium. This pathogenic organism was packed in bottles. On 4 August 1989 A IMMELMAN handed to the operator "Koos", 16 bottles containing the Cholera bacterium. On 16 August another 6 bottles of Cholera germs were handed over to the medical coordinator of the CCB (Koos). This bacterium was supplied through the instruction and agency of the accused to the medical coordinator of the CCB. Immelman also reported to the accused.

3. BOTES, a CCB member who by rights worked in Region 2, had a clandestine member who had access to a camp in Windhoek that accommodated mainly SWAPO members. On the instruction of PJ VERSTER a project was launched, which included the contamination of the water supply of the refugee camp where mainly SWAPO members were staying near Windhoek.

4. BOTES received from VERSTER four bottles containing Cholera germs. BOTES handed it over to his operator, J DANIELS for it to be thrown into the water supply of the camp at Windhoek.

5. After the operator carried out his instruction, Botes destroyed the bottles.

6. The state alleges that the Cholera germs were handed over to the CCB on the instructions and through the agency of the accused."

[120] If the allegations contained in counts 31 and 61 could be proved, it would be difficult to argue that, accepting Cassese's definition, they did not constitute war crimes.

[121] The next question relates to the constitutional significance of a finding that the charges if proved could establish the commission of war crimes. Would such a finding signify a constitutionally-commanded need to take account of international law in determining the issues? In particular as far as the present case is concerned, would it require that in relation to the interpretation of the Constitution and our law of criminal procedure, special consideration be given to South Africa's international law obligations? This is a relatively new area in our jurisprudence, and requires appropriate circumspection. At this stage, however, we are not called upon to make definitive determinations. Rather, we must decide the limited question of whether or not the possible impact on the case of South Africa's international law obligations raises a constitutional question. In this respect I am of the opinion that the materials before us are sufficiently substantive to propel this question from the realm of the purely speculative into the universe of the real.

[122] Section 232 of the Constitution states:

"Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice [the ICJ] has stated, they are fundamental to the respect of the human person and "elementary considerations of humanity". The rules of humanitarian law in armed conflicts are to be observed by all states whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law. The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.

[123] The duty of states to provide effective penal sanctions today for persons involved in grave breaches of humanitarian law, whenever committed, is captured and expressed in Article 146 of the Fourth Geneva Convention of 1949 (articles 146-147 appear with different numbering in all four conventions). It states:

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

Article 147 of the Geneva Convention goes on to indicate what sort of conduct would constitute grave breaches of international humanitarian law. These include:

"(A)ny of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health".

[124] This brings me to the third question. It concerns the failure of the SCA, when dealing with the proposed appeal against the decision to quash the charges, to take account of South Africa's international law obligations as outlined above. It should be repeated that at this stage we are not called upon to make any definitive determinations as to whether the trial court was correct or not in quashing the charges. Nor is it necessary to decide whether the SCA should or should not have entertained the appeal against the decision. The only issue in these preliminary proceedings is whether the fact that at no stage was any attention paid to South Africa's international obligations as mandated by the Constitution raises a constitutional issue. In *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* this Court held that a dispute as to whether a decision by the SCA gave paramountcy to the best interests of the child, and enquiries into gender equality, both raised constitutional issues, properly before this Court. Similarly, enquiries into whether the SCA failed to give sufficient or any weight to the state's obligations under international law, raise constitutional questions, properly before this Court.

[125] This Court is accordingly entitled to hear the application for leave to appeal against the SCA's decision refusing to entertain the appeal against the trial court's quashing of the charges.

[126] In conclusion, it should be emphasised that none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.