Psychological Evidence in South African Murder Trials

Andrew Colman's expert witness to social psychological processes that may have contributed to murders was accepted by two South African courts, and led to an important legal breakthrough.

In two recent murder trials, South African courts have accepted basic processes of social psychology as extenuating factors. In the SARHWU murder trial, eight black railway workers pleaded guilty to the murder of four strike-breakers during a bitter industrial dispute. The argument for extenuation rested on situational factors operating at the time of the murders. Social psychologists testified about conformity, obedience to authority, group polarisation, frustration, relative deprivation, de-individuation, bystander apathy, and other psychological processes which may help to explain the conduct of the accused. The court accepted these factors as extenuating, but sentenced four of the eight to death. In the case of the "Queenstown Six", township residents who had already been sentenced to death for the "necklace" killing of a young woman during a period of township unrest had their sentences set aside on a technicality. A retrial focussed on extenuating factors arising from crowd psychology, and all six had their death sentences reduced to 20 months' imprisonment.

IN OCTOBER to November 1988 and November 1989 I appeared as an expert witness in two murder trials in South Africa. Taken together, these trials represent an important legal breakthrough in that country and perhaps also a significant milestone in the history of applied social psychology. For the first time in any jurisdiction, the courts accepted a whole raft of social psychological processes (including conformity, obedience to authority, group polarisation, deindividuation, frustration-aggression, relative deprivation, and bystander apathy) as extenuating circumstances allowing convicted murderers to escape the death penalty.

Socio-political background

From the 1976 Soweto uprising onwards there was chronic unrest in the black townships of South Africa. This led to many incidents of mob violence, usually in the context of industrial strikes, political demonstrations, consumer boycotts, and funerals of residents killed by the police. Violence sometimes boiled over and resulted in murders committed by rampaging mobs. The individuals eventually charged with these murders were typically only an arbitrary handful of those present at the killings and not necessarily the ones who dealt the fatal blows. Under the legal doctrine of *common purpose*, people can be convicted of murder in South Africa, even if they took no part in the actual killing, merely by virtue of having associated themselves with a murderous mob: the acts of the mob are imputed to any individual who shared a common purpose with the mob.

During the late 1970s and 1980s political unrest in the townships led to a huge increase in the number of executions in South Africa. There were about 40 executions each year in the early 1970s, after which the numbers rose to over 100 per annum by the late 1970s and reached a peak of 164 in 1987, a year in which 25 executions took place in the whole of the United States, whose population is nine times the size of South Africa's (Allen-Mills, 1988). There are no black judges in South Africa, and no trial by jury, but the vast majorty of people executed for murder have been black.

Until the passing of the Criminal Law Amendment Act of 1990, which introduced an element of judicial discretion, the death sentence was mandatory for murder in South Africa except in cases where the accused succeeded in proving extenuating circumstances. Anything that tends to reduce the moral blameworthiness

of a murderer's actions can be put forward as an extenuating circumstance. In practice, courts have most often accepted such factors as provocation, intoxication, youth, absence of premeditation, and duress.

Psychology in extenuation

Extenuation proceedings are usually brief and half-hearted affairs in which no fresh evidence of significance is introduced. But in the late 1980s defence lawyers in South Africa began in some cases to devote considerable time and effort and to introduce an entirely new class of extenuating circumstances, namely social psychological processes associated with crowd behaviour. In the first case, *S. v. Motaung and Others* (1987/1990), Ed Diener of the University of Illinois testified as an expert witness about de-individuation, but the court rejected his evidence on the grounds that it rested on the truthfulness of the accused's own testimony, which the court disbelieved. In the notorious case of the "Sharpeville Six" (*S. v. Safatsa and Others*, 1988), Graham Tyson of Witwatersrand University gave evidence about crowd psychology, but the court found that the case for extenuation was not proven because Tyson had testified in general terms about psychological phenomena without addressing himself directly to the motivation or state of mind of each individual accused, and the accused were sentenced to death. This decision was upheld on appeal but, significantly, neither the Supreme Court nor the Court of Appeal ruled out the possibility that deindividuation could *in principle* constitute an extenuating circumstance.

The SARHWU Trial

The breakthrough came in *S. v. Sibisi and Others* (1989), an extenuation trial of eight members of the South African Railways and Harbours Workers' Union (SARHWU) convicted of a mob murder. The proceedings ran from the beginning of August until the end of November 1988, making it apparently the longest extenuation trial on record in any jurisdiction.

The murders were committed in 1987 during a bitter railway strike. A black van driver, Andrew Nedzamba, had been sacked for being a day late in handing in a very small sum of money which he had collected during a delivery. SARHWU members struck in sympathy, demanding among other things Nedzamba's unconditional reinstatement, improvements in grievance procedures, and the elimination of numerous racially discriminatory employment practices in the transport services. Management flatly refused to negotiate with SARHWU, which is affiliated to the left-wing Congress of South African Trade Unions (COSATU), and decided instead to lock the strikers out of railway premises. Many of the strikers, who were migrant contract workers from the rural "homelands" living without their families in single-sex hostels, starkly reminiscent of concentration camps, found themselves deprived of even that meagre shelter.

Thousands of strikers decamped to Cosatu House, a building in the centre of Johannesburg occupied by the radical Trade Union Congress. Throngs of strikers gathered there daily to discuss the progress of the strike between spells of singing and *toyi-toyiing* (traditional dancing). The police responded by spraying tear gas into Cosatu House and attacking strikers in the streets outside with *sjamboks* (raw-hide whips). On 22 April 1987 police shot dead six of the strikers and then stormed Cosatu House, claiming that there were "trained terrorists" in the building, and seriously injured many more strikers.

When pay day came a week later, the strikers learned that they had all been sacked. The people gathered in Cosatu House became frustrated and angry and decided unanimously to kill five workers who had refused to join the strike and had been kidnapped from their work-places and brought there. Many people helped bundle the non-strikers into a pickup truck and drive them to a deserted tract of ground. On the way to the scene of the crime, one of the strikers developed pangs of conscience and helped one of the intended victims to escape. The lynching party killed the other four by stabbing them with a long bread knife and dropping a 30 kg concrete block on to their heads as they lay on the ground. Someone then doused the bodies with petrol and set them alight. The fifth intended victim, who had been allowed to escape, went straight to the police and was the key prosecution witness in the subsequent murder trial.

Only three or four of the eight defendants had participated in the actual killings. One of them had not even travelled with the others to the scene of the crime. But all eight had associated themselves with the unanimous decision of the vast mob in Cosatu House to kill the non-strikers, and had therefore been found guilty of murder by virtue of common purpose.

The defence decided to call as expert witnesses social psychologists from opposite corners of the world, and by a process of elimination they eventually ended up with Scott Fraser of the University of Southern California and me. We drew the court's attention to several psychological phenomena which we believed influenced the eight accused to varying degrees.

The dense crowding and the continuous singing and dancing in Cosatu House appeared to have caused some of the accused to become deindividuated and therefore less aware than they normally were of their individual identity and accountability (Dipboye, 1977; Zimbardo, 1969). **Deindividuation** is associated with a **decrease in self-monitoring**, which can make people especially vulnerable to external, situational pressures. Such pressures are, in any event, far more powerful than they are generally thought to be. Experiments have shown that people underestimate the importance of external, situational pressures and overestimate the importance of internal motives and dispositions in interpreting the behaviour of others. We explained this well-established bias, called the **fundamental attribution error** (Ross, 1977), and warned the court to be wary of it.

We presented evidence of **conformity and obedience pressures** (Asch, 1956; Milgram, 1974; Tanford & Penrod, 1984) operating in Cosatu House and at the scene of the crime. We discussed the **relative deprivation** (Crosby, 1976) that the defendants seem to have experienced when they compared their wages, working conditions, and general quality of life with those of their white co-workers and of black workers in the private sector. Black men living in hostels, for example, were not even allowed to be visited on the premises by their wives and children. We cited evidence of extreme **frustration** among some of the defendants and pointed out that frustration, coupled with relative deprivation, characteristically generates anger and **aggression** (Berkowitz, 1989; Masters & Smith, 1987; Olson, Herman, & Zanna, 1986). We explained the **group polarisation effect** (Isenberg, 1986) which causes col-

lective decisions, such as the unanimous decision to kill the non-strikers, to tend toward greater extremity than the individual opinions of the group members. We discussed the research evidence on **bystander apathy** (Latané & Darley, 1970; Latané & Naida, 1981) which helps to explain why some of the defendants watched passively without intervening while others killed the non-strikers. Finally, we submitted that one of the defendants showed the classic symptoms of **learned helplessness** - a resigned, passive condition resulting from exposure to repeated, inescapable noxious experiences (Kofta & Sedek, 1989; Seligman, 1975).

At the end of my evidence-in-chief, after summarising the evidence that Scott Fraser and I had given, I told the court:

> I have no doubt in my own mind that these forces were very powerful in every case and that they go a long way towards explaining why the accused behaved in what, for all of them I think, was a wholly uncharacteristic manner ... Although none of these situational forces is irresistible, and that much is clear from the scientific evidence, their combined effect was in all cases so powerful, given the most unusual confluence of circumstances in Cosatu House, that it would have taken unusual personal qualities, I believe, to have resisted them altogether (*S. v. Sibisi and Others*, 1989, court record, pp. 2159-2160).

My testimony stretched over four days, two of them devoted to hostile cross-examination. Most of the cross-examination consisted of attempts by the prosecution to question the relevance of the psychological evidence to the individual defendants. But part of it dealt with the psychological evidence itself. The following extract from my cross-examination, which focusses on Milgram's (1974) well-known experiments on obedience to authority, is typical:

> *Concerning the Milgram experiment, here the subject was urged on by a confederate to administer shock, is that not so?* - Yes.
> *Is it an obvious possibility then that the subject thinks that the confederate knows what he is doing?* - The confederate clearly does know what he is doing, I mean he is running the experiment, yes.
> *Furthermore, the subject knows it is an experiment?* - The subject knows it is an experiment, yes.
> *And it is also true then that he knows he will not be prosecuted for his actions, [so] obviously he must think he will not be prosecuted, there will not be any criminal liability?* - Well, you say it is obvious; it is not obvious to me ... I do not know whether the subjects thought that they were criminally responsible or not.
> *That could also be indicative of the fact that the subject does not believe that the person is being tortured?* - Well, the subjects did, in fact, believe this. I mean, what happened after the publication of the original series of Milgram experiments was that an enormous debate took place in the psychological literature, and one of the questions that was raised was whether or not the subjects really believed, and in reply to this Milgram sent out questionnaires to all the subjects who had taken part in the experiment and the figure, the result that I happen to remember is 85 per cent of the people who took part ... either completely believed or believed that they had been delivering painful electric shocks ... And then other experiments were carried out in order to put this beyond doubt, experiments in which the credibility issue does not exist. Like, for example, one of Milgram's students performed an experiment where the subjects were ordered to eat crackers soaked in quinine, which is extremely unpleasant, and the subjects here are their own victims. In other words, they are not punishing any other person, they are being told to do something which is punishing to themselves, and what Kudirka, who is the student of Milgram who did the experiment, found was that all the subjects ate, with considerable disgust ... all the biscuits that were put in front of them. So here the issue, the credibility of whether or not you are in fact harming the victim, falls away because the victim is yourself ... It was accepted, I think, by all social psychologists that it is not a problem with the original Milgram experiments, although initially it had been thought it might be. (*S. v. Sibisi and Others*, 1989, court record, pp. 2345-2348).

My cross-examination was gruelling on account of its length, but it did not succeed in getting me to retract any of my earlier evidence about the psychological factors that help to explain the killings.

The court understood and accepted most of the psychological evidence:

"Broadly speaking, we find the phenomena [referred to] by the experts as having probably been present. We also accept that the accused were influenced to varying degrees by these factors ... In principle we find that none of the accused with whom we are now concerned was left completely unaffected by one or more of these influences" (*S. v. Sibisi and Others*, judgment, pp. 27-28).

But the four who had played the most active part were none the less sentenced to death because of the "brutal", "fiendish", and "gruesome" manner in which the victims were killed. The case generated a lot of press coverage, and the Anti-Apartheid Movement mounted a campaign to "save the 'SARHWU Four'". The black playwright Mbongeni Ngema turned the story into a musical theatre production, *Township Fever*, which was performed by a company called Committed Artists and transferred to Broadway towards the end of 1990.

Finally, in May 1991, the Court of Appeal lifted the death sentences on the ground that the psychological evidence in extenuation had not been disproved by the State.

Retrial of the "Queenstown Six"

In November 1989 I testified along similar lines in the retrial (*S. v. Gqeba and Others*, 1990) of six men, five of whom had been found guilty of murder without extenuating circumstances in the original trial and had already spent two years on death row. The outcome was quite extraordinary.

The trial arose from the "necklace" killing of a young woman in the township of Mlungisi in December 1985. This murder was committed at a time of general unrest in most of the country's black townships. Mlungisi was extremely overcrowded, poorly serviced, and generally deprived, even by South African standards. The quality of housing was appalling, and the level of unemployment in the township was extremely high. There was no electricity supply to the township except at a central floodlit square which was nicknamed the "Golden". The only toilet facilities for the 35,000 residents were about a dozen communal latrines situated on the outskirts of the township. When most residents were at home on Sundays and public holidays, raw sewage overflowed into the streets and caused the stench of human excrement to diffuse throughout the township. The township's water supply consisted of standpipes situated right next to the public latrines.

In the winter of 1985 residents sympathetic to the African National Congress (ANC), organised a consumer boycott of white-owned shops in the nearby urban centre of Queenstown to persuade the authorities to upgrade the township. As a result, 35 businesses quickly went bankrupt, and the authorities flooded the township with a specially trained unit of black riot police loyal to the Zulu Inkatha leader, Chief Buthelezi. The Inkatha police, arch-enemies of the ANC and generally feared and

hated by the Xhosa-speaking residents, began to intimidate, assault, arrest, and even kill children and adults suspected of supporting the consumer boycott.

On 17 November 1985 a mass meeting was held in a church to discuss the consumer boycott. The police surrounded the church, parked an armoured vehicle directly opposite its main door, and issued an order over a loudspeaker for everyone to disperse within five minutes. Without waiting for five minutes to pass, and without issuing any further warning, they began to fire tear-gas canisters into the church. To escape the tear-gas, people stampeded toward the doors and windows of the church. Those who managed to escape were met by a hail of bullets from the police, and many of them tried to clamber back into the church through the doors and windows. In the ensuing confusion 11 people were killed and many more were injured.

As a result of the church massacre the atmosphere in Mlungisi became extremely tense. An all-night vigil was followed by a funeral for the victims, attended by 20,000 residents, many of them dressed defiantly in the distinctive black, green, and gold colours of the banned ANC. The coffins were draped with ANC flags, and some of the activists in the funeral cortege carried wooden replicas of Kalashnikov AK-47 assault rifles.

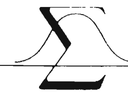
The events that culminated in the killing occurred the day after the funeral. The victim was an 18-year-old woman called Nosipho Zamela who was accused of being a collaborator and an informer after allegedly having an affair with an Inkatha policeman. A street committee of young activists decided to punish Nosipho by means of a public whipping. She was escorted to one of the public lavatories and flogged with a *sjambok*. As a crowd of spectators began to gather, Nosipho suddenly blurted out that she was not the only woman in Mlungisi having an affair with an Inkatha policeman, and she offered to "finger" one of the other culprits. The crowd followed her across the township, singing and *toyi-toyiing*, to several addresses, but it gradually became apparent that they were on a wild-goose chase. By this time the crowd had grown in size to over 200 and had transformed itself into an angry mob. A classic instance of **group polarisation** took place, the opinions of members of the mob rapidly shifting in the direction of extremity, and a unanimous decision emerged in favour of killing the *impimpi* (traitor) by necklacing. Nosipho was forced to roll a car tyre in front of her as she walked, and on arrival at the "Golden", members of the mob placed the tyre round her neck, doused her body with petrol, and set her alight. The mob sang and *toyi-toyied* around her while she burned to death.

Six members of the mob were convicted in June 1987 of murder through common purpose - none of them had taken part in the actual killing - and five of them were sentenced to death. Luckily for the "Queenstown Six", as they became known, the trial was vitiated by a legal technicality: the Court of Appeal set aside the convictions and sentences and ordered a retrial.

My evidence in the retrial stretched over three days, including cross-examination. In my consultations with the accused before testifying I had attempted to gauge feelings of **relative deprivation** with the help of a crude version of Cantril's (1963; Kilpatrick & Cantril, 1960) self-anchoring striving scale. All but one of the defendants, when asked to rate general quality of life, put their own group on the very lowest rung of the ladder and the white group literally on the top rung, with the "coloured" [mixed-race] people with whom they clearly compared themselves unfavourably several rungs above them. I told the court that research has shown over and over again that such relative deprivation is associated with discontent and can provoke illegal and violent behaviour in normally peace-loving people. The other phenomena I referred to were **obedience to authority, conformity**, group polarisation, **frustration-aggression,** and **de-individuation**. I also explained to the court the **fundamental attribution error** (Ross, 1977) and Latané's **law of social impact** (Latané, 1981), according to which the social impact of a situational pressure on an individual is a multiplicative function of the strength, immediacy, and number of the social influence sources; all three parameters were very high at the time of the killing.

I summed up my evidence by saying:

> Each of these social forces on its own ... is powerful and can lead people to behave in ways that are not characteristic of their normal behaviour. Taken together in these highly un-



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usual circumstances, they all happened through some horrible combination of circumstances to come together. To have them come together like that, I would have thought as a social psychologist, is a recipe for trouble, and that the trouble was - although not this specific form of trouble - some form of trouble was almost predictable, given the background. If I knew all about these circumstances, but not what the consequence was, I think that as a social psychologist I would say something nasty is very likely to happen. (*S. v. Gqeba and Others*, 1990, court record, p. 409.)

The cross-examination was devoted, in the main, to trying to establish that the social pressures I referred to were not irresistible, that some of the accused showed autonomy or leadership qualities, and that the social psychological phenomena did not apply to the specific facts of the case.

The defence team was rather bullish at the conclusion of the extenuation proceedings. But the judgment exceeded their most optimistic hopes. The judge made it clear that he accepted the psychological evidence in respect of all the accused. Before passing sentence, he addressed the following remark directly to the accused:

"The sentence I am about to pass on the six of you may be regarded by some people as too lenient. Some politicians may even want to discuss it in Parliament ... I am passing this lenient sentence on you only because of the very exceptional circumstances in this case" (*S. v. Gqeba and Others*, 1990, court record, p.485).

Taking into account the fact that the accused had already spent almost two years on death row, the judge sentenced all six accused to 60 months' imprisonment, of which 40 months were suspended for five years. In other words, the same defendants who had been sentenced to death in the original trial were given less than two years in prison when social psychological phenomena were taken into account.

Conclusions

Anything that helps to explain a person's behaviour could potentially have a bearing on the moral blameworthiness of that behaviour. The central goal of psychological research is to help us to understand behaviour, and a court of law choosing an appropriate sentence for a convicted criminal has the related problem, among others, of trying to understand the defendant's behaviour. Almost by definition, psychology is devoted to understanding human actions, and to that extent its concerns overlap with those of the judge, or in some countries (for example, Austria) the jury, whose task it is to determine sentence. The difference, of course, is that psychology proceeds by carefully controlled research whereas judges and juries rely chiefly on intuition and common sense.

Psychological testimony could play a much larger role than it has hitherto done at the point of sentencing, not only in murder trials in South Africa, but also in trials involving lesser offences in other jurisdictions. Wherever a court has discretion to increase or decrease the severity of punishment in the light of aggravating or mitigating circumstances, expert psychological testimony is at least potentially illuminating. But the admissibility of expert evidence, at least in the liability phase of a criminal trial, is governed by strict common-law principles, and it is questionable whether courts will, in practice, admit such testimony. My own experience in Northern Ireland, for example, is that the courts are rather reluctant to admit non-clinical psychological evidence.

Township residents and security forces after a night of violence between rival black groups

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