CASE NO. 161/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ALMOND NOFOMELA APPELLANT

and

THE STATE RESPONDENT

CORAM: HEFER, NIENABER JJA et PREISS AJA

DATE HEARD: 18 NOVEMBER 1991

DATE DELIVERED: 28 NOVEMBER 1991

J U D G M E N T

NIENABER JA:

The appellant and one Johnny Abraham Mohane were convicted and sentenced to death in 1987 for a murder which they were found to have committed in 1986, when Johannes Hendrik Lourens was stabbed to death on his farm near Brits. Their appeal to this court, with leave granted by it against conviction only, failed. Both of them thereupon petitioned the State President for clemency in terms of s 326 of the Criminal Procedure Act 51 of 1977. Mohane's petition succeeded and his sentence of death was commuted. The appellant's petition did not. He had accordingly exhausted all the recognized legal procedures pertaining to appeal or review open to him.

Thereafter, on 27 July 1990, the Criminal Law Amendment Act 107 of 1990 ("the Act") became law. Section 4 thereof introduced an entirely new approach to the imposition of the death sentence. Whereas before, the onus was on an accused convicted of murder to prove the existence of extenuating circumstances, the **onus** is now on the State in asking for the

imposition of the death sentence to negative mitigating and to establish aggravating factors. The Act also provided for the appointment of a panel (consisting of judges, ex-judges and other persons "who in the opinion of the Minister are fit to serve on the panel on account of their knowledge of and experience in the administration of justice" (s 19(1)(a)(ii))) whose function it is to

> "consider the case of every person under sentence of death -
> (a) who was sentenced to death before the date of commencement of section 4; and
> (b) who has in respect of that sentence exhausted all the recognized legal procedures pertaining to appeal or review or no longer has such procedures at his disposal, whether or not such a person has lodged a petition referred to in section 327 of the principal Act..." (s 19(8)(a) and (b)).

The appellant's case was such a one. It came before the panel on 27 March 1991. The panel made a finding in terms of s 19(10)(a) of the Act that, in its opinion, the sentence of death "would probably have been imposed by the trial court concerned had s 277 of the principal Act, as substituted by section 4 of this Act, been in operation at the time sentence was

passed." This brought into operation s 19(12) of the Act which reads as follows:

> "12(a) Where the panel finds that the sentence of death would probably have been imposed in the circumstances contemplated in subsection (10)(a), the Director-General: Justice shall forthwith transmit the requisite number of certified copies of the relevant court record and proceedings to the registrar of the Appellate Division of the Supreme Court, whereupon that court shall, irrespective of whether it has previously given a decision on appeal in the case concerned, consider the case in the same manner as if -
> (i) it were considering an appeal by the convicted person against his sentence; and
> (ii) section 277 of the principal Act, as substituted by section 4 of this Act, were in operation at the time sentence was passed by the trial court.
> (b) The Appellate Division may -
> (i) confirm the sentence of death;
> (ii) 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; or
> (iii) set aside the sentence of death and remit the case to the trial court with instructions to deal with any matter, including the hearing of evidence, in such manner as the Appellate Division may think fit, and thereafter to impose the sentence which in the opinion of the trial court would have been imposed had the said section 277

been so in operation.

(c) A sentence imposed in terms of paragraph (b) (iii), shall for the purposes of any further appeal and all other purposes be deemed to be the sentence imposed upon the convicted person at his trial.

(d) No judge shall sit at the hearing of an appeal contemplated in paragraph (a) if he served on the panel when the case concerned was considered by the panel."

At the trial before Human AJ and two assessors in the Transvaal Provincial Division neither the appellant nor his co-accused led any evidence in extenuation. If the matter were to be considered by this court on the basis of the evidence which was presented to that court at the time, the appeal, as counsel for the appellant readily conceded, is bound to fail.

What counsel for the appellant accordingly now seeks is an order in terms of s 19(12)(b)(iii) setting aside the sentence of death and remitting the matter to the trial court for the hearing of further evidence on the aspect of sentence. In support of that application, brought by way of notice of motion, the appellant has furnished some background material and

enclosed a report by a clinical psychologist, Mr Vogelman, in which the evidence which the appellant wants the trial court to consider, is outlined. The application is opposed by the State on two grounds: firstly, that the suggested evidence has no reasonable prospect of being accepted by the trial court and secondly, in the alternative, if it were to be accepted, that it would not constitute mitigating factors of such a nature as to persuade the trial court that the death sentence is not "the proper sentence".

The following facts can be gleaned from the trial record and the documentation submitted by the appellant which is not directly disputed by the State:

1. At the time of the murder the appellant, then 31 years old, was a sergeant in the South African Police. Since about 1980 he had been posted to a special unit at Vlakplaats under the command of captain Dirk Coetzee. The function of this unit, so he stated, was to engage in counter-insurgency operations.

2. At the time of the murder he was on leave at Skeerpoort, near Brits.

3. At his trial his co-accused testified

that the appellant killed the deceased. The appellant, however, denied any complicity in the murder although he admitted accompanying his co-accused to the place where the murder was committed.

4. The trial court found:

> "Dat nr. 2 [the appellant] die direkte opset gehad het om die oorledene te dood ly geen twyfel nie. Die oorledene is vyf keer gesteek met 'n skerp instrument en volgens die mediese getuienis is die steekwonde met geweld toegedien. Nr. 1 het nr. 2 gehelp om die roof te pleeg deur oorledene vas te hou of vas te gryp gedurende die mesaanval en dus is hy onder die omstandighede net so skuldig as nr. 2."

5. In his petition to the State President, so we were informed, the appellant persisted in his denial that he was responsible for the death of the deceased.

6. His petition to the State President having failed he was scheduled to be executed on 20 October 1989.

7. On 19 October 1989 the appellant sought the advice of Lawyers for Human Rights. He was interviewed and on the same day deposed to an affidavit. In it he repeated:

> "I did not commit the murder for which I stand condemned. I repeat my evidence at the trial which led to my death sentence. I confirm the contentions raised therein by myself and on my behalf by my counsel."

At the same time he made a series of sensational disclosures. He stated, for instance, that he had been briefed by senior officers in the police force to "eliminate" a certain Durban attorney, Griffiths Mxenge, and that he and three others travelled to Durban where they stabbed Mxenge to death. He and his colleagues each received R1000 for doing so. (It is only fair to add that the State, in opposing the application to remit the matter and to lead further evidence, filed affidavits from those implicated by the appellant in which the appellant's allegations are denied). The appellant goes on to say:

> "I was involved in approximately eight other assassinations during my stint in the assasination squad, and also numerous kidnappings. At this stage, I do not recall the names of any of the victims. Some of the assassinations, four in fact, took place in Swaziland, one in Botswana, one in Maseru and one in Krugersdorp. The victims were all ANC members, except in Krugersdorp where the victim was the brother of an ANC terrorist."

8. On the basis of this affidavit the Minister of Justice granted an administrative stay of execution.

9. The appellant's revelations received wide media coverage and set in train a series of further disclosures, investigations, official enquiries and court actions. These are not germane to the present proceedings, with one possible exception, and I mention them merely in passing. The one that was of some relevance for present purposes was the so-called "Harms Commission of Enquiry into Certain Alleged Murders" which culminated in a report of that commission issued in September 1990. In the course of his evidence before that commission the appellant admitted for the first time that he had indeed killed the deceased and that his previous evidence in which he denied his involvement in the killing was false.

10. This confession was repeated in the submissions made on his behalf to the panel, which the appellant confirmed under oath, stating:

> "(b) The applicant now states that it was at the insistence of his co-accused that they decided to rob the deceased they went there to steal. There was never any intention to

kill or even to injure the deceased; they went there to steal. When the applicant and his co-accused approached the house of the deceased he saw them, ordered them off his land and called them "kaffirs". According to the applicant he was very angry and upset because he had been called a "kaffir". He felt racially degraded and since he had killed a number of blacks supposedly for the benefit of white people he felt that the deceased was being disrespectful towards him. He in fact felt superior to the deceased whom he regarded as a "hobo" who had little value as a human being.

(c) The deceased further provoked the applicant by slapping him across the face and a scuffle then ensued. At a certain stage the deceased produced a firearm. In the course of the scuffle the applicant stabbed Lourens while he was being held by the co-accused. The murder was not premeditated and that although the stabbing was done by the applicant, the original plan to rob the deceased emanated from the co-accused."

11. Annexed to the submissions to the panel was a report by Vogelman, the clinical psychologist, according to which the appellant "presents a positive prognosis for the applicant's rehabilitation and possible re-integration, at some future date, into society."

So much, then, for the background to the

present matter.

Counsel for the appellant submitted that this court should set aside the death sentence and remit the matter in terms of s 19(12)(b)(iii) of the Act to the trial court for it to consider the new material in the context of the new test for the imposition of a death sentence.

Section 19(12)(b)(iii) of the Act is silent as to the criteria which this court ought to apply when considering an application of this nature.

By way of contrast s 316 of the Criminal Procedure Act 51 of 1977, which is a general provision dealing with the reception of further evidence by a court considering an application for leave to appeal, provides as follows:

> "(3) When in any application under subsection (1) for leave to appeal it is shown by affidavit -
> (a) that further evidence which would presumably be accepted as true, is available;
> (b) that if accepted the evidence could reasonably lead to a different verdict or sentence; and
> (c) save in exceptional cases, that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial,

> the court hearing the application may receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court."

The requirements of this subsection (a repetition of s 363 (3) of the Criminal Procedure Act 56 of 1955) are essentially a codification of a three-fold test propounded by this court in **S v de Jager** 1965 (2) SA 612 (A) in which Holmes JA at 613B-D said, apropos of an application for the hearing of further evidence:

> "Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:
> (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to be led was not led at the trial.
> (b) There should be a **prima facie** likelihood of the truth of the evidence.
> (c) The evidence should be materially relevant to the outcome of the trial."

In my view the requirements posited in **S v de Jager supra** and in s 316(3) of the Criminal Procedure Act, 51 of 1977, provide reliable guidelines as to the approach which this court ought to adopt when seized with an application in terms of s 19(12)(b)(iii) of the Act or, for that matter, s 20(3), to which I shall presently refer.

When the legislature enacted s 19(12)(b)(iii) it clearly did not contemplate an unrestricted re-opening of the trial allowing the appellant **carte blanche** to adduce new evidence at will. There are at least three limiting factors:

Firstly, it is a matter of policy that there must be an end to litigation. As it was stated in **S v de Jager supra** at 613A-B:

> "It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified., And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

(See, too, **S v N** 1988 (3) SA 450 (A) at 458D-F.) And

in **S v Sterrenberg** 1980 (2) SA 888 (A) Trollip JA at 893F-G said:

> "Because of the general need in the public interest for finality in duly concluded litigation, including criminal trials, this Court will only exercise its discretion to receive further evidence on the hearing of an appeal if, as a minimim requirement, the circumstances are exceptional."

Secondly, s 19 of the Act is concerned only with cases where a sentence of death has been imposed. The only issue that is therefore open for reconsideration by the trial court would be matters relevant to its finding on the presence or absence of mitigating and aggravating factors and the exercise of its discretion that the sentence of death is "the proper sentence."

Thirdly, one must have regard to the purpose of s 19 of the Act. Like s 20 it is a transitional provision. Both sections cater for cases which had commenced before the date of commencement of the Act and in which the death sentence had been or may be imposed. Section 20 deals with the situation where the trial had commenced before the date of commencement of the Act but the accused had not yet been convicted or,

if convicted, had not yet been sentenced or, if sentenced, had not yet exhausted all recognised legal procedures pertaining to appeal or review. Section 20(3) then provides:

> "In an appeal referred to in sub-section (1) against the sentence of death, the Appellate Division of the Supreme Court shall, in addition to any other power, have the power to set aside the sentence and to remit the case to the trial court with instructions to deal with any matter, including the hearing of evidence, in such manner as the Appellate Division may think fit."

Section 19, broadly speaking, deals with the situation where an accused has been convicted and sentenced and all such legal procedures have been exhausted. Section 19(12)(b)(iii) is the corresponding section to s 20(3) and provides, in identical terms, for the case to be remitted "with instructions to deal with any matter, including the hearing of evidence, in such manner as the Appellate Division may think fit."

The clear intention of the legislature is that the case of every person who is currently either facing, or is under, a sentence of death should be disposed of or, if already disposed of, should be

reconsidered, in terms of the new legislation. Where the evidence on sentence has not yet been completed the trial will be concluded under the new regime; an accused in that situation cannot, as a rule, be prejudiced since he will doubtless be allowed the opportunity of re-opening his case or of recalling witnesses to meet the exigencies of the new direction introduced by the Act. But where his evidence on sentence has been completed he may indeed be prejudiced if he is denied that opportunity. The manner in which he conducted the trial, his decision to lead, or to refrain from leading or controverting specific evidence, for instance, may well have been dictated by either the incidence of the **onus** as it then was or the narrower connotation ascribed to the old concept of extenuating circumstances in contrast to the new concept of mitigating factors (cf **S v Masina and Others** 1990 (4) SA 709 (A) at 714B) or both. Because the rules have retrospectively changed, it is only right that a person sentenced to death should be permitted to reconsider his strategy.

Implicit in that approach is, however, a

limitation. Since the purpose is to give an accused the benefit, **ex post facto**, of the new test, the proposed evidence must have a bearing on how the accused would have conducted his case on sentence if the new test had been in place at the time sentence was passed by the trial court. It follows that the sluices are not opened to him to let in a stream of evidence which does not flow from the contrast between the manner in which he conducted and would have conducted his case before the trial court. The section, in particular, is not designed to permit an accused who has been convicted in the face of a false version, to re-open the trial so as to launch a new and contradictory defence which was available to him at the time, which he now claims to be the truth, but which he deliberately withheld from the court at the time. As it was stated by Corbett JA in **S v N supra** at 458I-459B:

> "In an appropriate case this Court has the power to relax strict compliance with the requisite of a 'reasonably sufficient explanation' (see (a) above), but it is only in rare instances that this power will be exercised (**S v Njaba** 1966 (3) SA 140 (A) at 143H).
>
> A study of the reported decisions of

> this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief has been granted the evidence in question has related to a single critical issue in the case (as to which see eg **R v Carr** 1949 (2) SA 693 (A); **R v Jantjies** 1958 (2) SA 272 (A); **S v Nkala (supra)** and **S v Njaba (supra)**). In contrast to this, in the present case the application appears to contemplate a re-canvassing of the entire case. As counsel for the appellant conceded in argument, he was really asking for a fresh trial **de novo** before a different magistrate. It seems to me that this factor can only serve to multiply the dangers and disadvantages to the proper administration of justice which have been referred to in the cases."

(See, too, **R v van Heerden** 1956 (1) SA 366 (A); **R v Siwesa** 1957 (2) SA 223 (A) at 226B-D.)

As a first step this court must therefore be satisfied, in considering whether to accede to the request to have the matter remitted to the trial court for new evidence to be led, that the proposed evidence is of such a nature that it is reasonable to suppose that the appellant would have presented such evidence if the new test had been in operation at the time sentence was passed. That would encompass material of

which he was aware and which was available to him at the time but which he may have withheld because the **onus** was against him or because it was irrelevant; as well as evidence of which he was unaware but which he may well have led had he been aware of it and had the new test been in operation. This formulation would exclude as irrelevant any material, whether or not the appellant was aware of it at the time of sentence, which is of such a nature it it would not have been presented to the trial court even if the test had then been what it now is. By the same token material should as a rule be excluded which was not in existence at the time of sentence. Section 19(12)(a)(i) enjoins this court, when a matter reaches it via the panel, to consider it "in the same manner as if it were considering an appeal by the convicted person against his sentence." Material which originated after the passing of sentence but before the hearing of an appeal, would, save perhaps in exceptional circumstances, not be taken into account. (Cf **Goodrich v Botha and Others** 1954 (2) SA 540 (A) at 546A-C; **S v Immelman** 1978 (3) SA 726 (A) at 730H; **S v V en 'n Ander**

1989 (1) SA 532 (A) at 544H-545C.) The same approach should apply when, as here, the leading of the further evidence is contemplated under the subsection. (Such evidence could conceivably be accommodated under s 327 of the Criminal Procedure Act 51 of 1977).

But there is this qualification. One is here dealing with relevance. "Relevance is based upon a blend of logic and experience lying outside the law" (per Schreiner JA in **R v Matthews and Others** 1960 (1) SA 752 (A) at 758A-B). Relevance can never be reduced to hard and fast rules and some allowance should always be made for unforeseen and extraordinary cases.

In summary, and superimposing the above observations on the requirements of s 316 (3) of the Criminal Procedure Act 1977, an appellant, in order to succeed with an application in terms of s 19(12)(b)(iii), will have to satisfy this court:

(a) that the proposed evidence is relevant to the issues of mitigating or aggravating factors and the exercise by the trial court of its discretion in the light of the new test;

(b) that, save for exceptional circum-

stances, there is a reasonable possibility that such evidence would have been presented to the trial court by the appellant if the test had then been what it now is;

(c) that the proposed evidence would presumably be accepted as true by the trial court;

(d) that, if accepted, such evidence could reasonably lead to a different sentence; and

(e) that, save for exceptional circumstances, there is a reasonably acceptable explanation why such evidence was not led at the trial. Situations falling under (b) above would comply with this requirement.

I proceed to consider the appellant's application in the light of these requirements.

The evidence which the appellant is anxious to place before the trial court can be grouped together as follows:

1. Evidence that the appellant was provoked, assaulted and threatened by the deceased, that he lost his temper, and that the stabbing was not premeditated.

2. Evidence that he has become "desensitized to violence" as a result of the brutalising experiences to which he was exposed for a number of years as a member of a "hit squad" of the South African Police.

3. The opinion of Mr Vogelman that the appellant is capable of rehabilitation, having regard to his behaviour since sentence was passed on him.

4. "Such further evidence, not necessarily contained in the annexures hereto, as may have bearing upon the question of mitigation of sentence..." (para 5.3 of the appellant's affidavit in support of his Notice of Motion). Counsel for the appellant did not suggest, notwithstanding the wide wording of this formulation, that the appellant be given free rein as to what evidence to lead - what was meant, to use the phraseology of s 316 (3) of the Criminal Procedure Act was "further evidence rendered necessary" by the evidence which may be let in under paras 1 - 3 above.

I deal with each of these matters in turn.

Ad 1: The circumstances surrounding the murder of the deceased.

According to the appellant the deceased called him a "kaffir", ordered the two of them off his land, slapped his face, and produced a firearm. The appellant thereupon lost his temper and stabbed the deceased. The killing of the deceased was accordingly not premeditated.

That explanation, if tendered at the time and if accepted, might well have qualified as mitigation. But that, as has been stated earlier, is but a single step in the sifting process. The appellant's real difficulties commence with requirement (b). I do not regard the circumstances of this case as "exceptional" in the sense in which that term was understood in cases such as **S v Njaba** 1966 (3) SA 140 (A) and **S v Myende** 1985 (1) SA 795 (A), ie as a factor which would exonerate him completely. Hence the crux of the question is whether there is a reasonable possibility that the appellant would have led that evidence at his trial if the Act had by then been passed. Manifestly not. For one thing he proclaimed his innocence. In that defence he persisted even when, on the eve of his execution, he professed to bare his soul. It was only

sometime thereafter, during his evidence before the so-called Harms Commision of Enquiry, that he confessed to the killing. Secondly, he explained afterwards that he was advised by his superiors not to admit his complicity in the killing. What he omitted to explain is why he perpetuated the fiction of his innocence in his affidavit of 19 October 1989, the day before his execution, even after he had becme disillusioned with his superiors in the police force. But even assuming that he was so advised it shows no more than that he would have persevered in his denial of guilt even if the new test for the imposition of the death sentence had then been in operation. Requirement (b) has not, therefore, been satisfied. Turning to requirement (c) there, too, his application falls short of what is required. He has told so many lies, for so long, and on so many occasions, that little if any credence can be attached to his most recent version of what had happened on the day of the murder. There is nothing in the record or in any subsequent document to support his version that the deceased taunted and threatened the appellant before the latter stabbed him five times -

his co-accused gave no evidence to that effect, then or now, and the probabilities, far from supporting it, point the other way. Appellant and his companion embarked on an expedition to rob the deceased and his brother; and when the deceased's brother left, they pounced. It is highly improbable that the deceased would have adopted the attitude now ascribed to him by the appellant. What the appellant now seeks to do is to put an entirely new gloss on his evidence at the trial. The authorities make it clear that this is not to be permitted. In my view, therefore, the first ground relied on by the appellant does not meet the requirements which have to be satisfied before a matter is remitted to the trial court in terms of the relevant section.

Ad 2: The effect of the appellant's experiences in the police force.

The thrust of this part of the appellant's submission is that he had become "desensitized to violence" and regarded himself as being "above the law". Assuming that to be so, the unpalatable fact is that the crime in question was not committed while he

was on a mission ordered by his superiors. This was a planned robbery, for which he and his confederates had prepared and armed themselves in advance, directed against two elderly farmers, and carried into effect against the deceased when they saw that he was alone. It is no excuse for the appellant to say that he was trained and taught to kill; he was not trained to prey on elderly innocent people. Arrogance is not a mitigating factor. That he was a policeman is a distinctly aggravating factor. In my view this explanation, even if it is assumed to be true, falls short of requirements (b), (d) and (e).

Ad 3: That the appellant has the potential for rehabilitation.

According to Vogelman the appellant now

> "feels the killing was not necessary and feels apologetic. He feels regret about what he has done before God and man. He believes no one has a right to kill and that 'God does not delight in the death of a man.'"

Moreover, because of the appellant's

> "intellect, his capacity to care, his ability to form adequate social relationships and reflect critically on his past, as well as his non-aggressive and co-operative conduct whilst in prison, Mr Nofomela is likely to respond to rehabilitative programmes."

Counsel for the appellant conceded that events after sentence ought not to be taken into account when an application of this sort is considered; but it was submitted that since the issue is the appellant's personality, what happened afterwards can be used to give insight into it at the time. Evidence as to his personality and intelligence was of course available at the time of trial. Such evidence could have been led, and unless a case is made out that it would have been led if the test had been different it cannot be led now. It is true that the appellant was at the time defended by **pro deo** counsel who did not command the resources to commission a psychological profile of the appellant, as was later done by Vogelman. But that is doubtless true for most cases where **pro deo** counsel appears for an accused who faces a sentence of death. Such is the sadness of our system. These are considerations that would no doubt weigh with the State President when a matter which has merit is brought to his attention under section 327 of the Criminal Procedure Act 51 of 1977. It cannot,

however, form the sole basis for an application in terms of section 19(12)(b)(iii) of the Act (cf **R v Carr** 1949 (2) SA 693 (A) at 699).

The application on this ground also founders at the next level. I doubt whether there is a realistic possibility that the trial court will find, if all the evidence is placed before it, that a maverick policeman who killed an elderly farmer during a planned robbery and who confessed to eight other cold-blooded murders is promising material for rehabilitation. In my view Vogelman's contrary opinion, standing alone, is not likely to result in a different sentence. To refer the matter to the trial court on that limited issue would therefore be little more than an exercise in futility.

For all the above reasons I have come to the conclusion that the application to lead further evidence cannot succeed. It follows that the appeal must fail and that the sentence of death imposed on the appellant must be confirmed.

P.M. NIENABER JA

HEFER JA)
PREISS AJA) CONCUR