38/91

Case No 233/90
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

MICHAEL MATLALA — Appellant
(Accused No 1 in court a quo)

and

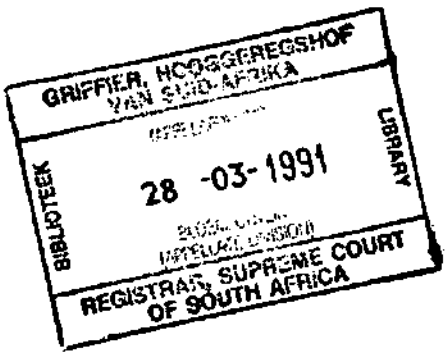
THE STATE — Respondent

CORAM: Hefer, Nestadt et Milne JJA

DATE OF HEARING: 7 March 1991

DATE OF JUDGMENT: 28 March 1991

J U D G M E N T



MILNE JA/.....

MILNE JA:

The appellant and his former co-accused (whom I shall call Accused 2) were charged with three counts: on count one with housebreaking with intent to rob and robbery with aggravating circumstances; on count two with rape; and on count three with murder.

The appellant pleaded guilty to counts one and two but not guilty to the murder charge. Accused 2 pleaded not guilty to all the charges. The appellant and Accused 2 were convicted on all three counts. The appellant was sentenced to 14 years' imprisonment on count one and to the death sentence on counts two and three. Accused 2 was sentenced to 12 years' imprisonment on count one and to the death sentence on counts two and three. The trial court refused the appellant and Accused 2 leave to appeal but in a

petition to the Chief Justice the appellant was granted leave to appeal against (a) the conviction and sentence in respect of the murder charge and (b) the sentence in respect of the rape. Accused 2 took the matter no further.

Save that there is no reliable evidence as to which of the two killed the deceased the relevant facts are, to a large extent, not in dispute. They are as follows. The deceased was a widow of 88 who lived on her own in a suburban home. At the time when these offences were committed Accused 2 worked for her as a part-time gardener and in fact lived in an outside room on the premises. As a result of doing some work inside the house Accused 2 learnt that the deceased kept quite a substantial sum of money in the house and he and the appellant planned to break in and take this money. During the night of 2/3 December 1987 the appellant and Accused 2 entered the deceased's house through

a window, the burglar-guarding on the window having first been bent so as to afford access to the window. The deceased was raped firstly by Accused 2 and then by the appellant. The appellant and Accused 2 then left the deceased's home with one blanket, three sheets, one hand-towel, four pillow slips and approximately R103 in cash. (They did not find the bulk of the money). At some stage which does not emerge clearly from the evidence the deceased was manually strangled to death. She was found dead in her bed the next day at about 5 p m. The front door and the back door had been locked and when her body was found the deceased had in her hand the lock of the security gate to the front door. Underneath her hand was the key for this gate.

There is no doubt that the deceased was strangled

to death and no doubt that either the appellant or the Accused 2 strangled her. There was no proof beyond reasonable doubt as to which of them strangled her. The appellant, by implication, suggested that Accused 2 had done so. This was on the basis that after they had each raped the deceased, the deceased still being alive at that stage, and as they were leaving the premises by the garden gate, Accused 2 went back to the house while he, the appellant, went on his way home and never returned. In a statement which the appellant had freely and voluntarily made to a magistrate he made the same suggestion. Accused 2 gave a series of versions which differed in material respects from each other. It was common cause that he had also made a confession freely and voluntarily to a magistrate. In his confession Accused 2 said that he had strangled the deceased after a quarrel with her about money. In that statement he

made no mention of the appellant. In the proceedings in terms of section 119 of the Criminal Procedure Act, Accused 2 pleaded guilty to the murder and the rape and said that the appellant had no knowledge of these charges. When he was questioned in terms of section 112, however, Accused 2 denied that he had raped or throttled the deceased or attacked her in any way. He gave evidence at the trial. His first version was that the appellant had told him that he, Accused 2, must have intercourse with the deceased and that he then did and that the appellant had then strangled her; but eventually in cross-examination he came forward with the version that he himself had helped to kill the deceased and that he had done so to avoid identification. He said that she was dead when they left and that this is why they had not tied her up.

The appellant's version may be briefly summarized

as follows. At the suggestion of Accused 2 he agreed to help him take money which Accused 2 said the deceased had in the house. Accused 2 bent the burglar guards and thus enabled them to get into the deceased's house through a window. Accused 2 woke the deceased, who was in bed asleep and asked for money. The deceased wanted to scream and then Accused 2 "het toe haar mond met die hand toegedruk". Accused 2 told the appellant to look for money but the appellant could not find money and took the blanket, sheets and other articles already referred to. Accused 2 asked him to hold the deceased and Accused 2 would show the appellant where the money was. The appellant held her while Accused 2 searched under the bed for money. Accused 2 then undressed her and had intercourse with her. When Accused 2 had finished having intercourse he, the appellant, had intercourse with her. They left the deceased on the bed and

> "Ek en die seun (Accused 2) is toe by die voordeur uit. Hy het my tot by die straat vergesel en gesê hy gaan terug om sy goed te gaan haal. Ek het toe weggegaan en het hom nie weer tot vandag gesien toe ons arresteer is nie".

The appellant also testified that after they had raped the deceased she had walked to the front door and unlocked the security gate at their request, and that they had then accompanied her back to the bedroom where she had laid down on the bed. This is highly improbable, particularly in the light of the medical evidence that there was a 3 cm tear in the deceased's vagina which would have bled heavily, and the fact that there was no evidence of any blood between the bedroom and the front door of the house. Counsel for the State also pointed to various other unsatisfactory aspects of the appellant's evidence. For example, in his evidence he said that Accused 2 had just put his hand over the deceased's mouth whereas in his statement to the magistrate he had said that "hy haar keel toegedruk het". The

appellant's version was that after they had raped the deceased they had left her on the bed and left the premises without tying her up or damaging the telephone or indeed doing anything to prevent her from telephoning the police - this notwithstanding the appellant's allegation that he and Accused 2 had accompanied the deceased back from the front door to her bed because they were frightened that she might telephone the police if they did not accompany her. It was also submitted that the appellant's version did not account for various other injuries on the deceased's body which are described in the post mortem report and to which I shall refer later. This is a valid criticism.

It follows that some parts at least of the appellant's version cannot reasonably be true.

However, particularly in the light of the fact

that Accused 2 admitted in his confession to the magistrate that he had strangled the deceased and pleaded guilty to the murder in the section 119 proceedings it certainly cannot be said to have been proved that it was the appellant who strangled her.

The judgment of the court a **quo** sets out the evidence of all the witnesses in great detail but the only reasoning that one has is the following:

> "Die hof het eenparig tot die slotsom gekom dat daar hoegenaamd geen twyfel bestaan dat ons hier te doen het met 'n koue, voorafbeplanning om in te breek of toegang te kry tot die huis van die oorledene met die opset om die hoeveelheid geld waarvan Beskuldigde nr 2 bewus was met geweld van die oorledene te neem as dit nodig was." (So far so good)
> "Die getuienis is oorweldigend dat toe daardie plan dat sy uitgelok word om die deur oop te sluit nie werk nie, hulle met geweld toegang deur die venster gekry het en haar wakker gemaak het, en soos nr 2 gesê het, haar eers oorrompel het en gedwing het om die voordeur en die veiligheidshek oop te sluit, en haar daarna teruggeneem het, haar verkrag het, en in die proses van verkragting haar ook verwurg het. Ons is tevrede dat

> op hierdie stadium beskuldigdes besef het dat sy minstens Beskuldigde nr 2 goed ken en dat ten einde te verseker dat sy nie getuienis teen haar (sic) kan gee nie, hulle voortgegaan het om deur verwurging haar lewe te neem." (my underlining)

This is, with respect, not very helpful. I say that because there is no attempt to separate the conduct of the appellant from that of Accused 2. This is briefly adverted to in the following passage at the conclusion of the judgment:

> " Wat klagte 3 betref, is dit duidelik dat wat gebeur het inderdaad is soos wat in die besonder uit die getuienis van Beskuldigde nr 2 blyk, dat sy oorweldig is en dat na die rooftog en die verkragting hulle besef het dat hulle nou die gevaar loop om uitgeken te word en dat die drukking op die keel gedoen was hetsy deur nr 1 of deur nr 2 of albei deurdat die een hom vereenselwig het met die handelinge van die ander, en dat daardie handelinge gerig was daarop om haar lewe te ontneem en gevolglik bevind die hof dat hulle ook wat klagte 3 betref, skuldig is aan moord soos aangekla."

No basis is set out for the finding that there was a common purpose which is implicit in the court's reasoning. In the

above passage the trial court appears to have placed reliance upon the evidence of Accused 2. It is abundantly apparent from the evidence of Accused 2 that he was a totally unreliable witness.

It is accordingly clear that the conviction on the murder charge cannot stand in the absence of proof that the appellant and Accused 2 had a common purpose to murder. There was clearly a common purpose to break into the house and rob the deceased, but the appellant was not proved to have foreseen that in the execution of the robbery the deceased might be killed. True, he admitted that he knew that the deceased was elderly and frail and that if she were attacked she could easily die. There is, however, nothing to indicate that he believed that more than minimal force would be needed to effect their purpose. Neither of them was armed in any way and indeed it seems probable that one of

the reasons why she was selected as the victim of the robbery was her patent inability to offer any resistance. Counsel for the State, however, submitted that (a) the appellant had a motive for wanting the deceased to be killed because he appreciated the risk of her identifying Accused 2 which would get him in trouble as well as Accused 2 and (b) that the probabilities were overwhelming that when the appellant and Accused 2 left the house the deceased was already dead; from which it followed that the appellant must have been present when she was throttled. He submitted that, in the circumstances, the requirements had been satisfied for the application of the principle of common purpose as set out in S v Mgedezi & Others 1989(1) SA 687 (A) at 705I - 706B.

Support for counsel's first proposition is to be found in the following passage of the appellant's evidence:

> "Nadat julle haar verkrag het, moes u tog besef het dit is 'n ernstige saak en as sy bly lewe om vir Nr 2 te identifiseer dan was julle regtig in die moeilikheid? -- Ja, ons het geweet dat deur die uitkenning van Beskuldigde 2 en 'n rapport aan die polisie sal ons in die moeilikheid beland."

This, however, loses much of its force in the light of the appellant's evidence that he and Accused 2 had agreed beforehand that the latter would leave immediately after the robbery so that, presumably, the police would not be able to trace him.

It was submitted that the fact that both the appellant and Accused 2 had left the deceased untied, and the telephone in working order meant that she must have been dead at the time when they left. There is considerable force in this argument but it is not the only reasonable inference. On the appellant's version the deceased had been raped twice. The medical evidence establishes that this

would have caused serious bleeding. The appellant may well have believed that she would be too weak to take any steps to telephone the police in time to prevent them from getting away. There is no evidence as to the time it would have taken for the police to get there. On the evidence, it remains, in my judgment, a reasonable possibility that the deceased was alive when the appellant left and, that as the appellant suggests, Accused 2 went back to, as it were "finish her off", in order to eliminate any risk of her identifying him. She knew Accused 2 well - he lived and worked on her property. She had never seen the appellant before.

Quite apart from this aspect of the matter there is a further obstacle which the State has failed to

overcome. Even if the deceased was dead by the time the appellant and Accused 2 left the house, there is no firm evidential basis for holding that the appellant was proved to have manifested his sharing of a common purpose with the perpetrator to murder by himself performing some act of association with the conduct of Accused 2. He did, on his own version, perform an act of association with the conduct of Accused 2 when the latter raped her. He said that Accused 2 asked him to hold the deceased's wrists while he searched for money. He did so and admitted in answer to a question by the trial judge that he had continued to hold her wrists while Accused 2 raped her. It was, however, not that conduct which killed the deceased.

For all the aforegoing reasons it follows that the conviction of the appellant on the murder charge cannot stand.

I deal now with the sentence of death imposed on the appellant on the rape charge.

The trial judge said in this regard

" Wat verkragting betref, is dit 'n uiters ernstige misdaad en veral verkragting van 'n weerlose en brose ou mens soos wat die oorledene was. Dit gaan egter verder. Wat belangrik is, is die wyse van verkragting, en soos mnr Van der Merwe tereg gesê het, as dit 'n baie ernstige geval is, afhangende van die omstandighede, het die hof ook die diskresionêre bevoegdheid om die doodvonnis op te lê. Dit sal die hof alleen doen wanneer hy tot die slotsom kom dat 'n ander gepaste straf nie toepaslik sou wees nie.

Ek kan my moeilik indink dat daar 'n ernstiger en 'n meer wreedaardiger geval van verkragting kan wees as waarmee ons in die geval van hierdie twee beskuldigdes te doen het. Ek kan my moeilik indink dat die samelewing 'n groter afsku kan openbaar behalwe miskien waar 'n klein dogtertjie wreedaardig verkrag word, as wanneer 'n ou dame in haar laat tagtigerjare, amper negentig jaar, deur twee persone soos die twee beskuldigdes so ernstig verkrag word dat sy soveel beserings opgedoen het aan haar liggaam en aan haar privaatdeel dat as dit nie was, volgens professor Loubser se getuienis, dat sy verwurg was nie, sy moontlik kon gesterf het van die bloeding wat hulle veroorsaak het met die geweld wat hulle toegepas het indien sy nie spoedig mediese behandeling gekry het

nie. Die hof is van mening dat dit daardie kategorie verkragting is waar die gemeenskap met reg kan vra dat die uiterste vonnis opgelê word ...".

The learned trial judge, in my respectful view, erred in finding, in effect, that this was a particularly violent rape. There were some injuries to the body of the deceased other than the injury to her private parts but they were not serious. They were: a small tear on the bridge of her nose, a superficial abrasion on the chin, the injuries caused in the strangulation (which must be disregarded for the purpose of considering the sentence for rape), a very superficial abrasion on the corner of the jaw, a superficial "brush burn" abrasion on the right knee (such as is caused by rubbing the skin with a rough material), bruising of the left forearm with a possible bite mark and various areas of bruising of the mucous membrane of the mouth consistent with the use of a gag. The injury to the deceased's private parts

consisted of a tear 3 cm in length in the vagina into which some pubic hair, possibly the deceased's own, had been driven. It was this tear which would have caused serious bleeding and in the words of Prof Loubser

> "Hierdie skeur sou as ernstig bejeën kan word in die sin dat dit vry ernstige, selfs lewensgevaarlike bloeding tot gevolg kon hê en ook sekerlik dat in die natuurlike verloop daarvan, dit wil sê as dit nie betyds geneeskundig en veral sjirurgies versien sou word nie, sou dit deur ernstige infeksiekomplikasies ook moontlik lewensbedrygend kon gewees het."

This evidence of Prof Loubser prompted the trial judge to ask the question

> "Kan u sê wat dit veroorsaak het, is dit vereenselwigbaar met 'n gewone seksuele daad, of nie?"

This elicited the reply

> "Dit is in die ouderdomsgroep van die oorledene sekerlik nie 'n buitengewone geweld wat hierdie brose struktuur versteur het nie."

The trial court may well therefore, have misdirected itself in this regard.

Be that as it may, the legal position with regard to the imposition of the death sentence has been changed by the provisions of the Criminal Law Amendment Act, 107 of 1990 ("the Act"). It is now unnecessary to consider that the court a quo correctly exercised its discretion in deciding to impose the death penalty. Whether it is the appropriate sentence in the present case must now be determined by this court in the exercise of its own discretion. The effect of the Act in rape cases was considered by this court in S v P 1991(1) SA 517 (A). In that case appellant had been convicted on 13 counts which included rape, robbery, housebreaking, culpable homicide and assault with intent to do grievous bodily harm. In respect of three of the four counts of rape the appellant was sentenced to death. The three rapes were committed within a period of two and a half months in conjunction with housebreaking and theft. The trial court had taken into

account the fact that the appellant was only 21 years of age at the time when he committed these offences, the absence of violence in the previous offences committed by the appellant and the fact that the three complainants were not virgins. He nevertheless took into account against the appellant that the first complainant had been severely affected by the rape as had the second complainant, who was six months pregnant at the time of the rape. The rape had also had a traumatic effect on the third complainant. Reference was then made to earlier decisions of this court in construing the Act, to the effect that regard is to be had to the main purposes of punishment namely deterrent, preventative, reformative and retributive and to the consequence that in deciding whether the death sentence is the only proper one, consideration would be given to whether these objects could not properly be achieved by a sentence other than the death sentence. GOLDSTONE JA held at 523D that

" As far as the deterrence of other prospective rapists is concerned it has never been established, as far as I am aware, that the death sentence is more efficacious than a long period of imprisonment."

With regard to retribution, reference was made to the remarks of NICHOLAS AJA in S v J 1989(1) SA 669 (A) 682H-J where he said the following

" In regard to retribution, it is a remark of HOLMES JA which is apposite once more. In S v Matthee 1971(3) SA 769 (A) at 771D, he said that the evil of the accused's deed may be

'... so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing'.

Generally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment."

In S v P the complainants were not seriously physically injured and there was no evidence that established that they would endure long-lasting psychological affects in consequence of their experiences. There was, however, the

seriously aggravating circumstance that the appellant in that case had, within a relatively short period of time, committed four separate acts of rape. The court there held that the death sentence for each of the three rapes in question might well be an appropriate sentence but after much anxious consideration concluded that the death penalty was not the only proper sentence. The death sentence was altered to one of imprisonment for life.

I am in respectful agreement with this approach. Each case must, of course, be decided on its own facts. In this case there are certainly some aggravating features. The first is the age of the deceased. The second is that the crime was committed in the privacy of the deceased's home, S v G 1989(3) SA 695 (A) at 705G. A further aggravating factor is that the appellant assisted Accused 2 by continuing to hold the deceased's wrists when Accused 2

raped her. On the other hand, there is no reason to doubt the appellant's evidence that he was induced impulsively to rape the deceased when he saw Accused 2 raping her. What is more, there is no proof that it was his rape that caused the injury to her private parts. He has no previous convictions involving the commission of sexual offences and his only conviction for violence was as long ago as 1979 when he was given a whipping as a juvenile in terms of section 294 of Act No 51 of 1977. Here, as in S v P, the evidence does not establish at all that a very long sentence of imprisonment will not result in the reform or rehabilitation of the appellant. The record of the appellant's previous convictions reveals only two prison sentences viz: a sentence of six months imprisonment for theft in 1982, and a sentence of 2 years' imprisonment for housebreaking with intent to commit theft and theft on 20 March 1987. He served slightly less than nine months of this sentence. He

has never, therefore, served a long period of imprisonment. The approach of this court in S v S 1987(2) 307 (A) is instructive. In that case the appellant, a man of 38 years of age with five previous convictions for assault with intent to commit grievous bodily harm and two previous convictions for rape, broke into the house of an elderly woman at night,assaulted, raped and throttled her. On the murder charge he was found guilty of culpable homicide, there being no proof of intent to kill and sentenced to eight years' imprisonment. He was sentenced to three years' imprisonment on the housebreaking charge and was sentenced to death on the rape charge. At p 314E SMALBERGER JA said

> "Ofskoon dit nie die enigste relevante oorweging is nie, bly die moontlikheid van 'n veroordeelde se rehabilitasie 'n geldige oorweging by die bepaling of die diskresionêre doodstraf 'n gepaste vonnis is (S v Sithole en Andere 1983(3) SA 610 (A) op 615C), tensy die erns van die misdaad oorwegings van rehabilitasie oordonder (S v Mooi (supra op 631A)). Die onderhawige

> is egter nie so 'n geval nie, ondanks die feit dat die appellant se slagogger 'n bejaarde, weerlose vrou was. Alhoewel die appellant 'n lang lys vorige veroordelings het, was hy nog nooit 'n werklike lang termyn van gevangenisstraf opgelê nie, en kan die moontlikheid van sy rehabilitasie nie uitgesluit word nie. Die gemeenskap sal effektief beskerm word as die appellant vir 'n lang tydperk uit hul midde verwyder word. Dit sal ook tot gevolg hê dat wanneer die appellant uiteindelik vrygelaat word, hy heelwat ouer en waarskynlik minder aggressief sal wees, met 'n gepaardgaande afname in sy drange. Terwyl die appellant se vorige veroordelings, veral die twee vorige veroordelings vir verkragting, as verswarend beskou kan word, is dit die erns van die misdaad wat gewoonweg die bepalende faktor sal wees by oorweging van die diskresionêre doodstraf. Die onderhawige geval behoort myns insiens nie binne die kader van gevalle waar die doodstraf gepas sal wees nie."

In that case the death sentence was set aside and a sentence of 15 years' imprisonment was substituted. See also the unreported decision of this court in Paulus Swarts v Die Staat, delivered on 30 November 1990.

In this case the appellant has, as already

mentioned, no previous convictions involving the commission of sexual offences but the age of the deceased makes the offence a more serious one. Although the rape was not, on Prof Loubser's evidence a particularly violent one, the appellant must have known that to rape a woman of that age would be likely to injure her and would be a shattering experience for her. The fact that he assisted Accused 2 by continuing to hold the deceased while Accused 2 raped her, is a serious aggravating factor. If the internal injury was caused by Accused 2's rape he was a party to that rape. In the result, the offence merits a very long period of imprisonment indeed. I would accordingly set aside the death sentence imposed in respect of the rape and substitute a sentence of imprisonment for 25 years.

In the result, the appeal succeeds and the

appellant's conviction and sentence on count three are set aside and the sentence of death imposed on count two is also set aside and a sentence of 25 years is substituted in its place. The sentence imposed on count one is to run concurrently with the sentence of 25 years.

A J MILNE
Judge of Appeal

NESTADT JA: CONCURS

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

MICHAEL MATLALA .....Appellant
(Accused No 1 in court a quo)

and

THE STATE .....Respondent

CORAM : HEFER, NESTADT et MILNE JJA.

HEARD : 7 MARCH 1991.

DELIVERED : 28 MARCH 1991.

J U D G M E N T

HEFER JA.

HEFER JA:

I agree, for the reasons stated in my brother MILNE's judgment, that the conviction and sentence on count 3 have to be set aside. I also concur in the setting aside of the death sentence on count 2 and the substitution therefor of a sentence of 25 years' imprisonment. It appears from the trial judge's judgment on sentence that he imposed the death sentence on count 2 because he regarded the rape as such a serious and vicious one that society would call for the ultimate sentence. I mention this because, although - as pointed out inter alia in S v Masina and Others 1990(4) SA 709 (A) at 714 D-E and I-J - this court now exercises an independent discretion in terms of sec 322 (2A)(b) of the Criminal Procedure Act as amended by sec 13(b) of Act 107 of 1990 and may set aside a death sentence if it is op the opinion that it would not itself have imposed it, the trial judge's judgment is still important. The amending legislation has not relegated the

trial court to the status of a mere finder of facts; nor can the passing of the death sentence by the trial judge be regarded as a formal requirement for the matter to come to this court. After all, as HOLMES JA said in the unreported judgment in S v Kok (delivered on 13 September 1973 and referred to in S v M 1976(3) SA 644 (A) at 651 D, this court lacks "the atmosphere of the trial court, and the learned judge's sight and impression of the appellant....." Equally importantly, members of this court do not always share the trial judge's knowledge of local conditions which may be relevant to the question of sentence. His reasons for imposing the death sentence deserve careful scrutiny and consideration. The appeals which presently come to this court are mostly matters in which sentence was passed before the amending legislation came into operation and in many of them the trial judge's judgment on sentence is of very limited assistance. But in others

(like the present one) where a discretionary death sentence was imposed, there is no reason why the judgment on sentence should not receive due consideration, as it does in my brother MILNE's judgment.

I share my brother's view that the rape in the present case was not a particularly violent one. But, due to the age and frailty of the victim, not much violence was required to subdue her. According to appellant's own evidence he only had to hold her arms while Accused 2 raped her; thereafter, while he was gratifying his own lust, she offered no further resistance. This could only have been because she feared the results of resistance or was no longer in a condition to offer any. And in any event there is the internal injury which either the appellant or Accused 2 inflicted on her. Even without much violence they thus injured her very seriously.

That the appellant's act was an impulsive one

one is another factor without much mitigating force. I do not for one moment believe that it was sheer sexual arousal that caused him (or Accused 2 for that matter) to interrupt their search for the money. Sexual assaults upon elderly women occur with disturbing regularity in cases not dissimilar to the present one and one wonders why it is that men whose minds are firmly set on robbery suddenly turn to rape, in circumstances where sexual arousal seems highly unlikely. Whether Accused 2 did so in order to terrorise his victim even further, we will never know. But whatever his reason might have been, I do not think that the appellant can reap any material benefit from the fact that he impulsively followed Accused 2's example. On the contrary, it counts heavily against him that he not only assisted in Accused 2's foul deed but followed it with an equally detestable one of his own.

That the appellant had no previous convictions

for any sexual or violent offence other than the one during 1979 referred to by my brother MILNE, obviously counts in his favour. On the other hand, his last previous conviction was for housebreaking with intent to commit theft and theft. After serving less than half of the two years' imprisonment imposed upon him for that offence he was released from prison. And within a month of his release, so his counsel informed the trial court, he committed the present offence which involved an even more serious housebreaking. He seems to have little respect for the inviolability of other people's homes.

Considering all the features of the case there can be no doubt that the aggravating factors outweigh the mitigating ones to a very considerable degree. The trial judge considered it to be one where society could rightly call for the death sentence. The learned judge probably had in mind the well-known remarks of SCHREINER JA in R v Karg 1961(1) SA 231 (A) at 236 A-B that

> ".....the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose....."

The learned judge of appeal proceeded to point out, moreover, that

> "it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

This approach to matters of the present kind is by *no means wrong* but, *even where* the accused's conduct is so heinous that harsh public condemnation and a demand for severe treatment can safely be anticipated, the question still is

> "whether the evil of his deed is so shocking, so clamant for <u>extreme</u> retribution, that society would demand his <u>destruction</u> as the <u>only</u> expiation for his wrongdoing."

(I have emphasized the key words in HOLMES JA's remark

in S v Matthee 1971(3) SA 769 (A) at 771 D. See also S v Nkwanyana and Others 1990(4) SA 735 (A) at 748 in fin - 749 C.) It is only when one is able to answer this question in the affirmative that the death sentence can be justified by the demands of society.

In the present case I am sure that society will indeed demand very severe expiation but I cannot confidently say that it will demand the extreme penalty. In whatsoever way one wishes to describe the appellant's dastardly deed, I cannot safely say that it only deserves his destruction.

J J F HEFER JA.

NESTADT JA, CONCURS.