238/92

SAAKNOMMER: 549/91
J VD M

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPèLAFDELING)

In die saak tussen:

SIPHO SIMON NKAMBULE — Appellant

en

DIE STAAT — Respondent

CORAM: NESTADT, AR et NICHOLAS, HARMS, WnARR

VERHOORDATUM: 3 NOVEMBER 1992

LEWERINGSDATUM: 30 NOVEMBER 1992

U I T S P R A A K

HARMS, WnAR:

Ek het die voorreg gehad om my geagte kollega Nicholas se uitspraak te bestudeer en hoewel ek dit eens

is met sy feite-uiteensetting en sy bevindinge oor die aard van die strafverswarende faktore teenwoordig, kan ek met eerbied nie sy konklusie, of die motivering daarvoor, onderskryf nie.

Dit is betoog dat die appellant se ouderdom (31 jaar), sy skolastiese prestasie (hy het gematrikuleer) en sy huwelikstaat (hy was getroud met vier kinders) strafversagtende faktore is. Dit kan ek nie aanvaar nie. Natuurlik is dit feite wat by die uiteindelike vonnisbepaling 'n belangrike rol speel, maar as 'n ouderdom van bv 31 jaar strafversagtend is, moet dit beteken dat enige ouderdom daardie effek het. En is die implikasie van die betoog dat 'n getroude beter daaraan toe behoort te wees as 'n ongetroude of 'n geleerde as 'n onopgevoede? Die gebruiklike betoog is juis dat 'n beskuldigde se gebrek aan opvoeding so 'n faktor is. As 'n hoë en ook 'n lae onderwyskwalifikasie per se strafversagtende faktore is,

word die begrip waardeloos. Dieselfde geld vir die feit dat die appellant 'n vaste betrekking beklee het en 'n loon van R150 per week verdien het. In die konteks van die doodvonnis is dit nie noodwendig 'n oorweging nie. Dan is daar die omstandigheid dat die appellant voorheen 'n polisie-reservis was: dit kan hom tog nie ten goede gereken word nie. Inderdaad het die verhoorhof dit as verswarend aangeslaan omdat die appellant beter tussen reg en verkeerd moes kon onderskei het. Hoewel ek nie fout met lg benadering kan vind nie, sal ek ten gunste van die appellant aanvaar dat dit 'n neutrale faktor was.

Wat die gebruik van drank betref, het die verhoorhof die onbetwiste getuienis van die appellant se werkgewer aanvaar dat hy kort na die moord na bier geruik het, nie dronk was nie en dat mens nie "kon agterkom hy was gedrink gewees nie". Daar was geen getuienis dat die drankinname 'n rol by die pleeg van

die misdryf gespeel het nie en waar die appellant dit nie eens in sy aanvanklike bekentenis as 'n verskoning geopper het nie, kan dit nie 'n strafversagtende feit wees nie.

Dit beteken dat daar in wese net een versagtende faktor ter sprake is en dit is die afwesigheid van vorige veroordelings. Hiermee word later meer volledig gehandel.

By straftoemeting word twee belange gedien nl dié van die gemeenskap en dié van die beskuldigde. Heel dikwels word die gemeenskapsbelang by vonnisoplegging vooropgestel, veral by geweldsmisdade. Sien bv S v Bezuidenhout 1991(1) SASV 43 (A) 51d-e.

Die volgende kwessie is die rol van afskrikking (wat, terloops, die gemeenskapsbelang dien) by vonnisoplegging. Die benadering wat deur my geagte kollega voorgestaan word, kan soos volg saamgevat word:

(a) afskrikking is die hoofdoel van vonnis;

(b) dit is volgens die "retentionists" veral so in die geval van die doodvonnis;

(c) "... it is not the severity of punishment which deters, but its certainty";

(d) die wetswysiging aan art 277 van die Strafproseswet aangebring, het die waarskynlikheid van 'n doodvonnis verminder;

(e) dit kan dus nie meer as afskrikmiddel dien nie; en

(f) lei ek af, dien dit daarom geen doel wat nie deur langtermyn-gevangenisstraf vervul kan word nie.

Die eerste stelling - (a) - het sy oënskynlike judisiële beslag in R v Swanepoel 1945 AD 444 verkry en het sinds geyk geraak. Sien bv S v B 1985(2) SA 120 (A) 124. Dit mag 'n doel dien om R v Swanepoel in geheel in oënskou te neem. Swanepoel is aan strafbare manslag (wat uit die nalatige bestuur van 'n motorfiets voortgevloei het) skuldig bevind en met veertig pond

beboet. Op appèl na die provinsiale afdeling is sy vonnis na een van gevangenisstraf verhoog. By oorweging van die vraag of 'n "unduly lenient sentence" deur die landdros opgelê is, het Davis WnAR (op 453) aangedui dat

> "he looked at the punishment exclusively from the point of view of its effect upon the accused personally, and not at all from the aspect of its effect upon other people".

Hy het verder aangedui dat hoewel die posisie van 'n beskuldigde "of great importance" is, die ander aspek nie geïgnoreer mag word nie. Om die punt te beklemtoon, het hy aangetoon dat dit histories gesien, 'n belangrike oorweging was en dat De Groot reeds gesê het dat om te lig te straf, nie die oogmerk van afskrikking kan dien nie. Die geleerde regter het toe voortgegaan en gesê (op 454-5):

"In case it be objected that since these authors wrote, the theory of punishment has changed, I may cite Salmond, Jurisprudence (3rd Ed), sec. 28. He says:-

> 'The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him.'

This statement may well be an over-simplification of a most difficult problem: see Kenny Crim. Law (Chapters 2 and 32); but that author also refers to the prevention of crime as 'this paramount, and universally admitted object of punishment'. It would seem, therefore, that in great measure it is not in the principles -- so far at least as they are understood even to-day -- but in their application, that any noticable change is to be found; what the future may bring in this regard I cannot forecast."

Dit blyk hieruit dat Davis WnAR aanvaar het dat om altyd prioriteit aan afskrikking te gee, op 'n oorvereenvoudiging kan neerkom en dat hierdie filosofiese sienings nie staties is nie. Dit verbaas dan ook nie dat Salmond se twaalfde uitgawe (die enigste waartoe ek toegang het) nie die aangehaalde gedeelte bevat nie en slegs sê (op p 94) dat "(s)ome would regard punishment as before all things a deterrent" (my beklemtoning). Ook Kenny's Outlines of Criminal Law (18e uitgawe) p 620 het sy hiperbool getemper en is dit nie afskrikking maar voorkoming (waarby hy insluit reformasie, afskrikking en "prevention in a direct way") wat "(t)he great object of criminal law" is. Ek vind niks in wat Davis WnAR gesê het wat 'n rangorde van oorwegings skep nie en as hy wou, sou hy nie die ligte vonnis van die landdros heringestel het nie. Al wat hy wou beklemtoon het, was dat 'n te ligte vonnis nie 'n

afskrikkingswaarde het nie. Hy het nie te kenne gegee dat swaar vonnisse alleen of hoofsaaklik ter wille daarvan opgelê behoort te word nie. In besonder bied sy uitspraak nie 'n basis vir 'n benadering dat die hoofoogmerk van die oplegging van die doodvonnis afskrikking moet wees nie. Dit mag moontlik die individualisering van straf negeer. Hiermee impliseer ek nie dat dit nooit deurslaggewend kan wees nie maar net dat dit nie altyd is nie.

Wat die tweede punt - (b) - betref, mag dit wees dat die voorstanders van die doodvonnis wel glo (en moontlik ten onregte) dat dit 'n unieke afskrikkingskrag het. Hulle geloof is nie ter sake nie. Die hof is verplig om, indien die doodvonnis die enigste gepaste vonnis is, dit op te lê. Daardie plig is nie op enige wyse in die Strafproseswet aan die geloof van 'n deel van die publiek gekoppel nie. By beoordeling van daardie vraag is die hof geroepe om na alle faktore te

kyk en geld in die algemeen die gewone beginsels van strafoorweging,

> "a matter of prudence and not of law, to be determined by the magnitude of the offence, the motives which prompted its commission, and the character of the offender".

(Stephen, Commentaries on the Laws of England vol 4 (1925) aangehaal deur AJ Middleton, Judicial Considerations Concerning the Imposition of Criminal Punishment: A Historical Survey LLD tesis p 564). Vgl S v Zinn 1969(2) SA 537 (A) 540G-H.

Dit kan aanvaar word - punt (c) - dat kriminoloë bevind het dat die sekerheid eerder as die strengheid van 'n straf die werklike afskrikking bied. ('n Motoris is immers meer geneig om die spoedgrens op 'n verlate as op 'n nasionale pad te oorskry omdat die kans op 'n spoedlokval geringer is.) Dit is egter

waarskynlik ook waar dat "there is an inverse relationship between severity of punishment and certainty of punishment" (volgens Topping aangehaal in Grosman, New Directions in Sentencing p 163). Dit beteken dat, as mens die voorgestelde benadering tot sy logiese konsekwensies deurtrek, aangesien die kans op die oplegging van lewenslange (of ander langdurige) gevangenisstraf in die algemeen gering is, die bestaan van so 'n strafopsie nie die nodige afskrikking bied en dus met 'n geringer gevangenisstraf vervang kan word. Die probleem wat my geagte kollega met die doodvonnis het, kan na alle vonnisse ge-ekstrapoleer word aangesien konsekwente en definitiewe afdwinging -- veral in die lig van die bevoegdhede vervat in hoofstuk VI van die Wet op Gevangenisse 8 van 1959 -- eerder die uitsondering as die reël is.

Dit is so - punt (d) - dat die wysiging aan art 277 aangebring is met die oog daarop om doodvonnisse te

verminder. Dit het die statutêre plig om die doodvonnis op te lê, gewysig: in plaas van versagtende omstandighede is die bevinding dat dit die enigste gepaste vonnis is, die determinant. In ieder geval was die doodvonnis nooit die sekere gevolg van 'n doodslag nie; die misdadiger wat hieroor sou rasionaliseer sou vermoedelik gewerk het op die veronderstelling dat daar 'n ten minste 'n gelyke kans is dat hy nie gevang sal word nie; 'n redelike kans dat hy nie skuldig bevind gaan word aan moord nie; 'n goeie kans dat versagtende omstandighede bevind sou word; 'n verdere geleentheid op appèl en, ten slotte, dat die uitvoerende gesag die vonnis sou versag. Van al hierdie premisses het die waarskynlikhede van slegs een verander. Dit volg dus dat die konklusies in (e) en (f) uiteengesit nie, volgens my mening, logiese antesedente het nie.

Retribusie moet nie uit die oog verloor word

nie. Retribusie het nie 'n vaste plek laag op die rangorde van strafoorwegings nie. Sy oorwegingskrag hang van die omstandighede af. R v Karg 1961(1) SA 231 (A) 235G-236D bevestig dit: dit was 'n geval waar die verhoorhof sy vonnisoplegging aan die hand daarvan gemotiveer het maar, omdat die misdryf 'n "severe punishment" verdien het en omdat nie "undue weight" aan vergelding gegee is nie, is die vonnis op appèl bekragtig. Niemand is geneë om strafoplegging aan die hand daarvan te motiveer nie omdat dit die indruk van 'n oog-vir-oog benadering skep. Ek het vantevore in S v Mafu 1992(2) SASV 494 (A) 497 gepoog om vergelding in sy juiste perspektief te stel. Dit is nie 'n oorweging wat in isolasie staan nie maar wat in samehang met die faktor deur Nigel Walker "denunciation" (d i "to show society's abhorence": sien Grosman a w p 23) genoem, gesien word. En hoewel dikwels reeds gesê is dat retribusie sy belang verloor het, het hierdie Hof dit

reeds by herhaling as deurslaggewend by die oplegging van bepaalde doodvonnisse gegee. Sien bv S v Nkwanyana and Other 1990(4) SA 735 (A) 749C-D.

Dit is ook betoog dat die appellant rehabiliteerbaar is veral in die lig van die afwesigheid van vorige veroordelings, sy ouderdom, sy werkrekord en sy gesinsverband. Ek is bereid om te aanvaar dat hy wel rehabiliteerbaar is. Hervorming is natuurlik 'n belangrike oorweging by straftoemeting maar dan moet die beoogde vonnis daardie oogmerk kan dien. Daar bestaan talle strawwe wat dit kan bereik, maar wanneer dit om 'n buitengewone lang gevangenisstraf gaan, is hervorming gewoonlik 'n ondergeskikte oorweging omdat so 'n straf se oogmerk of effek nie noodwendig rehabiliterend in die ware sin van die woord is nie.

By die finale beoordeling of die doodvonnis die enigste gepaste vonnis is of nie, moet ag geslaan word op die versagtende en verswarend faktore en die oogmerke

van vonnis. Ek stem saam met Nicholas WnAR dat:

> "Weighing most heavily against him is the repugnance evoked by his crime. It is undoubtedly one which calls for condign punishment."

Dit is dus 'n geval waar die gemeenskapsbelang sterk na vore tree en die persoonlike belange en omstandighede van die appellant en sy kans op hervorming ondergeskik is. Wat afskrikking betref, glo ek dat 'n versuim om die hoogste straf in hierdie geval op te lê, gedek word deur die waarskuwing vervat in R v Swanepoel. Dit is ook 'n instansie waar die vonnis die gemeenskap se weersin in die daad moet betoon. Weersinwekkende moorde gepleeg in die loop van 'n roof, nie net om weerstand te oorkom maar omdat die misdadiger aan die slagoffer bekend is, word 'n alledaagse verskynsel. So ook moorde op weerloses. Om nie die doodvonnis op te lê nie sou,

na my mening, die indruk skep dat hierdie Hof nie hierdie tipe misdryf as die grofste vergryp teen die individu en die samelewing beskou nie.

Die appèl word dus van die hand gewys.

L T C HARMS
WAARNEMENDE APPèLREGTER

NESTADT, AR : stem saam

Q38A/92

549/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SIPHO SIMON NKAMBULE ..... APPELLANT

and

THE STATE ..... RESPONDENT

Coram: NESTADT J A et NICHOLAS, HARMS A J J A

Date of Hearing: 3 November 1992

Date of Delivery: 30 November 1992

NICHOLAS A J A:

This is an appeal against the sentence of death imposed on Sipho Nkambule in respect of his conviction for the murder of Marthiens Claase.

The following were the main facts revealed by the evidence.

At about 7.30 a m on Wednesday 13 September 1989 the late Mr Marthiens Claase returned to his home after working the night shift at Highveld Steel near Witbank where he was employed as a fitter and turner. He spent the morning working on his motor car, a Ford Cortina, during the course of which he partook of alcoholic refreshment. At about 12 noon he left the house in order to have his car's exhaust system repaired. He was observed by his wife to be then somewhat under the influence of liquor.

At about 12.30 p m he arrived at a Witbank shop named "Quick Fit", whose business included the repair of exhaust systems. The manager, Mr Strydom, repaired the Cortina's exhaust, finishing the job at about 1.10 p m. He noticed that

Claase was under the influence of liquor. Strydom shut up the shop in order to go to his lunch. He saw the Cortina parked in the street outside, and Claase engaged in conversation with Nkambule, a Quick Fit employee.

Quick Fit is situated in a shopping centre, in which were also a branch of Barclays Bank, and the premises of Western Province Cellars and Mirrian Hardware. Shortly before 2 p m Mr Arthur Mitten was standing in a queue waiting for the bank to open, when he saw Claase walking along the road. He stumbled and Mitten had the impression that he was under the influence of liquor. A Black man came up and assisted Claase into his motor car and the two drove off together, with the Black man at the wheel. Mitten later identified Nkambule as the driver.

When Strydom returned to Quick Fit at 2 p m Nkambule was not there as he should have been. He did not return until about 4.30 p m, and when Strydom asked him where he had been, he replied evasively.

Mrs Claase never saw her husband again. When he had not returned home by 6 p m, she became anxious and telephoned her son, Mr M C Claase ("M C"). M C drove around Witbank, but did not find his father or the Cortina. The following day, Thursday 14 September, revealed no sign of Claase or the car and M C reported that he was missing to the police. On the morning of Friday 15 September M C discovered the Cortina parked outside Mirrian Hardware. He kept it under observation throughout the day. At about 5 p m, he saw a Black man approach and get into the car and start it. M C stopped him from driving away and the police were summoned. After questioning, the Black man (his name was Godfrey Maleka) took the police to Quick Fit, where he pointed out Nkambule. Det Sgt Viviers placed him under arrest on a charge of being in possession of goods suspected stolen - namely, the Cortina.

On the Saturday (16 September) Viviers questioned Nkambule at the Witbank police station. In the course of the interrogation Nkambule said that he wished to point out a place

in the bush near Clewer (a village in the vicinity of Witbank) where he had left Claase's body. He pointed out three different places through which a fruitless search was made. On Nkambule's direction they then drove to a place called Vriesgewagt in KwaNdebele about 70 to 80 kms from Witbank. Shortly after crossing a stream called Moosrivier they turned off along a track and stopped next to the dry bed of a spruit. There Nkambule pointed out Claase's body which was lying in the veld about 11 m from the track. It had sustained multiple injuries. Near to it was lying a knife with blood on it. This Nkambule said was his.

On Sunday 17 September Nkambule made a statement to Lieut Krügel of the S A P at Witbank, to whom he was well known - Nkambule had worked as a police reservist under the lieutenant for some 3½ years. According to this statement he took no part in the killing of Claase. The people responsible for the death were two men named Jama and John. Nkambule described how he had accompanied them and Claase in the car and continued :

"Ek het toe gevra, waar gaan ons kuier, toe hulle sê ons gaan Frisgewaagd toe. Toe hulle het grap met oubaas gemaak. Hulle het toe op die pad gegaan wat ek gister vir Sersant Viviers gewys het. By 'n gat langs die pad het Jama gou gestop en gou gou uit die kar geklim.

Toe Jama het uitgeklim hy het na die oubaas gegaan het hom uit die kar geruk. John het ook uitgespring en die oubaas gegryp en hulle het saam gegaan daar by die gras.

Ek het gesien hulle stoei daar en die oubaas het geval. Ek het gehoor die oubaas het een maal geskreeu. Ek het gesien dat Jama by die kop van die oubaas staan en dat John met die mes gesteek het. Toe hulle het vinnig na die kar, gekom en toe ons het weggery. Ons het toe met 'n ander pad na Witbank toe gery.

Toe ek hulle vra nou hoekom die oubaas is daar by die gras, toe sê hulle vir my ek moet my bek toe maak."

By Tuesday 19 September it had been established by the police that Jama and John were not concerned in the killing. When confronted with this fact, Nkambule volunteered another statement to Krügel.

After a trial within the trial, this was ruled to be

admissible. Krügel's note (Ex H) of this statement, which was signed by Nkambule, reads as follows:

> "Ek het bestuur na Highveld Klub. Drank gaan koop. Klipdrift. W. P. Kelders - Oubaas het ingegaan, was dronk maar nie baie nie.
> Van W. P. Kelders reguit na Verena toe. Ek het hom gesê ons gaan Verena. Net ons twee in die kar gewees. By Frisgewaagd by die spruit gestop. Oubaas gesê ons wil pis.
> Ek het ook op die pad gedrink. Toe die Oubaas pis, gryp ek hom. Sleep na die veld. Daar by die veld het ek die Oubaas gesteek. Baie keer. Na ek klaar was, het ek by die deur gestaan. Lorrie, Wit met Pype agter op verby gery. (Waterpype, sement). Toyota tipper. G.G. Reg.No. Oubaas was dood waar ek hom daar gelos het.
> Ek wou die kar vir myself gehad het, dis waarom ek die Oubaas dood gemaak het.
> Terug na Witbank."

On 4 October 1989 Nkambule appeared in the magistrate's court in proceedings held in terms of s 119 of the Criminal Code. To the charge of murdering Claase which was put to him he pleaded guilty. He was then questioned in terms of

s 112(1)(b) of the Code:

"Q Did you on 13/09/89 and at Vriesgewacht distr Mkobola stab Petrus Claase with a knife ?

A Yes

Q How many times did you stab him with a knife?

A I was just stabbing. I did not count because we were both drunk.

Q Did the said Petrus sustain any injuries where you stabbed him ?

A He had sustained some open wounds when I saw him the following day while I was in the company of the Police.

Q Where is Petrus today?

A I last saw him in Witbank at the mortuary.

Q Why did you stab this person?

A We were friends in fact. So we bought liquor and drank together and as we were already drunk, it just happened. I noticed that I had already stabbed him.

Q Where did you get the knife from?

A In a car inside the cabin.

Q Inside whose car?

A Of the deceased."

Nkambule was arraigned in the Transvaal Provincial

Division before a court consisting of HUMAN J and two assessors. There were two counts laid to his charge (1) the murder of Claase and (2) robbery with aggravating circumstances in respect of the Cortina motor car. On count (1) he pleaded guilty of murder "with extenuating circumstances", and on count (2) he pleaded guilty of theft. Neither plea was accepted by the prosecution. The evidence led by the State has been summarized above. Dr Beetge, who performed a post mortem examination on Claase's body,determined the cause of death as haemopneumothorax of the right lung (that is, a combination of blood and air) and haemorrhage. It was noted that the body was covered in blood. Dr Beetge found three lacerations, each 5 cm long, over and exposing the trachea which was itself undamaged. These were indicative of unsuccessful attempts to cut the deceased's throat.

There were three stabwounds, each 11 x 2 cm, extending into the right lung. Another five stabwounds, in the area of the chest and clavicle, did not penetrate a vital organ. In addition there were stabwounds in various parts of the body: one

in the left cheek; three superficial wounds in the left mandible; another, 2 cm deep, above the left hipbone; another, 4 cm deep, in the right upper leg; a stabwound, 1 cm deep, on the back of the left upper leg; and another, 1 cm deep, on the back above the left hipbone. The right lung was collapsed and contained 500 ml of blood.

Nkambule did not give evidence in his own defence.

He was convicted on both counts as charged. No evidence was given in mitigation of sentence, but the facts stated in his counsel's address in mitigation of sentence were not disputed by the State and were accepted by the trial court. In pursuance of the provisions of s 277(2)(a) of the Criminal Code the court made findings as to the presence or absence of mitigating or aggravating factors. The trial judge expressed himself as convinced that the sentence of death was the proper sentence, and this was the sentence imposed in respect of count (1). On count (2) Nkambule was sentenced to imprisonment for 15 years.

In considering an appeal against the sentence of death, it is now for this court to exercise an independent discretion: it must itself decide, in the light of such mitigating and aggravating factors as appear to it to have been established on the record, whether it would itself have imposed the death sentence. This calls for consideration of the question whether this court is satisfied that the sentence of death was the proper sentence.

A mitigating factor is one which is punishment-moderating (in Afrikaans straf versagtend). The concept includes any factor which is relevant to the imposition of a lighter sentence; or put somewhat differently, it includes all factors which can properly be taken by a court into consideration in mitigation of sentence. (S v Ramba 1990 (2) S A C R 334 (A) at 341 in fin to 342 a). Similarly an aggravating factor is one which is punishment-increasing (in Afrikaans straf verswarend) and it includes any factor which is relevant to the imposition of a heavier sentence. In S v Masina & Others 1990(4) SA 709 (A)

FRIEDMAN A J A said at 714 B-C,

> "The term 'mitigating factor' has a wider connotation than an extenuating circumstance: it can, for example, include factors unrelated to the crime, such as the accused's behaviour after the crime has been committed, or the fact that he has a clean record."

The trial court accepted that Nkambule was 31 years old at the date of the trial; that he had no previous convictions; that he had passed std 10 at school; that he was married with 4 children; that he was in fixed employment at the date of the crime; and that at the date of the trial he was in fixed employment at a wage of R150 per week, having in the meantime been released on bail. There was further circumstance not mentioned in the trial court's finding as to mitigating factors, namely, that Nkambule had been for $3\frac{1}{2}$ years a police reservist. Such persons, I understand, have undergone training in police duties which he voluntarily perform for no remuneration.

In my opinion these are mitigating factors, not

necessarily each by and in itself, but regarded in their totality.

It was argued on Nkambule's behalf that there were additional mitigating factors.

The first was that he was under the influence of alcohol. In the sec 119 proceedings, Nkambule gave as the reason for stabbing Claase :

> "We were friends in fact. So we bought liquor and drank together and as we were already drunk, it just happenend. I noticed that I had already stabbed him."

This was not the reason he gave Krügel. He said according to Ex H:

> "Ek wou die kar vir myself gehad het, dis waarom ek die Oubaas doodgemaak het."

In its judgment, the trial court accepted that at the time of the murder he was to an extent under the influence of liquor, but what effect it had on him was not known because he did not give evidence. Strydom said, and the trial court accepted, that when Nkambule returned to Quick Fit in the afternoon, he smelt of beer but was not drunk. It was also clear that he drove

Claase's car for a distance of 70 - 80 kms from Witbank to the murder scene and the same distance back again, which indicated that he could not have been seriously under the influence of alcohol. Moreover Claase's injuries were not at all indicative of an assailant strongly under the influence. I agree with the view of the trial court.

Then it was submitted that the fact that Nkambule pleaded guilty when arraigned at the trial was indicative of a measure of remorse. I do not agree: it was rather an acceptance of the fact that his conviction was unavoidable. In the sec 119 proceedings where he could have expressed remorse, he did not do so, but sought falsely to extenuate his conduct by a plea of intoxication.

Seriously aggravating is the enormity of the crime. The injuries inflicted on Claase are depicted in photographs which form part of the record. They excite feelings of revulsion and detestation. The inference to be drawn from the proved facts is that when Nkambule drove Claase out of Witbank at about 2 p m on

the Wednesday, he had already formed a plan to kill Claase in order to steal the Cortina. He abused the confidence and trust which apparently Claase reposed in him. Claase must, it is clear, have been strongly under the influence of liquor : the concentration of alcohol in a sample of his blood obtained at post mortem examination was 0,23 grams per 100 millilitres. In consequence his capacity to defend himself when attacked must have been seriously impaired. At the scene Claase told Nkambule that he wished to urinate. It was while he was at a disadvantage when so engaged that Nkambule seized him. He dragged him into the veld and stabbed him, inflicting on him the multiple injuries described by Dr Beetge and depicted in the photographs. Then he drove back to Witbank, arriving at about 4.30 p m, and carried on as if nothing had happened.

It was submitted on behalf of the State that it was an aggravating factor that Nkambule sought after his arrest to distance himself from the murder by leading the police on a false trail: at Clewer he pointed our various places as places where

Claase's body allegedly could be found; and he attempted to implicate innocent people in the death. I do not regard these factors as "punishment-increasing". Nkambule's conduct was of a type which is not unusual when a man tries to extricate himself from the net in which he had been caught.

It remains finally to assess whether the sentence of death is the proper sentence in this case. This requires the court to have regard inter alia to the purposes which punishment should serve, namely, deterrence including prevention, reformation and retribution; and also to the triad consisting of the crime, the offender and the interests of society (See S v Zinn 1969(2) SA 537 (A) at 540 G).

Deterrence has variously been referred to as the "essential", "all important", "paramount" and "universally admitted" object of punishment. The other objects are accessory. In regard to retribution, SCHREINER J A said in R v Karg 1961(1) S A 231 (A) at 236 A - C :

"While the deterrent effect of punishment has remained

> as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But 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, and 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. Naturally, righteous anger should not becloud judgment."

(The emphasis is mine.)

It is the claim of retentionists that capital punishment is a unique deterrent. This claim is in its nature incapable of objective proof, but it is conceived to be axiomatic. Whatever validity in South Africa the claim may have had hitherto, its force has been reduced by the substitution of the new s 277 in the Criminal Code. Criminologists accept that it is not so much the severity of punishment which deters, but its certainty. If this is correct, the effectiveness of the

sentence of death as a deterrent depends on a high degree of probability that it will be imposed and carried into execution. The sentencing judge may consider that under the new s 277 the death sentence is not now more effective a deterrent than is a long term of imprisonment. These are, of course, imponderables, and it is not possible nor would it be advisable to lay down any fixed rule. But it is, I conceive, a consideration which may properly enter into the exercise of his discretion by the sentencing judge.

In regard to reformation or rehabilitation, the question in a case such as this is whether "the discipline and training of a lengthy period might have reformative effects, so that the accused's continued existence would not be a real danger to society". (S v Matthee 1971(3) SA 769 (A) at 771 C-D per HOLMES J A). In this connection the sentencing judge must consider the question, What manner of man is the accused ? In S v Du Toit 1979(3) SA 846 (A) RUMPFF C J said at 857 H :

Wanneer die aard van die misdaad en die belang van

> die gemeenskap oorweeg word, is die beskuldigde eintlik nog op die agtergrond, maar wanneer hy as strafwaardige mens vir oorweging aan die beurt kom, moet die volle soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy geslag, sy agtergrond, sy geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word."

In the present case it would, I think, be unsafe to draw inferences as to Nkambule's character (what the trial judge referred to as his "inherente boosaardigheid en wreedheid") or his psychological make-up ("sy gedrag toon sadistiese neigings en is aanduidend van tekens van psigopatie") merely from the number and nature of the injuries he inflicted on Claase. Such conclusions would not be consonant with what is otherwise known about Nkambule's character before the occurrence. A number of the stabbings seems to have been aimless and, when they were directed to killing (as with the attempts to cut the throat), failed to achieve their purpose. It may be that they were inflicted not sadistically but in a frenzy of fury, possibly the result of

frustration resulting from the bluntness of the weapon he used.

Meagre though the available information is, it seems clear that Nkambule is not unpromising material for rehabilitation: the absence of previous convictions suggests that before the commission of this crime Nkambule was not given to violence; he had been educated to a comparatively advanced level; he enjoyed a settled family life and was in regular employment; and he was a police reservist, something which is indicative of a desire by him to render service to the community by assisting in the maintenance of law and order.

Weighing most heavily against him is the repugnance evoked by his crime. It is undoubtedly one which calls for condign punishment. But, when account is taken of the deterrent effect of a long term of imprisonment, and of the sort of man he appears to have been before this incident, I do not think the that evil of Nkambule's deed, great though it is, is

> "...so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrong-

doing."

(See S v Matthee (supra).)

I would uphold the appeal, set aside the sentence of death on count (1) and substitute therefor a sentence of 25 years imprisonment, 15 years of which is to run concurrently with the sentence imposed on count (2), so that the total effective sentence on both counts will be one of 25 years imprisonment.

H C NICHOLAS A J A.