\ihg CASE NO 65/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ARTHUR WATERBOER MHLONGO Appellant

and

THE STATE Respondent

CORAM: HEFER, EKSTEEN JJA et MAHOMED AJA DATE

OF HEARING: 1 MARCH 1994 DATE OF JUDGMENT: 25

MARCH 1994

J U D G M E N T

MAHOMED, AJA:

The Appellant was indicted in the Transvaal Provincial Division of the Supreme Court on five counts.

1) The first count was one of robbery. It was alleged that on or about the 7 June 1990 and at Brits the Appellant had wrongfully and unlawfully assaulted one Abel Molokoane and then forcibly removed from the possession of Abel Molokoane a Toyota Minibus belonging to one Stephens Molokoane, whilst that vehicle was in the unlawful possession of Abel Molokoane.

2) On the second count he was charged with the murder of Abel Molokoane on the 7 June 1990 at or near Brits.

3) On the third count, the Appellant was charged with the offence of robbery, it being alleged that he had wrongfully and unlawfully

assaulted one Titus Mlangeni and removed from his possession a Datsun E 20 Minibus which belonged to Jenya Koos Ngwako, whilst that Minibus was in the lawful possession of Titus Mlangeni.

4) The allegation on count 4 was that the Appellant had been in wrongful and unlawful possession of a firearm consisting of a 7.65 mm calibre pistol, without having a licence to do so.

5) On the fifth and last count, the Appellant was charged with the offence of being in unlawful possession of certain ammunition.

The Appellant was convicted on all five counts by Van Dyk J sitting with two assessors. On count 1, he was sentenced to twelve years imprisonment and for the murder in respect of count 2 he was sentenced to death. He was further sentenced to twelve years imprisonment in

respect of count 3 but four years of that sentence was ordered to run concurrently with the sentence on counts 4 and 5. Counts 4 and 5 were taken together for the purposes of sentence and the Appellant was sentenced to three years imprisonment in respect of these counts.

An application for leave to appeal in respect of counts 1 and 3 was made to and refused by the Trial Court but this Court is, in terms of Section 316 A of Act 51 of 1977, properly seized with an appeal against the Appellant's conviction for murder in count 2 and the sentence of death imposed in respect thereof by the Trial Court. THE APPEAL ON THE MERITS OF THE CONVICTION

On the undisputed evidence of the witnesses for the State, the deceased Abel Molokoane was last seen alive on the 7th June 1990. His body was thereafter found on the 10 June 1990 on the Brits-Letlhabile road some 3.6 kilometres south of Letlhabile. From the

observations made by Sergeant Thomas of the South African Police it had apparently been dragged in a westerly direction from the Brits-Lethlabile road and left in the grass.

A post mortem examination was conducted on the 12 June 1990 by Dr. S.F. Richards, the District Surgeon who established that the deceased had died from subarachnoid bleeding in the brain, in consequence of a bullet wound inflicted at the back of his head. This was formally admitted on behalf of the defence in terms of Section 220 of Act 51 of 1977.

The most incriminating evidence against the Appellant and which directly implicated him in the murder of the deceased consisted of certain admissions allegedly made by the Appellant to Lieutenant Bouwer ("Bouwer") on the 17th of October 1990 while the Appellant was said to be pointing out various spots in the area in which the body of the deceased had been

found. These admissions were reduced to writing by Bouwer. They were confirmed by an interpreter and the Appellant affixed his thumb print to the written statement which was then produced in evidence by Bouwer. According to this statement the Appellant pointed out the road to Lethlabile and eventually identified a spot to the west of the road in the following terms -

> "Op hierdie plek het ek aan die bestuurder van die taxi (gesê) dat hy moet stop want ek wil afklim. Die bestuurder het toe gestop. Op hierdie stadium het ek 'n vuurwapen in my hand gehad, wat ek op die bestuurder gerig het. Ek het voor langs die bestuurder gesit. Ek het toe aan die bestuurder gesê hy moet uitklim want ek wil die kar hê. Die bestuurder wou nie uitklim nie en ek het hom toe gestoot. Die bestuurder wou nie uitklim nie en ek het hom toe geskiet. Terwyl die bestuurder besig was om uit te klim terwyl ek hom stoot en hy anderkant toe gekyk het het ek hom geskiet. Die bestuurder het toe buite die kar geval. Ek het toe gesien dat die man dood is. Ek het hom toe geneem en voor om die

> voertuig gesleep en ek het toe sy liggaam tussen die gras langs die draad gaan wegsteek. Ek het toe in die kar geklim and toe na my huis toe gegaan met die kar".

It was conceded on behalf of the Appellant that the Appeal against the conviction of the Appellant on count 2 had to fail, if this evidence was correctly admitted by the Trial Court. It was submitted however, that this evidence was inadmissible.

It is clear that the evidence of the incriminating statements said to have been made by the Appellant to Bouwer and the evidence of what he pointed out to the Lieutenant, is only admissible if the Appellant acted freely and voluntarily in doing so, without having been unduly influenced thereto and whilst he was in his sound and sober senses. The onus was on the State to prove that the Appellant had indeed so acted. This was correctly conceded on behalf of the

State. [See Section 217 of Act 51 of 1977; S v Sheehama 1991(2) SA 860 (A) at 879 (H - I); S v Khumalo 1992(2) SACR 411 (N) at 415 f - g; ; S v Mjikwa 1993(1) SACR 507 (A) at 510 d - f].

The crucial issue which therefore has to be determined on appeal was whether or not the State has discharged the onus of establishing that the Appellant had acted freely and voluntarily and without being unduly influenced to do so, in allegedly pointing out various spots to Bouwer and in making the statements which were written down and produced in evidence.

The testimony of the Appellant was that he did not act freely and voluntarily. He said that on the day of his arrest (this would appear to be on the 17th October 1990) he was on his way to his house at Orange Farm when he was confronted by a man with whom he became involved in a scuffle. (That man was Koos Ngwako). He was arrested and taken to the police station at De Deur.

he was driven to Pretoria and Sergeant Mbatha, ("Mbatha") who was one of the persons who accompanied him to Pretoria, asked him what he knew about the deceased. The Appellant's testimony was that he told Mbatha that he knew nothing about the deceased and that Mbatha thereupon said: "wil jy hê ons moet nou kwaai vriende wees?" The Appellant said that he replied in the negative and told Mbatha that he could only confirm what he in fact knew. Mbatha thereon assaulted the Appellant by hitting him on his knees with a firearm and also by using his fist on the left cheek of the Appellant. The Appellant stated that he bled from this cheek because a ring which Mbatha wore on one of his fingers caused a cut. Mbatha then gave him some toilet paper to press against his cheek. Mbatha thereafter asked the Appellant what he would say upon his arrival in Pretoria to explain his injuries. The Appellant testified that he was afraid of being assaulted and he decided that in those circumstances he

would simply say that he had injured himself when he had fallen.

According to the evidence of the Appellant he was taken to the office of Warrant Officer Diedericks ("Diedericks") upon his arrival in Pretoria. Diedericks asked him if he knew where Brits was and then began to ask him about the deceased. The Appellant said that he denied any knowledge of the deceased. He said that Diedericks then began to shout at him and then called Mbatha in for help. Mbatha came in and reminded the Appellant of their previous conversation. He then warned the Appellant that he should not give them any problems because they would injure him if he did. Mbatha told the Appellant that he should convey the truth just as they had "discussed" it during the journey to Pretoria. Some difficulty thereafter arose about dates and the Appellant was asked when the deceased was killed. The Appellant said that he did not know. He said that Diedericks then

began to assault him. He was hit twice with the open hand and then given four dates from which he had to choose one day as being the date when the Deceased was killed. The Appellant said that he chose Friday and he was again smacked. He was told to choose a day between Thursday and Saturday and he was advised to choose Thursday. After that Diedericks just kept on writing and then said to the Appellant that he should go to the scene to show where he had killed the deceased. The Appellant testified that Diedericks asked him whether he knew where Letlhabile was. The Appellant replied that that was the first time that he had heard of Letlhabile. Diedericks then wanted to know how the Appellant knew where Brits was but did not know where Letlhabile was and the Appellant replied that he knew where Brits was because he passed it on his way to his in-laws. Diedericks then informed the Appellant that some people would take him to the scene where the deceased had been killed but he

warned the Appellant that he should co-operate and do exactly what he was told.

The Appellant said that Diedericks had already written something out and he asked the Appellant to sign. The Appellant refused and Diedericks reacted by saying that the Appellant thought that he was clever - he should just put his thumb print on the paper. The Appellant said that he complied with this demand by affixing his thumb print although he was capable of signing his name.

The Appellant said that he was thereafter taken in a motor vehicle with Bouwer and Sergeant Nhlanhla. He denied that he had made any statements to Bouwer about killing the deceased or that he had purported to identify or point out the spots at which the deceased was assaulted or killed. He said that he was afraid of the police and although nobody assaulted him at the scene he simply allowed himself to be photographed pointing at

various spots in accordance with the prior instructions of Bouwer without having any personal knowledge as to what the significance was of any of these places where which he was required to point out.

The State called Mbatha and Diedericks to rebut this evidence. They strongly denied that they had assaulted the Appellant or used any illegitimate pressure to induce him to make any statements or to get him to identify or point out any spots. The State also called both Bouwer and Nhlanhla. They both maintained that the Appellant had identified the spots referred to and made the statements relied upon the State, freely and voluntarily and they denied having instructed the Appellant to point at various spots simply for the purposes of being photographed doing so.

The Trial Court accepted the evidence tendered on behalf of the State and rejected the evidence of the Appellant as being false. Counsel for the Appellant

conceded that he could not offer any weighty criticism of the evidence tendered by witnesses on behalf of the State but he submitted, nevertheless, that the version deposed to by the Appellant had not been proved to be false beyond reasonable doubt.

I have carefully examined the objective evidence and the inherent probabilities with respect to the averments made by the Appellant. Obviously relevant in this respect was the recorded reaction of the Appellant when he was asked by Bouwer on the 17 October 1990 whether he had any injuries and whether such injuries were visible. The reaction of the Appellant was that he had an abrasion on his knee and a slight swelling on his left cheek. This was noted by Bouwer.

How were these injuries caused? It was contended on behalf of the Appellant that they were caused by the police officers who assaulted him. The State contends on the other hand that these injuries were

sustained by the Appellant at the time of his original arrest when he became involved in a scuffle with Koos Ngwako, (the owner of the Datsun Minibus referred to in count 3 of the indictment against the Appellant), who testified that he had been so incensed when the Appellant had been identified by his brother as being the man who had taken the Minibus belonging to him, that he. jumped upon the Appellant and became involved in the scuffle. Koos Ngwako said that in the course of this scuffle the Appellant received an abrasion on the side of his face as well as on his knees.

Although the Trial Court was impressed by the quality of Ngwako as a witness it is necessary to look at all the evidence in order to decide whether the injuries relied upon by the Appellant were sustained in consequence of the scuffle with Ngwako as contended by the State or whether those injuries were sustained in consequence of assaults upon the Appellant as is alleged

the Appellant.

There are several difficulties which present themselves against the submissions advanced on behalf of the Appellant in this regard. In the first place, in the statement taken by Bouwer to which the Appellant affixed his thumb print, the explanation which the Appellant himself gave for these injuries was that they had been sustained during the scuffle when he was arrested. That evidence could perhaps be explained on the basis that he was afraid to tell Bouwer that the injuries had been caused by other police officers but what is not easy to explain is why the evidence of Koos Ngwako was not put in issue when he testified that the Appellant has sustained injuries in the scuffle with Ngwako and why the assertion that he was not injured in the scuffle was made by the Appellant for the first time when he, himself, testified in the trial within the trial after the testimony of Ngwako had been already been completed. Moreover on the

version deposed to by the Appellant eventually, Mbatha had been guilty of a gratuitous and aggressive assault upon the Appellant, which must have been a source of considerable grievance for the Appellant, but when Mbatha first testified, this was never put to him in cross examination and when he was recalled again it was never suggested to him that he had caused a bleeding wound on the face of the Appellant or that he had given to the Appellant toilet paper to suppress this bleeding. Mbatha was also not confronted with the allegation that at the police offices in Pretoria, Dieiericks had at some point specifically harnessed the assistance of Mbatha in order to intimidate the Appellant. It was also not suggested to Diedericks that he had assaulted the Appellant on at least two occasions.

The objective fact that the Appellant did sustain some injuries does not in these circumstances justify the inference that these injuries were inflicted

upon him by the police or the inference that he was intimidated by the police into making the statements referred to by Bouwer and in identifying the relevant spots in the area in which the body of the deceased was found. There is on the evidence, a more acceptable explanation for the injuries sustained by the Appellant: these were injuries of a relatively minor nature which were caused to the Appellant during his scuffle with Koos Ngwako at Orange Farm at the time of his arrest on the 17th October 1990.

It is not simply the failure of the Defence to canvass with the relevant witnesses the version deposed to by the Appellant, which justifies this inference. The version deposed to by the Appellant is inherently improbable. Why should Mbatha, who was a frail and sickly person suffering from a form of pulmonary infection, decide to act so aggressively in the presence of several other persons in the vehicle and proceed

immediately to take out his firearm and to assault the Appellant on his knees and on his face, simply because the Appellant had answered in the negative, a query as to what he knew about the deceased. There was, on this version, no attempt by Mbatha to probe this reaction from the Appellant any further, or to persuade the Appellant to depart from that response, or to confront him with other information or evidence, or even to indulge in some real threats of violence, before becoming so aggressively involved in direct assaults on the Appellant. It is an unconvincing version which understandably made a poor impression on the Trial Court. It objectively strengthens the inference that the most material parts of the version of the Appellant were not put to the relevant State witnesses precisely because the Appellant was improvising and inventing evidence as he went on, to explain away the damaging admissions which he had made to Bouwer. That impression is further fortified by his

attempt to blame his counsel when he could not explain why his counsel had not canvassed with the State witnesses his version about how he came to sustain his injuries. The Appellant said that his counsel did not properly canvass these matters in consultation. He went further. He even suggested that his counsel was colluding with the State by attempting to persuade him to accept the version of the State witnesses. The record and the objective circumstances do not support any of these suggestions.

Even if, as I have found, the injuries sustained by the Appellant were not inflicted by the police, the evidence of the state as to what the Appellant pointed out in the area in which the body of the deceased was found and as to what he said to Bouwer, would remain inadmissible, if the State had failed to discharge the onus of proving that in making these statements and in pointing out these spots the Appellant

had acted freely and voluntarily and without being unduly influenced to do so. In my view however, the State did discharge that onus. All the witnesses called by the State who gave evidence on. this issue testified that the Appellant was acting on his own volition and without any compulsion from the police. The Trial Court accepted that evidence. I am not persuaded that it was wrong. Nothing in the cross examination of the police witnesses or in the objective circumstances disclosed by the evidence justifies a different conclusion.

What the evidence of the Appellant eventually amounted to was that he had no knowledge of the relevance of any of the spots he was photographed pointing out. He was simply obeying a prior instruction to point in certain directions so that he could be photographed. The Trial Court rejected that version. Again I am not persuaded that it was wrong in doing so. Not only is the version of the Appellant entirely

contradicted by the evidence of Bouwer himself as well as by Sergeant Nhlanhla who accompanied him but it is inherently of an improbable nature. The statement of the Appellant contains a wealth of circumstantial detail and particulars pertaining to the Appellant which could not reasonably have been within the knowledge of Bouwer. or Nhlanhla. Bouwer did not even know where Letlhabile was, let alone the obscure spots within that area which were pointed out by the Appellant according to the statement which Bouwer handed in and on which the Appellant had affixed his thumb print. Bouwer's evidence was that he was simply asked by Diedericks to accompany the interpreter and the Appellant in order to witness certain identifications. He was from a totally different branch of the police and not connected in any way whatever with the investigations into the murder of the deceased. There was no suggestion from the defence that he was. It would have been therefore quite impossible for Bouwer to

identify (as the statement purports to do) the place where the driver of the taxi had originally stopped or the place at which the deceased was shot or the place to which his body was dragged or the place at which it was abandoned.

Notwithstanding these considerations, I have kept alive in my mind the very formidable difficulties which an accused person in custody often has in trying to show that incriminatory statements made by him to the police were induced by compulsion or by undue influence. For this reason I have given some thought to the implications of the evidence on the record to the effect that when the Appellant was asked whether he wished to make a statement to a Magistrate he declined to do so. Could it perhaps be argued, that if the Appellant did not wish to make a statement to a Magistrate there was no reason why he would voluntarily wish to make one to Bouwer? This, however, was not an argument relied upon

by Counsel for the Appellant in his heads of argument and I am not satisfied that it can properly be invoked to compel any conclusion in favour of the Appellant. The reason why the Appellant did not make a statement before a Magistrate was never properly canvassed in evidence and was not relied upon by the Appellant during his testimony for the purposes of drawing the inference that his statement to Bouwer was not freely and voluntarily made. More facts would be necessary before such an inference could be drawn. How far away was there a Magistrate at the time? Was he available? Mas the suggestion ever revived later? If so what was the attitude of the Appellant then? What reason, if any, did he give for declining the invitation to make a statement to a Magistrate? None of these issues were canvassed. In these circumstances the mere existence of evidence which suggested that the accused did at some point elect not to make a statement to a Magistrate is not of a sufficiently

cogent quality to negate the conclusion justified by the other evidence before the Trial Court, which established clearly that the statements made by the Appellant to Bouwer were indeed freely and voluntarily made.

This finding is a formidable barrier against any attack on the correctness of the conviction of the Appellant on the charge of having murdered the deceased. It is perfectly true that there is a distinction between the admissibility of a confession and the truth of its contents and that it does not follow that because a confession was freely and voluntarily made it was also true. But no reason has been suggested, in the circumstances of the present case, why the Appellant should wish, freely and voluntarily, to make a statement seriously incriminating himself in the murder of the deceased, if this was not true. Moreover the truth of the confession is also corroborated by the fact that the vehicle of the deceased which the Appellant took away

after the deceased had been killed, was indeed later found in the possession of the Appellant on the day when he was arrested.

In the result the Appeal against the conviction of the Appellant on the charge of murdering the deceased must be dismissed. THE SENTENCE.

The crucial issue which remains for determination, is whether the death sentence imposed on the Appellant for the murder of the deceased should be upheld on appeal.

The death penalty is the ultimate and the most incomparably extreme form of punishment which a Court may impose. It is the last, the most devastating and the most irreversible recourse of the criminal law involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all

humankind. It is authorized by Parliament in terms of the present state of the law but its application must be confined to those exceptional, extreme and imperative cases, in which no other form of punishment - however severe, exemplary, or exacting, can legitimately be regarded as as acceptable or adequate. It must be the only proper sentence justified by the specially serious circumstances of the case. [S v Nkwanyana 1990 (4) SA 735 (A) at 745 A - G; ; S v Senonohi 1990 (4) SA 727 (A) at 734 F - H; S v J 1989 (1) SA 669 (A) at 682 D - G; S v P 1991 (1) SA 517 (A) at 523 C - E;].

The question which therefore needs to be considered is whether the present is such an extreme or imperative case. This involves an examination of the relevant aggravating and mitigating factors involved in the matter, the weight to be attached to each of these factors, the character and background of the offender and his prospects of rehabilitation, the interest and

protection of the general community and its legitimate expectations and inter alia the moral values and impulses of civilized society sought to be expressed in our system of criminal justice, regard being had to the deterrent, preventive, reformative and retributive ends of punishment.

The aggravating factors disclosed by the evidence in this matter, are indeed serious. The Appellant shot and killed a taxi driver in cold blood. He dragged the body of the deceased into the bush and then stole the taxi of the deceased. This was apparently the only motive for the murder. He showed no visible remorse at any time before or during the trial. It was clearly a heartless and brutal crime.

On these facts alone it is difficult to resist the conclusion that the death sentence is a suitable sentence which can be imposed on the Appellant, but is it the only suitable punishment for the Appellant? Will

nothing short of this incomparably extreme alternative be adequate? Would a sentence of life imprisonment perhaps accommodate the retributive, deterrent, and reformative ends of punishment?

> I think it is relevant in this regard to examine who the Appellant is and what his background is, in order to decide whether he is a man of such inherent wickedness and brutality and so utterly beyond redemption as to justify an order directing the forfeiture of his life as the only course which would sufficiently protect society and adequately express its total revulsion of the Appellant and his deed. [S v Ngobeni en 'n Ander 1992 (1) SACR 628 (A) et 631 g - j; S v Mamkeli 1992 (2) SACR 5 at 13 b - e; S v Ngcobo 1992 (2) SACR 515 (A) at 519 a - f; S v Cele 1991 (2) SACR 246 (A) at 248 h - j; S v Mdau 1991 (1) SA 169 (A) at 175 C - 176 B;]. From the record relevant to these issues it would appear that the Appellant was born in Sophiatown in 1952 and was 38 years

old at the time of the commission of the offence. He is therefore in the full flower of his adulthood. He is neither without skills nor without a stable work record. Although he lost his father when he was only four years old and was compelled to leave school after standard five because of the poverty in his family, he started working as an installer of television antennas and eventually acquired expertise as a motor mechanic which enabled him to earn and income of some R700.00 per month. He was married at some stage and had four children whom he supported. Although his marriage broke down, the children were left in his custody and he later appears to have developed a stable relationship with another woman. This record suggests a capacity for disciplined work, a consistent potential for self-improvement and achievement, a sense of familial responsibility and some emotional commitment. It is a relatively impressive record, unfortunately blemished, but not substantially

destroyed by a previous conviction for housebreaking, when he was only 17 years old and convictions in 1984 and 1987 for assault. Judging from the sentences imposed on him none of these offences were very serious. For the house breaking he received a sentence of five strokes with a light cane, for the assaults in 1984 he received a fine of R100.00 or 50 days imprisonment on each of two counts and for the assault in 1987 he received a fine of R90.00 or 90 days imprisonment. There were no further convictions after 1987, other than those enumerated in the present indictment against him.

Regard being had to this history and background, I am not satisfied that the Appellant has within him an "inherente boosheid" which renders him beyond redemption. [S v Lehnberg en 'n Ander 1975 (4) SA 553 (A) at 561 F - G]. This conclusion, by itself, does not however, become decisive. It is still necessary to have regard to the retributive element in punishment and

to accommodate the legitimate feelings of revulsion felt by the general community when offences of this kind are perpetrated.

How can such feelings of revulsion be properly accommodated on the facts of the present case? I think it is a mistake to assume that they can only be accommodated by the sentence of death. Attributed to a civilized community must not only be a strong sense of outrage when a cruel and gratuitous murder is committed, but also mixed and competing feelings of mercy for the perpetrator and hope for his reformation. Outrage and anger are seldom unalloyed.

Having agonized on these issues I have, after some considerable hesitation come to the conclusion that serious consideration, has to be given to a sentence of life imprisonment for the Appellant in the present matter. It is a sentence which would give strong expression to the retributive element of punishment

without surrendering to the despair about the Appellant

which must in some measure be inherent in the imposition

of the death sentence. A long term of imprisonment seems

prima facie to have been considered by the Trial Judge at

some point. In response to a plea by Counsel for the

Defence for a life imprisonment, the trial Judge remarked

"As ek geweet het dat as ek hom 'n vonnis oplê van 35 jaar en gelas dat hy nie voor dit vrygelaat moet word nie en dat dit uitgevoer sal word, dan het u ' n sterk argument gehad. Maar selfs vonnisse is deesdae nie meer in die howe se hande nie. Ons breek ons koppe, ons slaap sleg om te besluit was is 'n regte en billike vonnis en more oormôre, net omdat die tronke vol is en oorvol is, dan word die mense vrygelaat net om weer misdade te pleeg".

If, on a careful consideration of all the circumstances of a case, a sentence of life imprisonment can properly be imposed, it should not be avoided simply because the administrative machinery available to the executive allows for the possibility that the offender concerned may be released earlier. Even if a death

sentence is imposed, the administrative machinery of the executive might and is often harnessed to commute such a sentence, but that would be no reason for avoiding the imposition of such a sentence if it is otherwise imperative in a particular case.

The legislature has been at pains in recent years to give to the sentence of life imprisonment a special focus so that it can be seriously considered as an alternative punishment to the death sentence in appropriate cases. The new section 277 of Act 51 of 1977 and the new section 64 of the Correctional Services Act No 8 of 1959, both introduced by Act 107 of 1990, were clearly intended to further that objective. The provisions of Section 64 of the Correctional Services Act thus amended

" hou dus in dat 'n Hof sy plig om die gemeenskap te beskerm teen die aanslae van so 'n geweldenaar soos wat die appellant is, kan nakom deur horn lewenslange gevangenisstraf op te lê. Wat die Hof betref, sal so ' n

persoon finaal uit die gemeenskap geneem word en die res van sy natuurlike lewe in gevangenisskap deurbring. Die enigste manier waarop hy weer tot die gemeenskap kan terugkeer is as die Minister die inisiatief neem en die vrylatingsadvisiesraad vra om hom te adviseer or sy moontlike vrylating. Die Vrylatingsadviesraad moet dan 'met behoorlike inagneming van die belange van die gemeenskap', sy vrylating oorweeg.

Voor die wysiging van bogenoemde art 64 deur die nuwe Wet het die Met op Gevangenisse bepaal dat:

'64(1) By ontvangs van 'n verslag van 'n gevangenisraad betreffende 'n gevangenene op wie 'n lewenslange gevangenisstraf opgelê is, en wat 'n aanbeveling bevat vir die vrylating van bedoelde gevangene, lê die Kommissaris die verslag aan die Minister voor.'

Die Minister kon dan, handelende op dié verslag, magtiging verleen vir sy vrylating. Die inisiatief het dus by die 'gevangenisraad' gelê, en nie by die Minister nie. Hierdie bepaling is nou deur die nuwe Wet gewysig sodat die inisiatief van die Minister self moet uitgaan. Selfs al sou die raad sy vrylating aanbeveel, bly die uiteindelike verantwoordelikheid vir vrylating die van die Minister. Die plig en die verantwoordelikheid om die gemeenskap teen so 'n moordenaar

te beskerm berus dus in die eerste en in die finale instansie by die Minister.

> Waar 'n Hof dus 'n vonnis van lewenslange gevangenisstraf oplê, is dit die klaarblyklike bedoeling van die Hof dat die beskuldigde uit die samelewing verwyder moet word en vir die res van sy lewe in the gevangenis aangehou word. Hy kan dam slegs in die uitsonderlike omstandighede hierbo uiteengesit, waar die Minister vir hom tussenbei tree, weer na die samelewing terugkeer. Lewenslange gevangenisstraf is dus 'n vorm van straf wat as ' n alternatief vir die doodvonnis oorweeg moet word waar die beskerming van die samelewing 'n gebiedende oorweging is. Die onderhawige saak is, na my mening, so 'n saak en is lewenslange gevangenisstraf ook 'n gepaste straf. Dit voldoen aan die afskrikkings-, vergeldings- en voorkomingselemente van straftoemeting en gee ook gevolg aan die bedoeling van die Wetgewer soos in die nuwe Wet vervat. Die doodvonnis kan dus nie as die enigste gepaste straf beskou word nie." [Supra].

Save therefore in those exceptional circumstances where an Appellant sentenced to life

imprisonment is for good and sufficient reasons released before the termination of his natural life, a sentence of life imprisonment would effectively remove the offender concerned from the community at large. Such a sentence would therefore effectively protect that community against the offender. It would also be a severe sentence giving very serious expression to the retributive needs of punishment.

A sentence of life imprisonment would however not protect the prison community against the offender if there was any reasonable possibility that the Appellant would constitute a danger to other prisoners or the prison staff. [S v van Niekerk 1992 (1) SACR 1 (A); S v Lawrence 1991 (2) SACR 57 (A)]. Regard being had to the analysis I have previously made of the Appellant's background and history, I am not satisfied that there is any reasonable risk that the Appellant might constitute such a danger to the prison community.

In the result and after considerable hesitation and agony I have come to the conclusion that the sentence of death imposed on the Appellant should not be upheld.

I accordingly order that

3) The appeal against the conviction be dismissed and the conviction be confirmed.

4) The sentence of death imposed by the Trial Court be set aside and substituted by a sentence of life imprisonment on the Appellant.

I MAHOMED
ACTING JUDGE OF APPEAL

HEFER JA )
EKSTEEN JA ) CONCUR