Bib 74/94

Case No 125/91
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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PIETER JOHN VAN DER MERWE ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : BOTHA, KUMLEBEN et HOWIE JJA

HEARD : 11 MAY 1994

DELIVERED : 25 MAY 1994

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J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN JA:

On the facts of this case, which have been comprehensively summarised in the judgment of my Brother Howie (the "other judgment"), the trial court decided that the death sentence was the only proper one in respect of each of the murder convictions. In reaching this conclusion it took into account two mitigating circumstances: the age of the appellant and the adverse conditions of his upbringing. However, these considerations in the view of the trial court were of limited significance and were outweighed by the far reaching aggravating features of this case.

In the course of the judgment on sentence, it was said that:

> "Dr Vorster's evidence is clearly to the effect that you did not impulsively kill the three deceased, that you gave a clear, detailed and rational account of what you had done and that neither your personal background nor your

> psychopathic condition, nor your intake of liquor, had played any role in the commission of those offences."

In the other judgment the view is held that it is reasonably possible that the appellant did act impulsively and that thus the sole reason given for concluding that the psychopathic condition was unconnected with the murder cannot be sustained; alternatively, if impulsiveness is to be ruled out, a number of other features of the appellant's conduct establish a causal connection between his personality disorder and the crimes committed. The fact of such a disorder is consequently to be regarded as a further mitigating circumstance which warrants the substitution of the sentence proposed in the other judgment.

One must first consider whether as a reasonable possibility it can be said that the

appellant acted impulsively, since impulsive conduct per se could amount to a mitigating circumstance. There are, I respectfully agree, insufficient grounds for concluding that at the time the appellant left the camp armed with a rifle he had decided to embark upon a killing spree. However, from the time he picked up the hitch-hiker, or at the latest from the time this victim was killed, his subsequent conduct culminating in the death of the third deceased was the very antithesis of impulsive conduct. It is perhaps arguable - I put it no higher than this - that any one of the three incidents viewed in isolation may justify the inference that the appellant was prompted by sudden impulse. But taken cumulatively, as one must, the opposite conclusion is inescapable. After the murder of Jacob Morake, the hitch-hiker, there was an appreciable time lapse during which, had he acted impulsively, he would have

reflected on what - to his surprise - he had done without deliberation. This would have served as a restraint against repetition. But on reaching the minibus he proceeded to murder his next victim, the taxi driver, Petrus Seengo. This was anything but impulsive. He caused him to leave his vehicle on a false pretext and drove off with him. This he must have done with the intention of killing him: no other explanation for doing so comes to mind. Finally, the fact that he robbed and raped the girl-friend before killing her, hardly supports the conclusion that this was not a further calculated criminal act.

An undisputed aspect of this case is that, with the possible exception of the third incident, there was no motive for the killings. Dr Vorster in her evidence, after commenting that the psychopathy of the appellant was of a severe degree, explained

that the behavioural characteristics of this disorder included, as summarised in the other judgment,

> "an absence of compassion, remorse or self-recrimination; impulsiveness; a desire for instant gratification; an impaired ability to learn from past experience or to adjust to the demands of the community; an absence of motivation or drive; a conspicuous ability to manipulate others to own advantage; inadequate inter-personal relationships; the susceptibility to substance dependence; and the tendency to perversion and criminality."

In the absence of a motive, and with impulsiveness in this case discounted, the murders, it would seem, must be attributed to perversion and criminality: in lay terms, an irrational desire and intention to kill for the sake of killing. In this sense I accept that the personality disorder is linked to the offences and might therefore be taken into account as a further mitigating factor.

However, the conclusion that there is such

a causal connection bears upon a further consideration, namely, whether in this case the death penalty ought to be imposed in the interests of the protection of the community. This court has acknowledged that this is a factor to be taken into account provided the risk of repetition is a substantial one: "'n beduidende gevaar" in the words of Hoexter JA: S v Bezuidenhout 1991(1) SA 43(A) 51d. In this regard the following passage from the judgment of Botha JA in S v Van Niekerk 1992(1) SA 1(A) 16 d - f, can be aptly applied to the facts of the present case:

> "Die appellant se geval is na my mening nie vergelykbaar met die gewone geval van 'n gewelddadige aanrander, rower of verkragter wat weens 'n gewelddadige moord tronk toe gestuur word nie. Die appellant se abnormale persoonlikheid hou 'n voortdurende bedreiging in vir almal met wie hy in aanraking kom .... Ek laat die bespiegeling dat hy uit die gevangenis kan ontsnap, buite rekening. Sy verwronge persoonlikheid hou steeds 'n wesenlike gevaar in vir sy medegevangenes en vir die personeel.

> Daar is geen werklike vooruitsig dat daardie gevaar binne enige redelike tydperk sal afneem nie. Die Hof durf dit nie geringskat nie."

The evidence of Dr Vorster, provided it is considered in conjunction with the facts on which it was based, satisfies me that such a substantial risk of repetition does exist. It is true that the appellant had no previous convictions involving violence. But this is to my mind more than offset by the multiplicity of the murders, the manner in which they were committed and the fact that the deviant personality traits which prompted them are practically speaking incurable.

Finally, one need hardly stress that the random and brutal murder of three innocent members of the community calls for the full recognition of the retributive element of punishment.

Taking all relevant facts into account I am

satisfied that the death sentences were properly imposed and that they ought to be confirmed.

In the circumstances it is necessary to consider the two questions raised at the commencement of the other judgment: viz, whether s 241(8) of the Constitution of the Republic of South Africa, 1993, (the "Constitution") requires this Court to decide the question of the death sentence as if the Constitution had not been passed; and, if not, whether such a sentence is in conflict with the provisions of s 9 or s 11(2) of the Constitution. At the very least, the latter two sections create doubt as to whether the death penalty is permitted in terms of the Constitution on the facts of this case or at all. As regards s 241(8) a doubt similarly arises in that the preservation of the status quo ante therein envisaged may be held to be restricted to procedural and jurisdictional aspects of pending

proceedings. Since in terms of s 101(5) read with s 98(2) of the Constitution the Constitutional Court, and not this Court, is empowered to decide these questions it would be inappropriate to conclude this appeal at this juncture.

It is accordingly ordered that it be adjourned (to a date to be determined by the Registrar of this Court in consultation with the Chief Justice) pending a decision of the Constitutional Court on whether the confirmation of the death sentences imposed would be constitutional.

M E KUMLEBEN
JUDGE OF APPEAL

BOTHA JA - Concurs

B/b 76 A/94

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APPELLATE DIVISION

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J U D G M E N T

HOWIE, JA

HOWIE, JA

The appellant was sentenced to death on 6 March 1991 in the Western Circuit Local Division at Klerksdorp on each of three counts of murder. The present appeal was noted shortly after that and was directed against all three death sentences in terms of s 316A of the Criminal Procedure Act, 51 of 1977 ("the Act").

When the appeal was heard, however, counsel for the appellant advanced, in addition, the argument that the death sentence - that is to say, the provisions in the Act empowering its imposition - was in conflict with the respective fundamental rights created in s 9 or s 11(2) of the Constitution of the Republic of South Africa Act, 200 of 1993 ("the Constitution") which came into operation on 27 April 1994.

Counsel for the State countered the

constitutional argument by contending that s 241(8) of the Constitution required this Court to apply the Act in all respects as if the Constitution had not been passed.

It is appropriate to deal first with the merits of the appeal. The essential facts are not in dispute.

The events giving rise to the appellant's prosecution occurred on the evening of 30 January 1990. The appellant, then 19 years and 7 months old, was a national serviceman in the 10th Artillery Brigade of the South African Defence Force stationed at Potchefstroom. Some time after 19h00 he approached one Kirby, a fellow member of the unit, and asked to borrow the latter's rifle and an empty magazine. The reason he gave Kirby was that he was required to drive an escort vehicle to Pretoria that night and was without his own rifle because it had been locked away in the arms store. He said he would return the rifle the next day. Kirby complied. As it

happened, the appellant was indeed unable to obtain the release of his own rifle but the story about the escort duty was false. In fact he was not on duty on the evening in question at all.

In full uniform, and in a Defence Force Landrover, to the use of which he was not entitled except within the camp, the appellant drove to Klerksdorp and proceeded to the home of an acquaintance named Bezuidenhout, arriving there at some time between 19h00 and 20h00. In the vehicle with him he had Kirby's rifle and sundry rounds of ammunition which he had come by on earlier occasions.

He spent the next 60 to 75 minutes with Bezuidenhout and in that period drank 2 or 3 beers. On departure he seemed to Bezuidenhout to be "baie normaal" and none the worse for the liquor he had taken. In the course of their conversation the appellant had falsely

explained his visit as being a temporary break from duty while on convoy duty from the Northern Cape to Potchefstroom.

Leaving Klerksdorp, the appellant drove on to the Ventersdorp road. Shortly afterwards he encountered a hitch-hiker. This was Jacob Morake, the first deceased. The appellant stopped and offered Morake a lift, who accepted. After they had driven towards Ventersdorp for some while the appellant pulled off the road and ordered Morake to alight. They both got out and had walked no further than the front of the vehicle when the appellant struck Morake with the rifle-butt and then killed him with a close-range shot through the head.

The appellant then drove back to Klerksdorp. On the outskirts of the town he came across a minibus taxi next to the road. He stopped and went over to it taking the rifle with him. In the taxi were Petrus Seengo, the

second deceased, and his girlfriend, Paulina Seakhala, the third deceased. The appellant knocked on a window and indicated that they should get out. When Seengo did so, the appellant demanded to see his taxi licence. Seengo gave it to the appellant who inspected it. He then put the document in his pocket and ordered Seengo to accompany him. They got into the Landrover and the appellant once again drove towards Ventersdorp. After about 10 minutes he stopped. What followed was an almost exact repetition of the killing of Morake. This time, however, the muzzle was hard up against Seengo's head when the appellant pulled the trigger.

He then went back for Seakhala. Her fate was only different in one substantial respect from that of her man friend: the appellant robbed and raped her near the roadside before killing her. The shot that did so literally blew her brains out.

After this horrifying orgy of slaughter the appellant drove into Klerksdorp. In proceeding through the town he noticed a deep-sea fishing boat on a trailer standing amongst various vehicles in the open-air display premises of a used car dealer. He drove the Landrover as near as he could and after inspecting the boat briefly, manoeuvred the trailer to the back of the Landrover, secured the hitch connection and drove away with the boat back to Potchefstroom.

There he went to the flat of a Defence Force colleague named Bekker where he occasionally slept on nights when he was not in camp. Bekker was on night duty and not yet home. The appellant unhitched the trailer and left it in the street. He parked the Landrover, entered the flat and went to sleep. It was then between 02h00 and 03h00. Later that day he was arrested.

It remains to mention that the appellant took

Seengo's minibus keys and before raping Seakhala ordered her to hand him the articles of jewelry she was wearing.

At the trial, apart from being convicted of the three murders, the appellant was also convicted of raping Seakhala, of robbing her of her jewelry, of the theft of Seengo's minibus keys and licence permit and, finally, of the theft of the boat and trailer. Varying gaol terms were imposed in respect of these four additional offences.

On the evidence before it the trial Court (**M J Strydom J and assessors**) found two mitigating factors and a number of aggravating factors. The former consisted of the appellant's youthful age at the time he killed the deceased and, secondly, the fact that he had had to endure an unhappy childhood. On the aggravating side, the Court inferred that the appellant had set out from camp that night to kill people and that, in the absence of any proven motive, it had to be assumed that his cruel, inhuman and

barbarous actions were prompted simply by inherent wickedness. Furthermore he was not a first offender; his 5 previous convictions comprised two involving dishonesty, one for a traffic offence, one for culpable homicide involving the driving of a motor vehicle and one for illicit possession of a firearm. He had shown no remorse at any stage and he had abused his position as a national serviceman and the access which it afforded him to a uniform and firearm.

Counsel who appeared for the appellant at the hearing of the appeal (he did not appear at the trial or draw the heads of argument) refrained from any suggestion that the trial Court had misdirected itself either in its factual conclusions or in respect of its findings as to what aggravating and mitigating facts existed. His argument was confined to a criticism of the learned trial Judge's evaluation of those factors which led him to impose

the death sentence.

In counsel's submission life imprisonment would serve all the purposes of punishment and take adequate and proper account of all such matters which require consideration in the process of determining a fitting sentence. In short, so it was urged, life imprisonment was, even if not the only proper sentence, nonetheless a proper sentence, thus barring the imposition of the extreme penalty.

Counsel for the State, on the other hand, contended that there was no relevant connection between the appellant's age and his crimes and that, on the present facts, any childhood disadvantages could not constitute a mitigating factor.

For reasons to which I shall come, I consider that the trial Court should have found a third mitigating factor and that the attitude of the appellant's counsel is

no bar to this Court's making that finding itself.

To obtain the required perspective against which to consider the question whether sentence of death was the only proper sentence, one must have regard to the following evidence.

Within a week of his arrest the appellant underwent psychiatric observation at Sterkfontein Hospital by Dr Meryl Vorster, a senior psychiatrist and head of the Forensic Unit at the hospital, and Dr Leon Fine, a psychiatrist in practice in Johannesburg. Their joint report was handed in at the trial and confirmed by Drs Vorster and Fine in evidence. They found that the appellant was a certifiable psychopath, that he was at no relevant time subject to any mental illness or defect and that he was criminally responsible for his actions on the night in question.

Also produced in evidence was a welfare officer's

report which had been obtained for the purposes of the Sterkfontein psychiatric investigation. In the course of the report the sociologist concerned recorded that during the first year of the appellant's military service he had been absent without leave (AWOL) on 6 occasions (the last being for a period of no less than 62 days) and that during January 1990 he had been AWOL every evening without having been caught. He told the welfare officer that he had performed border duty, had been a sharpshooter in a helicopter and had had contact with "the enemy". When this information was checked it was found to be false and that also on these alleged occasions the appellant had been AWOL.

In her testimony Dr Vorster explained that psychopathy is a personality disorder the chief behavioural characteristics of which are an absence of compassion, remorse or self-recrimination; impulsiveness; a desire

for instant gratification; an impaired ability to learn from past experience or to adjust to the demands of the community; an absence of motivation or drive; a conspicuous ability to manipulate others to own advantage; inadequate inter-personal relationships; the susceptibility to substance dependence; and the tendency to perversion and criminality. In her assessment the appellant displayed most of these traits.

With specific reference to the events in issue and more particularly the trial Court's question whether they were linked to the appellant's psychopathy, Dr Vorster said that although the appellant's psychopathy rendered him less able to control himself than a non-psychopath there was no connection to be discerned between his actions on the night concerned and his personality disorder. On the contrary, so she stated, his conduct indicated planning, not impulsiveness, and the entire episode was not fleeting

but extended over several hours.

At another stage of her evidence, however, Dr Vorster said, having been asked what she thought his motive had been:

> "I can speculate that as follows (from ?) his personality disorder, he enjoys the violence."

As to the significance of the appellant's age, Dr Vorster considered that he was not an immature person. She based that opinion on evidence that after leaving school he had worked on his stepfather's farm, had received two years' military training and had had relationships with various women.

Regarding the appellant's lack of feeling, Dr Vorster said that she specifically asked how he viewed his conduct in retrospect. His answer was that he could kick himself and that it was a "stupid thing" to have done. He voiced no sorrow for his victims or their families.

In so far as the appellant's prognosis was

concerned, Dr Vorster said that he was an aggressive person who was easily angered. Because the aggression exhibited in the present instance had emerged at an early age the prognosis for his rehabilitation was poor. She felt sure that if confronted with aggression he would react with aggression. There was no guarantee that he would not repeat his crimes. In her opinion, and experience, psychopaths did not respond well to rehabilitative treatment. In general the only hope for rehabilitation was what was called burn-out. This was simply the ageing process; when psychopaths reached 60 or 70 years of age, or more, they seemed to become less aggressive and violent. Asked about the degree of the appellant's psychopathy, Dr Vorster said

> "If one takes into account his age, how young he is and how he is already involving himself in violent activities, one is concerned that he (is) severe....."

When he gave evidence, Dr Fine was also asked

what he thought the appellant's motive was for the killings. He, too, could think of nothing but the possibility that because people with personality disorders are sometimes emotionally blunted and embark upon risky or dangerous behaviour in order to increase the intensity of their emotional experience, the same thing could have happened in the appellant's case. He said this was a theory on his part and that the appellant had not discussed it with him. Asked whether the killings did not indicate a disordered mind, Dr Fine replied in the negative but he did say that they were certainly consistent with the appellant's psychopathic personality.

In the Court below the subject of the appellant's psychopathy was dealt with as follows. Psychopathy, said the trial Court, was not in itself a mitigating factor but it could be such depending on the facts of the case at hand. In those respects reference was made to **S v Nell**

1968(2) SA 576(A) at 580 D-H and **S v Pieterse** 1982(3) SA 678(A) at 683H - 684C. As to the facts here, the trial Court accepted that the appellant's degree of psychopathy was severe but considered that Dr Vorster's evidence - which it accepted without hesitation - was clearly to the effect that the killings were not impulsive and that the appellant's psychopathy had played no role in their commission. The Court then expressed the following finding on this aspect:

> "We consequently find it difficult to conclude that your psychopathic condition is **per se** of a mitigating nature."

I must confess that the formulation of this finding occasions me difficulty in two respects. In the first place, it is trite that the onus is on the prosecution to disprove mitigating factors beyond reasonable doubt. Accordingly, the test is not whether it is difficult to make a finding favourable to an accused in

this context; the test is whether the necessary factual basis for such finding exists as a reasonable possibility. In the second place, even if the appellant's psychopathy was not mitigating **per se** the question still remained whether that condition was not causally linked to the perpetration of the murders. The answer to this inquiry depended, **inter alia**, on the degree of the psychopathy, the nature of the killings and the circumstances in which they were committed: **S v Pieterse supra** at 683H, 685D and 687F.

Close analysis of Dr Vorster's evidence shows that she advanced only one ground for concluding that the appellant's psychopathy was not connected with the murders. That was the absence, in her view, of any sign of impulsiveness in his conduct on the fateful night.

Dr Vorster's conclusion in that regard was not, on my reading of her testimony, rooted in her professional expertise and knowledge but in her analysis of the facts.

It was incumbent on the trial Court to evaluate those facts for itself and it is equally incumbent upon this Court to do so.

That the appellant left the camp that night and that he was not authorised to do so was not significant. As already mentioned, the welfare officer's report records that he was very frequently absent without leave during his period of military service. This trend reached a peak in January 1990 when he was absent every evening. Although this information emanated partly from the appellant it was not qualified or corrected at the State's instance and there is no reason to doubt it.

That the appellant took a rifle and ammunition with him he explained on the basis that military procedure required it if one was in charge of a military vehicle outside camp. The State led no evidence to disprove that alleged requirement.

That the appellant took the Landrover without permission is consistent with his manifest tendency towards indiscipline and irresponsibility. That tendency is not by itself indicative of psychopathy but it is certainly consistent with a number of the characteristics of psychopathy as listed by Dr Vorster.

The evidence of his visit to Bezuidenhout at Klerksdorp and his driving out on to the Ventersdorp road after that was at least as consistent with his simply having nothing better to do to pass the evening than to drive aimlessly about, than it was with the intention to go out and kill people. That he could have done on the road back to Potchefstroom; he did not need to take the road to Ventersdorp. Therefore, up till the time of the encounter with the hitch-hiker, although there was no conduct on the appellant's part which appears to have been impulsive, there was also no conduct, in my view, which justified one

in concluding, as the only reasonable inference, that he was implementing a pre-conceived murderous plan.

As to the events from then on, I see no reason why it could not be regarded as impulsive that he picked up the hitch-hiker or, even if giving him a lift was not impulsive, why it could not be regarded as impulsive that the appellant suddenly stopped and shot this deceased. The later deaths may certainly be explicable on the basis of an awakened barbarous bloodlust rather than impulsiveness but thereafter, when the appellant spotted the boat and simply went up and stole it, one has further conduct at least as indicative of impulsiveness, in my view, as it was with calculated deliberation.

Furthermore, quite apart from impulsiveness, it seems to me that the trial Court overlooked the significance of a number of features of the appellant's conduct. Firstly, Dr Fine's evidence was that the

killings were certainly consistent with the appellant's personality disorder. Secondly, the absence of remorse is consistent with psychopathy. Thirdly, there is undoubtedly an indication of blunted emotions in the appellant's assessment that "it was a stupid thing" to have done; that, too, fits the psychopathic profile. So does the fact that the killing of the first deceased did not deter him from further carnage or jolt him into the realisation of the enormity of his conduct. Finally, there is the fact that the only possible motive either psychiatrist could think of was that the appellant was moved by a sense of excitement or enjoyment. That possibility, of course, fits comfortably within the list of psychopathic characteristics furnished by Dr Vorster, more particularly callousness, blunted feelings and the tendency to perversion. And the fact that both doctors referred to this possibility as speculation is no reason at

all to discard it. What a scientist cannot prove with the degree of certainty required for the establishment of a scientific fact he may well tend to relegate to the realm of speculation. Such a relegated possibility may nonetheless, to the legally-trained mind, be a reasonable possibility.

Viewing the horrifying events of that night in totality, and given the apparent lack of motive or rationality in the appellant's conduct, one would be forgiven for concluding that the most probable explanation was his psychopathy. At the very least, however, the State failed to explore the position fully enough to eliminate the reasonable possibility that these attacks were indeed the product of the appellant's personality disorder. On all the evidence I conclude, therefore, that this case must be decided on the basis that there was a material connection between the appellant's psychopathy and the

crimes which he committed on the night in question.

The effect of psychopathy, as I understand Dr Vorster's evidence concerning the behavioural pattern which is characteristic of this particular personality disorder, is that while it is not a disability as such, it is nonetheless a condition which places the psychopath at a certain disadvantage when compared with a non-psychopath. Dr Vorster said, significantly, "he lacks more control than someone who is not a psychopath." That fact as well as the tendency to act without reflection, the impaired ability to learn from past experience and the predeliction for perverse or criminal conduct may not singly or collectively render the psychopath less able to tell right from wrong but they would seem to constitute some impediment to his regulating his conduct in accordance with that distinction.

This consideration, coupled with the material

link which I find between the appellant's psycopathy and his crimes, accounts, in my view, to a further mitigating factor in this case.

The aggravating factors are, of course, of enormous weight even if, as I find, the appellant's intention to kill was only formed shortly before the first deceased's death. There is particularly the fact that the killings consisted in random, unprovoked, cold-blooded executions of three innocent people who were complete strangers to the appellant. Of that one does not lose sight for a moment. In this case, however, it is not really the aggravating factors which are determinative of the question whether the death sentence is the only proper sentence under the law as it presently reads. Given the appellant's personality disorder and his poor prognosis, the prime need in this matter is for a sentence which will best afford long-term protection for the public. That

being so, the only alternatives comprise the sentence appealed against and life imprisonment. That vexed choice is similar to the one which faced this Court in **S v van Niekerk** 1992(1) SACR 1 (A). But although both cases concern an offender with a personality disorder, the fundamental problem attaching to the appellant in that matter was that he was unusually susceptible to vehement and violent reaction to what he would regard as humiliating conduct towards him. This tendency was so marked that it was just a question of time before he injured somebody seriously or even fatally. It had happened in respect of the incident giving rise to his conviction and it was liable to happen again. The crucial factor in that regard was that he was, as a strong possibility, liable to be a serious danger even to prison staff and fellow prisoners at some time during his incarceration. On that ground this Court held, by a majority, that the death

sentence was the only proper sentence.

In this appellant's case the public at large must clearly be protected from him but as to whether the prison population will be at risk, the furthest that the evidence goes, apart from showing that he is subject to psychopathy of a severe degree, is that he is liable, in Dr Vorster's view, to counter aggression with aggression. This last point cannot really carry weight. It can be said of many sound and orderly citizens that they are liable to meet aggression with aggression. In any event, the present was not a case where that occurred and, moreover, the appellant has no previous conviction for violent crime.

That his psychopathy creates the same degree of risk as that found to exist in **van Niekerk's** case, the evidence in the present matter simply fails to establish. One knows full well, from the law reports and common judicial experience, that psychopaths are frequently sent

to gaol. If they tend to pose a serious risk to prison staff and inmates by reason of their psychopathy this fact must be known to the relevant authorities and could have been proved. There was no evidence in this trial that the appellant posed such a risk. This Court has, in this exact context, warned against acting on nothing but speculation: **S v Lawrence**, 1991(2) SACR 57(A) at 59 f-h. Although, as already indicated, the Court in **van Niekerk's** case acted on the evidence of a strong possibility, there it was not really a case of **whether** that appellant's explosive aggression might constitute a serious danger but **when** it would do so.

In my assessment the evidence in this matter falls short of answering affirmatively the question whether the present appellant, given the available prison management, supervision and control, might pose a serious threat to gaol staff or fellow prisoners.

It follows, in my view, that life imprisonment will be sufficiently effective in protecting the public from the appellant and it is therefore a proper sentence. The further consequence is that the death sentence is not the only proper sentence.

This conclusion renders it unnecessary to say anything concerning the constitutionality of the death sentence or the provisions of the Constitution.

In the result I would set aside the death sentences on counts 1, 2 and 4 and in their stead impose life imprisonment on each of those counts.

C T HOWIE JA