

SOUTH AFRICA / JUDGMENT

S v Lawrence (381/90) [1991] ZASCA 72 (30 May 1991)

[1991] ZASCA 72

COURT

Supreme Court of Appeal

BEFORE

Hoexter, Eksteen, Goldstone

CASE / FILE NUMBER

381/90

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IN THE SUPREME COURT OF SOUTH
AFRICA

(APPELLATE DIVISION)

CASE NO.381/90

In the matter between

VICTOR JOHN LAWRENCE APPELLANT

AND

THE STATE RESPONDENT

CORAM: HOEXTER, EKSTEEN et

GOLDSTONE, JJ.A.

HEARD :

17 May 1991

DELIVERED: 30 May 1991

JUDGMENT

GOLDSTONE JA

I have had the privilege of reading the judgment of Eksteen JA. Having regard to the facts fully set out therein, the only question which falls to be considered is whether life imprisonment would be a proper sentence. If it would, then it cannot be held that the death sentence is the only proper sentence.

Psychopaths are detained at prison hospitals at 3

Zonderwater and Brandvlei Prisons. The former is situated near Cullinan and is presumably the one to which Dr Plomp referred in his evidence. Concerning that institution Dr. Plomp said the following:

"Kan ek daarby voeg, my laaste gesprekke met die persone in bevel by daardie afdeling het hulle vir my gesê hulle keur nou baie strenger wie hulle daar opneem en tensy psigopatie nie pertinent in die hofsaak genoem is nie en daar 'n aanbeveling gemaak word, kom so 'n persoon wat in die gewone gevangenis is nie maklik ter sprake as hulle iemand selekteer om soontoe oor te plaas nie. Maar wanneer daar 'n hofaanbeveling is dan gaan so 'n persoon ernstige oorweging kry vir opname in daardie afdeling."

Dr Plomp did not say from whom he received his information. I have no doubt that if a court sentences a person suffering from severe psychopathy to life imprisonment the prison authorities would take active and adequate steps to ensure that he was appropriately detained and treated. In

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any event the failure so to do, for whatever cause, does not commend itself to me as a reason, in itself, for imposing the ultimate penalty.

Dr Plomp was a defence witness. No evidence was led on behalf of the State to establish that a person such as the appellant cannot properly or adequately be controlled in prison, or that he would constitute a danger to other prisoners or to members of the prison service. The facts relating to the alleged attack by the appellant upon a warder at the Nigel Prison were not placed before the Court *a quo*. Accordingly, it would be both irregular and unfair to take hearsay evidence by a social worker into account in deciding upon a matter so extreme and final as the imposition of the death penalty.

Having regard to the passages cited by Eksteen JA from *S v Eiman* 1989(2) SA 863(A) at 873A-B, I respectfully agree that in a proper case, and upon adequate evidence, the

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probability that a convicted criminal is likely to constitute a danger to prison society is a factor which a court might take into account in the determination of a proper sentence. In the event that evidence is adduced establishing the probability that a dangerous criminal could not be prevented from escaping from custody, that, too, could be a factor which might properly be taken into account. In the present case there was no such evidence in respect of either of these issues. At the cost of repetition, I would stress that, in my opinion, more particularly in cases involving the death penalty, a court should not make findings prejudicial to an accused on the basis of mere speculation. A proper and adequate factual foundation should be laid if the State wishes such

considerations to be taken into account for purposes of sentence.

It remains to consider what Eksteen JA refers to

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as "the heinous and brutal murder ... so clamant for extreme retribution" In my opinion the ghastly and gruesome manner in which the appellant murdered the deceased and the particular way in which he indecently assaulted his former wife proclaim the very mental illness from which the appellant suffers. The murder was clearly not planned. The appellant's meeting with the deceased on the night in question was quite fortuitous.

In *S v Pieterse* 1982(3)SA 678(A), Rumpff CJ said at 685 C-D that:

"In die onderhawige saak is daar na my mening geen

verband tussen die psigopatiese toestand van

appellant en die verkragting en moord van die kindnie."

That finding distinguishes Pieterse's case from the present one. Here there is no question but that there is a direct causal connection between the psychopathy of the appellant and his behaviour on the night of the murder.

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In my judgment reasonable and right-thinking members of our society, fully cognizant of the mental condition of the appellant, would not demand that he be put to death for his crime. Dr Plomp agreed with an American psychiatrist that in respect of persons suffering from this kind of mental illness:

"After the age 30, the more flagrantly anti-social behaviour may diminish, particularly sexual promiscuity, fighting and criminality."

Concerning treatment of such persons, Dr Plomp's evidence reads as follows:

"Op hierdie stadium, sê u is die behandeling nog nie bewys as suksesvol nie? - Nee

Maar dit mag verander? - Dit mag verander." It is not unreasonable, in our day, to nurture the hope that medical science may yet find a drug or procedure to control, if not cure, this extreme kind of mental abnormality.

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In all the circumstances of this case, therefore, I am of the opinion that imprisonment for life is a proper sentence.

The appeal is upheld. The death sentence is set aside. There is substituted a sentence of imprisonment for life. Copies of the judgments in this appeal are to be served upon the appropriate official or officials of the Department of Correctional Services, and their attention is to be directed to the findings concerning the psychopathy of the appellant.

R J GOLDSTONE JUDGE OF APPEALHOEXTER JA) CONCURS

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

VICTOR JOHN LAWRENCE Appellant

THE STATE Respondent

Coram: HOEXTER, EKSTEEN et GOLDSTONE, JJ.A.

Heard: 17 May 1991

Delivered: 30 May 1991

J U D G M E N T

EKSTEEN, J.A. :

The appellant was indicted in the Witwaters-rand Local Division on a charge of murder and one of rape; it being alleged that on 24 September 1988 he raped and murdered S.K. in Boksburg North. In explaining his plea of not guilty on both counts, the appellant conceded having had intercourse with the de-ceased on the night she died, but alleged that it occurred with her consent. Because of the circumstances in which she was murdered, and to which I shall refer hereinafter, the trial Court could not find that the deceased had been raped. The appellant was consequently acquitted on that charge. He was however convicted on the charge

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of murder. Despite the fact that the Court found ex-tenuating circumstances, the learned trial Judge, in the exercise of his discretion, sentenced the appellant to death. On an application to him, the trial Judge grant-ed leave to the appellant to appeal to this Court on sentence only.

The evidence led at the trial reveals a particularly gruesome murder. It appears that the deceased was a young girl of 19 years of age at the time. She had just completed her N3 examination (the equivalent of a matriculation examination) at the Boksburg Technical College. Her mother described her as a shy, retiring child who did not smoke or drink. On the evening of 23 September 1988 the deceased told her

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mother that she was going to a "disco" with a female friend of hers who lived close by, and that the friend's father would bring them home. She left at about 6 p.m. and that was the last time that her mother saw her alive.

At about 4 p.m. the next afternoon Sgt. Scheepers of the South African Police came to tell her that her daughter's body had been found.

A young man, Arthur Charles Baker, told the trial Court that he and a friend of his, one Kedian, also attended the "disco" which was held at the East Rand Hotel in Boksburg East on the night of 23 September 1988. When they left at about 12.30 a.m. on the 24th they saw the deceased and the appellant walking from the hotel towards the station. He and his friend asked

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them where they were going, and when the appellant replied that they were going to Boksburg North, Kedian offered to give them a lift in his car.

Baker says that both the appellant and the deceased appeared to be perfectly sober, although he could notice that the appellant had had liquor. They carried nothing with them in their hands. Kedian drove the car and Baker sat next to him on the front seat. The appellant and the deceased sat on the back seat. The appellant appeared to be in an argumentative mood and argued with Baker as to whether the road they were travelling on went over or under a bridge. After they had travelled for about 15 minutes the appellant asked Kedian to drop them off. Baker, who had ascertained

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that the deceased lived in Eighth Street, offered to take them to her home. The deceased seemed inclined to accept this offer, but the appellant refused and insisted on alighting just where they were. He got out of the car and walked away without so much as a "thank you". The deceased, however, thanked them for the lift.

On Sunday 25 September Baker read a report in a Sunday newspaper about the discovery of the body of the deceased in a house which was in the course of construction. Her photograph appeared next to the article. He recognized the deceased at once and immediately went to the police to tell them what he knew.

The deceased's body seems to have been

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discovered at about 3 o'clock on the afternoon of Saturday 24 September in a room in a house that was under construction, and which was about 358 metres from where she lived. The walls of the house had reached roof height but the roof had not been put on yet. The discovery was reported to the police and at 4.30 that afternoon Sgt. Scheepers and Constable Hoyle repaired to the scene. Constable Hoyle took photographs of the body and the surrounding area which were handed in as exhibits at the trial. They reflect something of the horror of their discovery. A fuller description is given by Dr. Holloway who conducted the post-mortem examination on the body of the deceased. He described her as a slightly built young woman whose physical strength would

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have been much less than that of the appellant. Apart from several abrasions and bruises to the head, face, and both arms the district surgeon found that she had been eviscerated through her vagina and perineum - i.e. her omentum and intestines had been forcibly pulled out through her vagina and perineum. The vagina appeared to have been cut or torn from top to bottom destroying the anterior aspect of the vulva, the perineum and the rectum. Through this gaping hole the intestines and the uterus had been pulled. The uterus itself was still attached to part of the vagina by the connecting tissue of the cervix, but it had prolapsed through the introitus, and was clearly visible on the outside of the body as appears, too, from the photographs. Constable Hoyle, who took the

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photographs, gathered the omentum and intestines which were lying on the ground in front of the body, and took them in a plastic bag to the district surgeon. The photographs depict the pool of blood in which the body was found as well as the blood-spattered wall in front of the body.

On the pavement in front of the house where the body of the deceased was found, Sgt. Scheepers found a small ornamental cross which, according to her mother, the deceased habitually wore round her neck. The chain to which it had been attached was not there. In the house, close to the body of the deceased, a medallion was found, which, it is common cause, belongs to the appellant.

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Warrant Officer Holmes arrested the appellant

shortly after midday on Sunday 25 September 1988 on a charge of murder and handed him over to Sgt. Scheepers. That same afternoon he was examined by Dr. Fletcher. Dr. Fletcher found three linear abrasions on appellant's left shoulder, and another three on the left side of his epigastrium. There were also abrasions on the axillary fold behind the right shoulder, on his right elbow, on

the dorsum of his right wrist, his left shin and lower lumbar area. Punctate abrasions were found on the dor-sum of his right hand, right finger, both knees and dorsum of the left wrist. There were also punctate abrasions on the left side of his neck which resembled fingernail abrasions. The frenulum of his upper lip

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was torn by some form of violence which pushed the upper lip away from the gum.

The next day, 26 September, the appellant took Sgt. Scheepers to various places between the house where the deceased's body had been found and his own home, and at each of these places articles of clothing and other possessions of the deceased were found. Thereafter the appellant was detained in the police cells at Benoni until the end of October when he was transferred to the prison at Nigel.

On 2 November appellant asked Sgt. Scheepers to come and see him and he then handed Scheepers a hand-written document purporting to explain what had happened on the night the deceased was killed. In it he conceded

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having met the deceased at the "disco" and having been given a lift by two men in a white Passat as far as the Boksburg North Hotel. From there, he says, he and the deceased walked to a church where he consumed some brandy from a bottle which he had with him. They then continued to an empty house where they both got un-dressed and had intercourse. After they had finished he heard the deceased saying "Vic pasop", and at the same time something hit him and knocked him unconscious. When he came to he found the deceased lying in a pool of blood. After he had ascertained that she was dead he gathered up all their clothes that were lying about and ran home. On the way he discarded various items of clothing that belonged to the deceased.

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On 12 December 1988 appellant was brought before Mr. Botha, a magistrate in Boksburg, and was re-ferred to a mental hospital for observation. At the conclusion of these proceedings the appellant asked whether he could speak to the magistrate alone. Mr. Botha asked him what he wanted to say whereupon the appellant handed him a handwritten document headed "Pleitverduideliking". In this document he repeated that he did not know how the deceased had met her death as he had been knocked unconscious by a third person or persons.

At the commencement of the trial on 26 September 1989 he pleaded not guilty to both the charges put to him, and then handed in a lengthy statement

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setting out the basis of his defence in terms of section 115 of the Criminal Procedure Act 51 of 1977. In his explanation he again conceded having met the deceased at the "disco". He says the two of them spent the night

dancing and drinking beer. Together they consumed 8 bottles of beer.

Just before the "disco" came to an end that night he says he bought a bottle of brandy and two bottles of beer which he and the deceased intended drinking on their way home. He again refers to their having been given a lift to the Boksburg North Hotel, before continuing on their way to the deceased's home. As they walked

along, he says, he consumed the bottle of brandy and she drank the two beers. He says he also swallowed

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several tablets which, in his statement he calls "Perig-non" tablets, but which later transpired to be Peracon tablets. Peracon tablets are described as being a preparation used to control coughing. It is a cough centre depressant, but may also depress other vital centres and, taken in sufficient quantities, may cause bizarre thought disturbances.

The appellant then goes on to describe how, after consuming all the liquor, they entered the house which was under construction, and had intercourse. This was with the consent of the deceased. He had told the deceased about his wife from whom he was divorced, and when, after their intercourse, the deceased referred to his wife as a harlot, he lost his temper.

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He pulled the deceased up and when she fell down again, he took a stone which he thrust up her vagina. She grabbed him by his shoulders. He withdrew the hand with the stone and then put his hand in her body again - and may have done so several times. When she showed no signs of life he took fright and ran away. He says he had no intention of killing the deceased but lost his temper completely when the deceased insulted his former wife.

Earlier that day he says he had been drinking and smoking dagga, and before taking the Peracons he injected himself with Welconal and drank some Phensy-dil. He ascribes his otherwise inexplicable behaviour in killing the deceased in the way he did, to the consumption of the liquor and the drugs.

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The appellant's allegation that the deceased had consumed liquor at the "disco" and again on their way to the scene of her death is not borne out by the analysis of a blood sample taken from her body at the post-mortem. This analysis showed no traces of alcohol in her blood, and therefore tends to contradict the appellant's assertion.

In his evidence at the trial appellant again related how he smoked dagga on the morning of 23 September, and then in the afternoon drank 3 or 4 double brandies until about 6 p.m. Then he bought some drugs -pinks (i.e. Welconals), Phensydil and Peracons - from a dealer, and in an alley injected the pinks into an artery in his thigh. He then went back to the place

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where he had been drinking earlier and continued drinking brandy until about 8 o'clock. He and one Clive, a friend of his, then drove to Johannesburg to fetch two girls with whom they had apparently made some arrangement. The girls, however, were not there, so they drove back to the house in Boksburg, and again started drinking. Later on Clive took appellant to the East Rand Hotel and dropped him there. He met the deceased and, in the course of their association at the hotel he drank about 8 bottles of beer and the bottle of Phensydil. The deceased, he said, took no more than a sip of his beer every now and then. Just before midnight he bought a bottle of brandy and two bottles of beer, which he took with him when he and the

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deceased left the hotel. He pushed the bottle of brandy into his trousers under his belt and concealed the two bottles of beer under his jacket, and that, he suggests, is why Baker failed to see them. He cannot explain how Baker could not have noticed his degree of intoxication.

After being dropped by Baker and Kedian, he and the deceased walked to a church where they sat and drank the liquor he had brought with him. In his evidence-in-chief he says that he drank the whole bottle of brandy and swallowed 5 or 10 Peracons. He was not sure whether the deceased drank the two beers or not. In cross-examination he was not sure whether he had consumed all the brandy, and thought that the

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deceased could have had some of the beer.

They then went to the house which was under construction there they had intercourse. He then saw someone looking through a window at them, so they gathered up their clothes and went to the house next door which was also under construction. He was not sure whether they had intercourse there again, but this was where the deceased made what he thought was a derogatory remark about his divorced wife. He was not sure what the remark was but it sounded as

though she had referred to his wife as a harlot, although she may have said something else. He then hit the deceased and when she fell he pushed a stone up her vagina. He professed not to know whether she screamed or put up

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any form of resistance, but then seemed to think that she grabbed him by his shoulders. He put his hand up her vagina but does not know what he did. In cross-examination he says that when he eventually removed his hand from her vagina she appeared to be dead. He cannot remember where he sustained any of the scratch-es and injuries found by Dr. Fletcher.

The trial Court found the appellant to be a "pathological liar" and rejected his evidence in toto. Besides the two earlier statements of the appellant which fundamentally conflict with his testimony in Court and which the appellant concedes were a pack of lies, his evidence was so bad and so unsatisfactory on a mere reading of it, that I am not persuaded that

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the trial Court was wrong in rejecting it out of hand.

From the evidence of the appellant it

appears that on 31 October 1984 he was sentenced to one years imprisonment for the theft of a motor cycle; on 9 January 1985 to two years imprisonment on two further counts of the theft of motor cycles; and on 15 May 1985 to another two years imprisonment on a similar count. Portions of the sentences were suspended and in effect the appellant spent 18 months in gaol before being released on parole on 9 August 1986.

On 29 February 1988 he was admitted to Weskoppies Mental Hospital in terms of a reception order issued by the magistrate of Boksburg. There he was examined i.a.

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by Dr. Holloway who diagnosed him as being a dangerous psychopath with suicidal tendencies, and recommended his reception in an institution for treatment. However, on 21 March 1988 the appellant jumped through a window and absconded. On 1 August he committed a serious sexual assault on his estranged wife by dragging her into a room at a boarding house where she was living, and, after having forcibly had intercourse with her, tying her hands to the bed and pushing a 500 ml. Coca-Cola bottle up her vagina. Three days later on 4 August 1988 he was again admitted to Weskoppies Hospital but declined any form of treatment and left on 11 August. On 1 November 1988 - i.e. after the commission of the offence presently under consideration -

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he was sentenced to one years imprisonment for the in-decent assault on his wife.

The present offence was committed on 24 September 1988 and on 12 December 1988 he was committed to Weskoppies Hospital for observation in terms of section 77 of Act 51 of 1977. There two psychiatrists, Drs. J. A. Plomp and C. le Roux found that although he had an antisocial personality disorder he was capable of understanding court proceedings so as to make a proper defence, and that at the time of the commission of the offence he was not affected by any mental disturbance or defect so as to prevent him from appreciating the wrongfulness of his act, or from restraining him from the commission of the offence. On 24

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September 1989 another psychiatrist, Dr. Verster, was commissioned by the appellant's advisers to examine him, and Dr. Verster came to the same conclusion as Drs. Plomp and le Roux. Dr. Plomp was the only one of these three psychiatrists who gave evidence at the trial. He was called by the defence and I shall return to his evidence later.

The defence also called Mrs. Krynauw, a social worker attached to the Weskoppies Hospital, and Dr. de Miranda, the director and head of clinical services of "Sanca" in Johannesburg, and a part-time lecturer on the subject of alcohol and drugs at the University of the Witwatersrand. Mrs. Krynauw had compiled two reports on the appellant - one during

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January 1988 when he was admitted to Weskoppies Hospital for the first time, and another during December 1988 when he was committed for observation. In her reports Mrs. Krynauw deals with the appellant's unhappy childhood. At the age of about 3 or 4, after his father's death he was declared to be a child in need of care and placed in various institutions. His mother was either unable or unwilling to care for him and what parental love and care he received as a child came from his maternal grandmother. At as early an age as 7 or 8 he began manifesting exceptionally aggressive behaviour. That this aggressive streak in his character has persisted through the years is borne out not only in Mrs. Krynauw's reports, but also

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by the appellant's own evidence at his trial. He deposed to having obtained work as a carpenter on leaving school, and to having been "fired" by his employers for having hit his brother, Anton. Thereafter he says he worked at various places - but never for longer than 9 months

- and was generally discharged for fighting. On 1 November 1988, as I have indicated, appellant was sentenced to one years imprisonment for the indecent assault perpetrated on his former wife, and when Mrs. Krynauw compiled her report on 25 December 1988, she referred to the fact that the appellant had physically attacked a prison warder in the prison at Nigel and that criminal proceedings in respect of this assault

were apparently pending.

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Dr. de Miranda's evidence' referred prima-ri-ly to the effect which the various drugs appellant alleged he had used that night would have on a person. All the drugs

- Peracon, Welconal and Phensydil - were depressants, which, like alcohol, depresses the vital centres of the central nervous system, thereby affecting the better developed judgment of a person. In South Africa, Dr. de Miranda says, Welconal is only distributed in tab-let form, so before it can be injected in the way appel-lant said he did, the tablets had to be crushed and then mixed with some fluid, usually water. It is then drawn up in a syringe and injected intravenously. Nowhere in his evidence did appellant depose to crushing and mixing the Welconal tablets in a fluid, but rather

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left the impression that he was talking about some-thing already in a fluid form. The effect of the alco-hol taken together with any of these drugs would mere-ly serve to aggravate the effects. Dagga taken with alcohol, he says, would tend to exaggerate the appel-lant's aggressive tendencies.

In his evidence Dr. Plomp pointed out that if the appellant had smoked dagga during the morn-ing of the day in question the effect would have worn off by the time he committed the murder. So, too, the effect of the Welconal, which he said he in-jected at about 6 o'clock that evening, would have worn off after about 4 hours - i.e. by about 10 p.m. The effect of the dagga and of the Welconal, even if

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appellant's evidence in this respect be accepted, can therefore,for all practical intents and purposes, be left out of account. On the appellant's evidence, then, we are left only with the consumption of the alcohol, the Phensydil and the Peracons. His evidence on this aspect of the case is as unreliable and mendacious as the rest of his evidence. As his own witness, Dr. Plomp, points out, if the appellant had consumed the 8 beers he says he did at the "disco", and then a bottle of brandy after he had left the hotel, he would have been in a comatose state and verging on death. That amount of alcohol, he said would be lethal. By virtue of the effects of Phensydil

and Peracon, the ingestion of these drugs could only have aggravated the condition,

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and could not have ameliorated it in anyway. The appellant's evidence in this regard therefore cannot be true. Moreover these deliberate lies would seem to be a conscious attempt to excuse him from all criminal responsibility for the death of the deceased, or at least to reduce his moral culpability for the deed. Baker's evidence that the appellant was not obviously under the influence of liquor when he saw him, and that he carried nothing with him at the time, was accepted by the trial Court, and would seem to present a much more reliable reflection of the appellant's condition.

So too appellant's suggestion that the deceased not only consumed beer with him at the "disco", but also drank two further bottles of beer after

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leaving the hotel, was shown to be devoid of all truth. Again this would seem to have been a deliberate lie designed to lend credence to his allegation that she willingly accompanied him into the deserted house in order to have intercourse. The evidence of her mother and the fact that she had not consumed any alcohol, and that the cross from her necklace was found on the pavement outside the house, tends to militate against such a suggestion.

In finding extenuating circumstances the learned trial Judge remarked that he and his assessors had initially been of the view

"that the horrific crime committed by the accused merited a finding of no extenuating circumstances"

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but that eventually "with some trepidation" they had come to the conclusion that they were bound to find extenuation. After referring in extenso to the judgment of this Court in *S. v. Sibiyi* 1984 (1) SA 91 (A) the learned Judge concluded:

"We accordingly find, as I have said, with some difficulty, that this is a border-line case but that extenuating circumstances in respect of count 1 are unanimously found to have been established on the balance of probabilities being that:

When he murdered the deceased the accused, although he knew what he was doing, suffered from a mental defect in the form of severe psychopathy; and

that such psychopathy, coupled with the in-take of alcohol and probably the use of drugs on the day of the commission of the offence, diminished the accused's moral as opposed to his legal culpability for the crime."

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When it came to sentence however the trial Judge, in the exercise of his discretion, sentenced the appellant to death, remarking:

"I have considered all the circumstances of this particular case and I am of the view that the accused is an absolute menace to society and that ... he should be removed from society and that is the only way in which this horrible murder can be expiated."

The concept of "extenuating circumstances"

has been replaced by the provisions of Act 107 of 1990, ("the Act") and in an appeal against a sentence of death this Court is now empowered to set aside the sentence and to impose such punishment as it considers to be proper if it is of the opinion that it would not itself have imposed the sentence of death. (Section 13(b)).

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Moreover in exercising its discretion this Court must have regard to the provisions of section 4 of the Act which allows a trial Judge to impose the death sentence only when he is satisfied, after having due regard to the mitigating and aggravating factors found by the trial Court that the sentence of death is the proper sentence (section 4). In *S. v. Nkwanyana*

[1990] ZASCA 95; 1990 (4) SA 735 (A) at p. 745 D - G Nestadt J.A. held, in considering whether the death sentence is the proper sentence, that:

" ... I agree with the view of E.M. Grosskopf J.A. in *S. v. Senonohi*

[1990] ZASCA 93; (1990 (4) SA 727 (A) at p. 734 E - F) that regard will be had to the main purposes of punishment, namely deterrent, pre-ventive, reformatory and retributive. This means that in deciding whether the death sentence is the proper one, consideration will be given to whether these objects cannot properly be achieved by a sentence other than the death

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sentence (generally a lengthy period of im-prisonment). If they can, then the death sent-ence will not be passed. This is because 'the proper sentence' (unlike 'a proper sentence') must be interpreted to mean 'the only proper sentence'. It follows that the imposition of the death sentence will be confined to except-ionally serious cases; where (in the words of Nicholas A J A in S v J 1989 (1) SA 669 (A) at 682 D, albeit in a different context) 'it is imperatively called for'."

In the present case the appellant was, in the view of all three psychiatrists who examined him, a psychopath. Dr. Plomp was of the view that he would be classed as a "severe case of psychopathy". When asked if he would classify him as a "five star psychopath" Dr. Plomp replied that he would prefer to put him in the "four star" category. The essential feature of psychopathy, or anti-social personality disorder as

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it is currently termed in psychiatric literature, is, in Dr. Plomp's view "a pattern of irresponsible and anti-social behaviour beginning in childhood or early ado-lescence and continuing into adulthood People with anti-social personality disorder tend to be irri-table and aggressive and get repeatedly into physical fights and assaults They generally have no remorse about the effect of their behaviour on others". They are egocentric and manipulate other people for their own ends without any regard for their feelings. They are inclined to be impulsive with a low frustration tolerance, and insist on the immediate satisfaction of their wants. They do not learn from experience. For that which they are punished today, they will do

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again tomorrow. There is therefore no hope of punish-ment leaving any reformatory effect on them.

The appellant, as I have indicated, shows a high degree of psychopathy and, in Dr. Plomp's view, the prognosis of improvement, even with treatment, is bad. This, he says, makes the appellant an extremely dangerous person in society - not only for women but also for men. In fact Dr. Plomp considers that he would pose a dangerous threat to any form of society, and even in a prison society he would constitute a danger to his fellow prisoners. His behaviour, says Dr. Plomp, is predictable only in its unpredictability.

A psychopathic disorder is defined in section 1 of the Mental Health Act, No. 18 of 1973 as:

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"a persistent disorder or disability of the mind (whether or not subnormality of intelligence is present) which has existed in the patient from any age prior to that of eighteen years and which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and 'psychopath' has a corresponding meaning."

The section also includes a psychopathic disorder under the concept of a mental illness. This, however, Dr. Plomp points out, does not mean that he is a psychotic, or that it makes him dull-witted or stupid. He does not suffer from delusions or other comparable mental illness which could deprive him of the responsibility of appreciating the wrongfulness of his act or of acting in accordance with such appreciation. He fully appreciated the wrongfulness of his act.

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Two attempts were made to determine the appellant's intelligence quotient (I.Q.). On the first occasion an average of 90 was recorded. The second attempt yielded a lower figure, but in Dr. Plomp's view very little reliance could be placed on this result because the appellant was unco-operative and, deliberately tried to "sabotage" the result. In the light of these tests Dr. Plomp was of the opinion that the actual I.Q. of the appellant could be about 95.

It was put to Dr. Plomp that a 1954 report of the World Health Organization classified persons with an I.Q. of 68-85 as "borderline mental retardation" -i.e. persons who "possess little or no powers of abstract

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thinking" and who "are virtually incapable of purpose-ful behaviour". Dr. Plomp did not agree with this classification and pointed out that many people within that I.Q. range - i.e. 68-85 - conducted themselves well enough in society; held down jobs and earned a living; married and had children and behaved in a responsible manner. Appellant's true I.Q. was therefore considerably higher than persons falling in that group. The question why the appellant should have wanted to sabotage the tests so as to reflect a false and lower I.Q. immediately presents itself. Here too it seems to me that the appellant was sufficiently intelligent - or rather shrewd enough - to realize that the more dull-witted he could appear to be, the less

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a court would assess his blameworthiness for the deed. This inference is consistent with the tendency of a psychopath to manipulate others to his own advantage, and with Dr. Plomp's observation that psychopathy does not make one dull-witted or stupid.

The allegation by the appellant that his aggression towards the deceased was provoked by her reference to the appellant's former wife as a harlot (subsequently watered down to "something that sounded like a harlot") rests entirely on his own evidence -evidence which has been shown, as indicated above, to contain deliberate perversions of the truth designed to excuse his actions or to reduce his blameworthiness. Seen in the light of his psychopathic intolerance of

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any frustrations of his desires, his aggressive behaviour may as easily have been provoked by the deceased's re-fusal to have intercourse with him. That this inference is the more probable one is borne out by the fact that she was a young, shy, retiring girl who hardly knew the appellant, and that she was perfectly sober at the time.

It was common cause in the argument before us that the only alternative to the death sentence worthy of consideration in the present case was imprisonment for life. The provisions of section 18 of the Act, which is substituted for section 64 of Act 8 of 1959, makes life imprisonment a much more effective means of removing a dangerous criminal from society

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than had formerly been the case. (S. v. Mdau [1990] ZASCA 126; 1991 (1) SA 169 (A) at p 176 D - 177 C.) If, in the light of these provisions, life imprisonment would be a proper sentence in this case, then clearly the death sentence cannot be said to be the only proper sentence.

In finding extenuation the trial Court concluded that the appellant "suffered from a mental defect in the form of severe psychopathy", which, "coupled with his intake of alcohol and probably the use of drugs" diminished his moral, as opposed to his legal,

culpability. As I have indicated this "mental defect" did not render him incapable of appreciating the wrongfulness of his act or from acting in accordance with such appreciation. What makes him different from other people is that his

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will to resist the temptation to commit unethical or criminal acts is less strong than in an ordinary person. He succumbs more easily to his wrong or evil desires due to his insensitivity to the feelings of other people. (Cf. S. v. Mnyanda 1976 (2) SA 751 (A) at 763 F - G.) In this sense his personality may be said to be impaired and anti-social. But he is not psychotic or insane, and he can control his emotions and anti-social impulses. That is why psychopathy - and even severe psychopathy - does not relieve him from criminal responsibility for his actions, and at most can serve as a feature which to some extent may diminish his moral culpability. (S. v. Mnyanda (supra) at p 766 H.) In a case such as the present one it must certainly be taken into account

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as a mitigating factor to be weighed together with the aggravating factors in determining the proper sentence.

It is common cause, as I have indicated, that the appellant is such a dangerous and unpredictable person, and such a threat to society that the prevent-ive aspect of punishment must be a dominant considera-tion, and that the appellant must be removed from so-ciety in general. This can be achieved either by life imprisonment or by the death sentence. According to the evidence of Dr. Plomp the prison authorities main-tain a psychiatric hospital at Cullinan where psycho-paths, may be kept. The authorities have adopted a

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very strict system of selection for any vacancies which may occur, so that even a recommendation by a court will not necessarily ensure his reception. What the crite-ria for selection are, was not traversed. In any event Dr. Plomp was of the opinion that this hospital - as indeed any other institution - has not achieved much success in its treatment of psychopaths, and he con-sidered the prognosis for improvement in the case of the appellant in particular, as bad.

The prospect is therefore that the appel- lant will be kept in an ordinary prison, where, on Dr. Plomp's evidence, he will pose a potential danger to the other inmates. As appears from the report of Mrs. Krynauw he has already attacked a prison warder

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shortly after his admission to the Nigel Prison in November or December 1988. In S. v. Eiman 1989

(2) SA 863 (A) at p 873 A - B, M.T. Steyn J.A. remarked:

"Ons Howe het alte dikwels te doen met die so-genaamde 'tronkmoorde', by vele waarvan geweld-adige psigopate betrokke is. Die gevangenis-gemeenskap is ook geregtig om teen sulke gevare beskerm te word."

The learned Judge then went on to say:

"Sou appellant uit die gevangenis ontsnap sou hy 'n gevaar vir die breër gemeenskap ook wees, en ontsnappings uit ons tronke is geen onbe-kende of rare gebeurtenis nie."

Because of the unconscionable and unscrupulous nature of the appellant's psychopathic personality and its tendency to manipulate others for the attainment of his goals, I do not think that imprisonment - even life imprisonment - can be an adequate

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protection of the safety and the lives of others. The appellant has already manifested a fairly consistent degree of criminality as evidenced by his previous convictions, as well as a consistent degree of aggression, as evidenced by his frequent dismissals from employment because of his propensity to violence against fellow-employees, and culminating in the vicious assault on his former wife and the present murder. There is no indication that punishment has deterred him in any way or that it is likely to do so in the future.

Moreover it seems to me that this is a case where it may well be said that the enormity of the heinous and brutal murder of this young girl is so great, and so clamant for extreme retribution

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"that society demands the appellant's destruction as the only expiation for his wrongdoing"

(per Holmes J.A. in S. v. Matthee 1971 (3) SA 769 (A) at 771 D). This Court in S. v. Pieterse 1982 (3) SA 678 (A) also had to deal with the murder of a young girl by a certifiable psychopath, and in confirming the death sentence imposed on the appellant Rumpff C.J. remarked at p 688 C that:

"Na my mening strook die vonnis met wat die ge-meenskap vandag in hierdie land verlang."

That was essentially the view of the learned trial Judge in this matter, and it is a view which I share.

In the result therefore, I have, after serious consideration, come to the conclusion that life imprisonment would not be a proper sentence, and

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that the death sentence is in fact the only proper sentence. I would therefore dismiss the appeal.

J.P.G. EKSTEEN, J.A.

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