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ARTHUR GENERALS

APPELLANT

and

THE STATE

RESPONDENT

Judgment by:

NESTADT, JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ARTHUR GENERALS

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, NESTADT et MILNE JJA

HEARD: 11 MAY 1989

DELIVERED: 1 JUNE 1989

JUDGMENT

NESTADT JA:

The issue to be decided is whether the trial judge exercised his discretion to impose the death sentence in a proper and reasonable manner. Unless one can be satisfied or convinced he did not, interference with the sentence is not

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justified (S vs Pieters 1987(3) S A 717((A) at 727 F - 728 C; S vs Kock en h Ander 1988(1) S A 37(A) at 41 B - C).

It is necessary, in the first place, to consider whether COETZEE J misdirected himself. In this regard it must be remembered that a mere misdirection does not suffice to warrant interference. It must be of such a nature, degree or seriousness that it vitiates the court's decision on sentence (S vs Pillay 1977(4) S A 531(A) at 535 F). I am unable to agree with MILNE JA that an exemplary sentence in the sense used by him was imposed. Lieutenant Zeelie's statistics were referred to primarily in relation to the frequency of housebreakings. In any event the ten rapes which Zeelie said had accompanied housebreakings during a period of just over a year was not an insignificant figure. It served to reinforce the need to take the deterrent aspect of punishment into account. And, where this occurs, the element of example will inevitably feature in

the sentence (R vs Swanepoel 1945 A D 444 at 455). This is because, to achieve the object of deterrence, the sentence must demonstrate to a potential offender the consequences of violating the law.

The other misdirection which was relied on by appellant and which is found by my Brother MILNE to have taken place relates to the trial judge's treatment of appellant's prospects of rehabilitation. His statement that appellant was "beyond that" is unfortunate. It was not fully justified. But I do not think that it evinces a material misdirection. Its positive nature must be read in the light of two earlier, less dogmatic observations, viz, "from that record one gains the impression that there would be difficulty to rehabilitate accused 4. He makes a living selling dagga... It does not seem as if a long period of incarceration would rehabilitate accused 4". Appellant's previous convictions appear from the passage of the

trial court's judgment on sentence quoted by MILNE JA at pp 7 - 8 of his judgment. It is apparent that appellant has a strong criminal propensity which reduces his chances of reform. Two previous convictions for theft did not deter him from stealing (a motor vehicle) for a third time. And the sentences imposed for two previous sexual offences did not deter him from raping complainant in this case. His sentences included strokes, committal to a reformatory, a postponement of sentence in terms of sec 297(1)(a)(ii) of the Criminal Procedure Act, 51 of 1977 and imprisonment for three years. The rape of complainant occurred relatively soon after appellant's release from serving a substantial portion of this sentence, namely, almost two years. There was no indication of any remorse by appellant. In support of his plea of not guilty he denied participating in the crime. In any event, one cannot assume that the judge a quo would not have been aware that the possibility of rehabilitation did not

mean that a long term of imprisonment was, for that reason, the only appropriate punishment (S vs Sithole en Andere 1983(3) S A 610(A) at 615 B - C); the gravity of the offence may override that consideration (S vs Mooi 1985(1) S A 625(A) at 631 A). This, I think, was the position here. It seems to me that COETZEE J's view as to appellant's chances of reform was by no means the major factor which caused him to exercise his discretion in favour of the death sentence. What rather influenced him were the circumstances of the crime itself, its effect on complainant, and the need to protect society by a sentence which, as he put it, should "express the law-abiding community's feeling of revulsion and disgust of the deed". It is obvious that the learned judge appreciated that the death sentence should only be imposed if the rape was a serious one.

This brings me to the remaining issue of whether, in the absence of any material misdirections, it can be

said that the trial judge failed to exercise a proper discretion in imposing the death sentence. The test in deciding this is whether it could reasonably have been imposed (S vs Pieters, supra, at 734 E and 735 H). In my view, the answer is in the affirmative. This was a serious case of rape. Appellant was armed with a knife. He threatened to kill complainant if she did not have intercourse with him "properly". She was a refined and educated person. He had previously dragged her from her bedroom. This he did by means of a skirt which was tied round her neck. She was thereby nearly choked. Appellant had tied her hands behind her back. She was in the nude. There was no question of appellant being under the influence of liquor. He was a relatively mature person of 22 or 23 when he committed the offence. And, of course, he had a previous conviction for rape. This was an aggravating feature (R vs Zonele and Others 1959(3) S A 319(A) at 330 D). So, too, was the fact that the crime was

committed (late at night) in the privacy of complainant's home (S vs V 1972(3) S A 611(A) at 614 A; S vs B 1981(4) S A 851(A) at 857 B) - and, one may add, in the virtual presence of her husband. There was no evidence (and it is unlikely) that appellant's lust arose on the spur of the moment, ie immediately before he raped complainant. It was probably formed some time earlier when he saw her being raped by two of his confederates. After her ordeal she was, according to the testimony of her husband, "very, very shocked". Her arms were badly bruised. She suffered psychological effects. Her husband said that for some time she was "extremely nervous"; even at the time of the trial (some 15 months later) she "found it difficult to spend time alone at home". Complainant herself testified that "never a day goes past that the whole thing does not appear in my mind at some stage". Initially her sex life with her husband was adversely affected. The greater part of these consequences must

have resulted from the rape.

I am, in the result, not convinced that the trial judge did not exercise his discretion in imposing the death sentence on appellant in a proper and reasonable manner.

The appeal is therefore dismissed.

A handwritten signature in dark ink, appearing to read "Nestadt", is written over a horizontal line.

NESTADT, JA

VAN HEERDEN, JA - CONCURS

/wlb

Case No 498/88

SUPREME COURT OF SOUTH AFRICAAPPELLATE DIVISION

In the appeal of:

ARTHUR GENERALS

Appellant

and

THE STATE

RespondentCORAM: VAN HEERDEN, NESTADT et MILNE JJADATE OF HEARING: 11 May 1989DATE OF JUDGMENT: 1 June 1989

J U D G M E N TMILNE JA/.....

MILNE JA:

With leave of the trial court the appellant appeals against the death sentence which was imposed upon him for rape.

He and three others were charged with rape (count 3), housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 (count 1), attempted murder (count 2), unlawful possession of a firearm (count 4) and escaping from lawful custody (count 5). All these offences, with the exception of the escaping charge, were alleged to have been committed on 14 December 1986, at the home of Mr and Mrs D at Rivonia in the district of Randburg. The appellant's co-accused were convicted on various charges, but only the appellant was convicted on the rape charge. The court found that the

complainant on the rape charge (Mrs D) was raped four times in succession by the intruders into her house. It was also found that the intruders had a common purpose to break in and rob but not to commit rape. The court found it likely that "... only on being faced with a young woman in the nude was the intention to rape formed." The appellant was the only one of the rapists whom Mrs D was able to identify and as there was insufficient evidence to prove the identity of the other rapists the court found that it was not proved that any of the other accused was guilty of rape.

The appellant was also found guilty on all the other charges. On the charge of housebreaking with intent to rob and robbery with aggravating circumstances he was sentenced to 10 years' imprisonment; on the charge of attempted murder he was sentenced to 2 years' imprisonment; on the charge of unlawful possession of a firearm he was

sentenced to imprisonment for one year; and on the charge of escaping from custody he was sentenced to 6 month's imprisonment. The correctness of the convictions and the sentences, other than that imposed on the charge of rape, was not in issue.

Mrs D was a young married woman aged 33 who had a baby of fourteen months at the time the rape was committed. At that time she and her husband (who was the complainant on the attempted murder charge) lived in a house in Rivonia in the district of Randburg. The circumstances in which the rape, the attempted murder, the housebreaking with intent to rob and robbery were committed appear from the following extracts from the judgment of the trial court:

"Some time later, approximately 23h00, a time estimated by Mr D on his reconstruction of the events, they woke up and saw four or more black men surrounding their double bed. Mr D jumped up and made a valiant attempt to fight them off. He was

overpowered and stabbed in the back, the blade of the knife penetrating into his lung. Lights were switched on and immediately off again. Because the room curtains facing the street were open, these were drawn closed and the main lights were switched on again. Mr D was thrown face down onto the bed. His hands were tied up behind his back with electric cord. A belt was placed tightly around his neck with an intruder sitting holding the other end and in his other hand a knife. Whenever he tried to move the belt was tightened. He was totally within their power. They constantly threatened to take his wife away. Mrs D had her hands tied behind her back with her dressing gown cord.

At this stage her wedding and engagement rings were forcibly removed from her hands. The intruders demanded money. Upon being told there was no money they emptied her handbag onto the floor. This did not contain any money. They were angry. One of the intruders discovered a bunch of keys. He demanded that he be shown which keys fitted the garage door and the motor vehicles. Mr D pointed them out. When they were told that there was no safe in the house, they demanded guns. Mrs D was dragged away to point out an old 12-bore shotgun which was an heirloom. This was taken by them. She was thrown on the floor on her husband's side of the bed. Her hands were still tied. One of the intruders came along with a knife and cut off her body the pair of pants she was wearing. She was then probably in the nude. This person then took the plastic container of a sanitary

tampon and placed it into her private parts. This was removed before the first rape commenced. She was then dragged away to her side of the bed where she ended up on the floor lying on a continental pillow. She was then raped by the first assailant. He had full intercourse with her, obviously without her consent. While he was busy she heard another of the assailants say: 'I am next, brother.' After the first person went away the second assailant came to her and had intercourse with her. During these episodes of rape she clearly remembers one of the assailants coming into the bedroom with her baby in his arms. She was frightened because she thought he was going to harm her child. She had a good look at his face because of her concern for her child. (This man was the appellant.) He, however, walked away with the child and the rapes proceeded.

Mr D was all the time aware that his wife was being raped on the floor close to him. The person who was carrying the baby came back after a while and using a skirt which had been tied around her neck, dragged her pillow and all off to the study next to the main bedroom. This person proceeded to rape her on the floor of the study while holding a knife against her neck, saying that she must have intercourse properly, otherwise he would kill her.

While she was being raped in the study somebody else was in there rifling the drawers and cupboards. She clearly remembers that during the episode in the house there were at least two persons with knives. It is clear that while she was being raped and her husband kept under

continuous surveillance the house was methodically stripped of clothing, appliances and valuables mentioned in count 1.

She was then left lying locked up in the study. She managed to untie the cord around her hands. After shouting to her husband for assistance he managed to struggle up and off the bed and managed to unlock the study door which had been locked from the outside. She was then still in the nude.

After taking their child with them, they left the house to go to neighbours to contact the police because their telephone wires were cut."

The learned trial Judge dealt with the personal circumstances of the appellant as follows:

"Accused 4 is a 24-year old male. He has never had any schooling. He has a very long record of previous convictions. All these convictions are relevant to the present convictions. In 1979 he was convicted of theft and sentenced to four strokes. In 1980 he was convicted of theft of a radio and cassettes and sentenced to submit himself to a welfare officer for five years. The sentence was postponed. In 1981 he was convicted of motor car theft and sentenced to go to a reformatory. In 1983 he was convicted of intercourse with a minor girl and imposition of sentence was postponed for three years. On 8 June 1984 he was convicted of rape which involved physical violence and sentenced

to three years' imprisonment. He was unconditionally released on 1 May 1986 six months before the present crimes were committed. From that record one gains the impression that there would be difficulty to rehabilitate accused 4."

In sentencing the appellant on the rape charge the trial Judge said the following:

"It has been argued that this is not such an extreme case of rape that I should exercise my discretion and impose the supreme penalty. However, the question must be asked: Where is the dividing line? In 1988 (1) SA there are two cases in the appellate division, S v Kock at page 37 and S v S at page 120, which dealt with this specific problem. I found a lot of guidance in these two cases. In Kock's case the rape of the female was also committed during a housebreaking and robbery which took place. In that case the woman was six months pregnant and despite her complaint that she was pregnant she was dragged outside and raped. She did not sustain any physical injuries either and there was evidence that she would probably recover from the psychological consequences of the rape.

In S v S it was specifically held that a woman is entitled to feel safe in her own house. In that case a young woman was raped in her own house when her parents were out. In that case the rapist

wanted to kiss the woman and he threatened that he would cut her (sny die vrou).

In this case the complainant appears to us to be about thirty years of age and a refined young woman. She was subjected to most degrading conduct. I cannot imagine a greater insult to a woman than a rape induced by violence. One continuously reads in the newspapers about women's societies complaining about the great number of rapes committed on women without the culprits really being brought to book. Women are entitled to be protected. The claimant in this case was entitled to rely on the shelter of her home. The fact that she was sleeping in mid-summer wearing probably only a pair of panties obviously can never operate against her. She is an educated woman, a medical technologist by profession. She showed, in our view, extraordinary resolution and ability to withstand the blows life had dealt her. Her evidence was given in an exemplary fashion. She never hesitated in the witness-box; she did not cry; she was never incoherent - all of which things one was likely to expect after such a harrowing experience of four rapes. Once her hands were tied behind her back she was completely defenceless and utterly within the power of her attackers. When she was in the nude the plan to rape was born. Accused was in and out of the main bedroom and must have seen her being raped by two of his henchmen. After she had been raped twice he grabbed her by the skirt around her neck and dragged her across the floor out of the bedroom into the study and left her on the floor. Here he

proceeded to have intercourse with her while holding a knife to her neck, demanding that she have intercourse properly, otherwise he will kill her. Others came into the study, busy looting the house while he was still busy having intercourse. This episode had such a violent reaction on her that she never went back to live at that house. From her evidence it is clear that she had suffered some psychological deficits (sic: effects?). She is scared of men; she cannot be alone at night. Initially her sex life was affected but she came through everything because she said she had the support of her husband, so much so that they have recently had a baby.

Accused 4, it is clear from your record that you were gaoled for three years for rape, using physical violence. It does not seem to me that it had any effect on you. It does not seem as if a long period of incarceration would rehabilitate accused 4. He is beyond that. Courts must not be seen to countenance such dastardly crimes as this one, otherwise criminals will carry on with violence against defenceless women in their homes.

The sentence that I pass must warn would-be housebreakers and rapists that society does not hesitate to exact the highest punishment. On this count you are SENTENCED TO DEATH."

In an appeal against a discretionary death sentence this court will not interfere and alter the sentence of the

trial judge, unless it appears that the discretion entrusted to him was not exercised in a proper or reasonable manner. The manner in which this test is to be applied is clearly set out in S v Pieters 1987(3) SA 717 (A). "But where there has been a misdirection on the part of the trial court (that is, 'an error committed by the court in determining or applying the facts for assessing the appropriate sentence'), and it is 'of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably' this court is entitled to interfere and to consider the sentence afresh." - per NICHOLAS AJA in S v J 1989(1) SA 669 (A) at 679 E-G. The majority of the court in this case was of the view that, on the facts of that case, no misdirection had been shown, but it is apparent from the reasoning at p674E that the majority did not differ from NICHOLAS AJA as to the tests to be applied in an appeal of this nature.

I think it may fairly be deduced from the remarks on sentence of the learned trial judge that he decided to exercise his discretion to impose the death penalty for the following reasons:

1. The complainant, who was a refined young woman, was subjected to most degrading treatment.
2. It was an aggravating feature that:
 - (a) She was raped in her own home.
 - (b) The appellant must have seen her being raped by two

of his "henchmen" before he raped her.

(c) The complainant, although a woman of resolution and character, had suffered psychological harm as a result of the rape to such an extent that she had never gone back to live at the house where the rape occurred and was afraid to be alone at night.

3. The criminal record of the appellant demonstrated that he was beyond rehabilitation.
4. The court felt obliged, in the interests of society, to protect women against violence in their homes by passing a sentence that would warn "... would-be housebreakers and rapists" that society does not hesitate to exact the highest punishment (i.e. the death sentence).

The remarks of the learned trial judge about violence against defenceless women in their homes and the need to pass a sentence that would act as a warning to

would-be housebreakers and rapists should, in my view, be read in the light of certain general observations with which he commenced his remarks on sentence. In order to appreciate the significance of this point, it should be mentioned that after the appellant and his co-accused had been sentenced, the State adduced the evidence of Lt Zeelie, the investigating officer. He said, inter alia, that during the period between 18 December 1986 and January 1988 there were 120-150 complaints per week of housebreaking and entry in the area comprising the Randburg Magisterial District. He also said that, during the same period in 10 of the cases the housebreaking and entering were accompanied by rape of the housewife; in 21 cases of breaking and entering the woman of the house was either tied up, locked up in a room or wardrobe, or threatened with a fire arm or-knife. The learned judge went on to say:

"Surely the time has arrived where the interests of the

community demand that heavy sentences be imposed on the housebreakers and robbers so that it can act as a deterrent to other would-be housebreakers. Long terms of imprisonment should, depending on the other factors mentioned, be imposed. I am told that even the formation of privately financed security services have not succeeded in substantially curbing this crime rate."

[This was, incidentally, not a correct statement of the evidence which was to the effect that it was too early to tell.]

"The society and the community cry out for help and their feelings must be taken into account.

A sentence should express the law abiding community's feeling of revulsion and disgust of the deed."

These remarks were part of the learned judge's setting out of "... some general principles ..." before turning to the facts relating to each accused. I do not think these remarks were intended to apply only to the charge of housebreaking with intent to rob and robbery. They are part of the general principles set out by the learned trial judge as being applicable to the matters before him, and they were, on the

face of them, intended to apply generally to all the charges under consideration. Furthermore, the concluding remarks of the learned judge, when dealing with the sentence to be imposed on the appellant on the charge of rape, demonstrate to my mind that he had these factors in mind. I refer in particular to his reference to "... violence against defenceless women in their homes ..." and to "... would-be housebreakers and rapists ..." (my underlining).

It was open to the trial judge to impose the death sentence on the housebreaking with intent to rob and robbery charge because aggravating circumstances as defined in section 1 of Act 51 of 1957 were found to be present. The statistics given by Lt Zeelie certainly justify the inference that there is an alarmingly high incidence of housebreaking in the Randburg Magisterial District. Moreover the goods stolen in the robbery included two motor vehicles valued at

approximately R45 000, and household goods worth R25 000.

Nevertheless, the court did not see fit to impose the death sentence on that count but sentenced the appellant to 10 years' imprisonment. The statistics also demonstrated, however, that it is only in a minute proportion of the cases referred to that rape occurred. The figure was 10 in a period of 13 months during which, depending on whether the correct figure was 120 or 150, either approximately 6 240 or 7 800 housebreakings occurred. The rapes which occurred in the course of these cases represent .16% or .12%. On the basis of this evidence I do not think it can be said that it was established that an exemplary sentence was required in respect of a charge of rape. Nevertheless, that is, in my view, precisely what the trial judge intended to impose. He intended to make an example of the appellant in imposing the death sentence, and he said so. Cf S v Maseko 1982(1) SA 99 (A) at 102D where MILLER JA came to the conclusion where a

magistrate imposed a sentence "wat as voorbeeld sal dien en wat afskrikingswaarde sal hê", he intended to impose an exemplary sentence. See also S v Khulu 1975(2) SA 518 (N). In that case a magistrate referred to "... the need to demonstrate clearly in every suitable case that the fact that the accused was a male youth would not necessarily entail the court avoiding the long prescribed sentences and rather resort to corporal punishment ...". It was held that the magistrate had decided to impose an exemplary sentence (see p521B).

It is only where the circumstances justify such a sentence that an exemplary sentence may be imposed. One of the circumstances which justifies the imposition of an exemplary sentence is the fact that a particular crime is dangerously frequent. See the remarks of ASQUITH LJ cited in S v Khulu supra at 521 C-E. There is nothing in the evidence

to indicate that this particular crime, that is to say the rape of women in their homes, is "becoming dangerously frequent". As observed above, the evidence of Lt Zeelie, while indicating that housebreaking is dangerously frequent, seems to indicate the contrary with regard to the incidents of rape in such cases. There does not appear to be any other basis upon which an exemplary sentence could be regarded as justified in the circumstances of this case. It follows in my view that there has been a misdirection on the part of the trial court of such a nature that it shows that the trial court exercised its discretion improperly or unreasonably.

Even if the court was justified in sentencing the appellant for rape on the basis that an exemplary sentence was necessary, the court must ensure that the deviation from justice (in the sense of imposing punishment more severe than the particular offender merited) "... was no greater than was

necessary in the public interest ..." and that the sentence, though more severe than it would otherwise have been, was nevertheless not unreasonable in all the circumstances. Khulu's case supra at p522B-C. As MILLER J observed in that case at p523H: "One who approaches the problem with a mind predominantly concentrated on serving the needs of society in general, tends to lose sight of or to relegate other important considerations." I am inclined to think that that is what happened in the instant case as well. I refer here to the finding of the trial court that, because of his criminal record, the appellant is "beyond" rehabilitation. Admittedly this remark must not be considered in isolation, and the earlier remark of the trial court to the effect that "... from that record one gains the impression that there would be difficulty to rehabilitate accused no 4" is a much more tentative statement. That tentative statement was in my view fully justified by the record of the accused, bearing in

mind that he had a previous conviction for rape, for which he was sentenced to imprisonment, and the fact that he was released from prison only seven and a half months before committing the rape in this case. I think, however, that it was going too far to say that he was beyond rehabilitation. In saying that, the learned judge was losing sight of the reasonable possibility that a relatively young man of the appellant's age may be rehabilitated by serving a really long term of imprisonment, notwithstanding his record. He served 1 year and 11 months of the only previous prison sentence imposed on him. I know from many years experience of gaol inspections that two years or less is generally regarded by the Prison Authorities as short-term imprisonment. Furthermore, in terms of section 39(b) of the Prisons Act No 8 of 1957, a person who has been sentenced to imprisonment for corrective training must be detained for a period "of at least two years". Regulation 141 of the Regulations in terms

of section 94 of the Prisons Act requires the treatment and training of a prisoner sentenced to imprisonment for corrective training to be applied on the following basis:

- "(a) Intensive practical and theoretical training in suitable work which, as far as is practicable, will equip and assist the prisoner on release in earning an honest living in free life;
- (b) Personal influencing, encouragement and guidance of the prisoner to be of good conduct and character; and
- (c) The provision of opportunities for the cultivation and development of a sense of responsibility".

It does not seem unreasonable to infer from these provisions that it is generally accepted that a minimum period of two years is required for a sentence of corrective training to have any real prospect of success. The appellant has not yet been exposed to rehabilitative treatment for long enough to say that it is clear that he is beyond redemption. It follows that in this respect as well the learned judge misdirected himself.

In the light of the above criticisms it is not necessary to decide whether the learned trial judge was correct in regarding the fact that the rape occurred in Mrs D's own home as an aggravating circumstance. The learned judge mentions this factor on no less than three occasions in his remarks on sentence. He is in good company. See the remarks of OGILVIE THOMPSON CJ (dissenting) in S v V 1972(3) SA 611 (A) at 614A, and see S v B 1981(4) SA 815(A) at 857B and S v S 1988(1) SA 120 (A) at 124C-D. I have, with great respect, some difficulty with this as a general proposition. Of course, it involves a greater invasion of privacy to break into a woman's home and rape her, than if she were to be raped in a public park. But that involves the commission of another offence, namely housebreaking, and for that offence the appellant in this case has been duly convicted and sentenced, and will therefore be duly punished. I do not see how it makes it worse that the rape occurred in her home.

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The experience is no worse for her than if she had been raped in an alley-way. If a man is assaulted in his bed at home by a housebreaker, I find difficulty in seeing how that is more serious than an assault committed on him by a man who, say, breaks into his office while he is working late at night. It is said that a woman is entitled to feel safe in her own home. Of course this is true, but she is equally entitled to feel safe in her garden or in a lift going up to her flat; or even in a public street unless, of course, there are factors which would put her on her guard such as, for example, the fact that she is in an insalubrious area or she is out late at night in a lonely place. In any event, it is not clear to me why the fact that a person is entitled to feel safe in a particular place makes a rape committed in that place worse than in any other. It is true that in S v S supra at 124C-D NESTADT JA after enumerating various aggravating features said "Maar bowenal is die omstandigheid

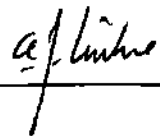
dat die misdaad in klaagster se huis plaasgevind het. Dit behoort, soos wat NEL R in wese bevind het, 'n heilige plek te wees." These remarks must not, however, be taken out of context: in that case there was no charge of housebreaking, and the accused was not already being punished for having entered the complainant's home. The fact that a rape takes place in the complainant's home may, of course, be relevant in other ways. Because she is entitled to feel safe in her own home, she cannot in any way be said to have courted danger if she sleeps in the nude in her home, or wears apparel that would be quite unsuitable or even provocative, outside her home. In that sense it is relevant, but I cannot see how it aggravated the offence in this particular case. The invasion of privacy involved in housebreaking is part of that crime.

There is another factor which I suggest should be

borne in mind when considering the need to protect the public. It is expressed in the popular saying "As well be hanged for a sheep as for a lamb". If discretionary death sentences are passed in cases where such a sentence is not "imperatively called for", (S v J supra at 682E) the notion may gain ground that "If I rape I might as well murder my victim. I will run no greater risk in doing so because if I rape I am likely to be hanged anyway and if I murder I will substantially reduce the risk of being identified". The notion one would wish to prevail is "If you commit housebreaking or even rape but you don't kill you will probably not be hanged". That may lead to fewer murders and protect the members of society at least as much, if not more, than sentences which are too harsh. As DUMBUTSHENA CJ said in S v Harington 1989(2) SA 348 (ZS) at p362F-G:

"It is also well to remember that too harsh a sentence is an ineffective and unjust as is a sentence that is too lenient".

Had the rape charge stood alone I would have imposed a sentence of 25 years' imprisonment. Bearing in mind, however, that the appellant is to serve 13 years' imprisonment in respect of the other offences of which he was convicted I would have imposed a sentence of 20 years' imprisonment on the rape charge, together with a strong recommendation to the Prisons Parole Board that the appellant should be required to serve not less than a total of 30 years in respect of all the sentences imposed upon him in this case.



A J MILNE, JA