1996(1) SACR 390(NmS) Mahomed. C.J.

Case No: SA 4/93

IN THE SUPREME COURT OF NAMIBIA

WINDHOEK,

BEFORE THE HONOURABLE MR. JUSTICE MAHOMED, C.J.

THE HONOURABLE MR. JUSTICE DUMBUTSHENA, A.J.A.

THE HONOURABLE MR. JUSTICE LEON, A.J.A.

In the matter between:

LUKAS TCOEIB APPELLANT

and

THE STATE RESPONDENT

Coram: Mahomed C.J.; Dumbutshena A.J.A.; et Leon A.J.A.

Heard on: 1994/10/04
Delivered on: 1996/02/06

APPEAL JUDGMENT

MAHOMED, C.J.: The appellant was indicted in the Court *a quo*, on two counts of murder and one count of theft. He was convicted on all three counts. On each of the counts of murder he was sentenced to life imprisonment and on the count of theft he was sentenced to two years imprisonment. The Court *a quo* directed that the latter two sentences were to run concurrently

with the life sentence imposed on the first count of murder. The Court *a quo* further recommended that the appellant ought not to be "released on parole or probation before the lapse of at least 18 years imprisonment calculated from the date of sentence."[1]

An application for leave to appeal was made to, and refused by, the trial judge who was O'Linn J.[2] The "main thrust" of the application was that a sentence of life imprisonment was unconstitutional in Namibia. That contention had not previously been advanced during the trial.

Following the dismissal of the application for leave to appeal by the Court *a quo*, the appellant petitioned the Chief Justice for leave to appeal to the Supreme Court of Namibia in terms of section 316(6) of Act 51 of 1977, as amended. Substantially because of certain conflicting *dicta* on the constitutionality of a sentence of life imprisonment emanating from the High Court, leave to appeal was granted on this petition in the following terms -

> "Leave is granted to Lukas Tcoeib to appeal to the Supreme Court against sentence only and in particular whether a sentence to life imprisonment is competent in terms of the Constitution of Namibia."

Although it was not analysed in that way by counsel for the appellant, the attack on the sentence imposed on the appellant involves a consideration of three issues:

1. Is the imposition of a sentence of life imprisonment *per se* unconstitutional in Namibia?
2. If it is not *per se* unconstitutional, is such a sentence nevertheless unconstitutional in the circumstances of the present case?

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[1] *S v Tcoeib* 1991 (2) SACR 627 (Nm).

[2] reported in 1993 (1) SACR 274 (Nm).

3. **Apart from the issue of the constitutionality of the sentence, is it a sentence of such harshness in the present case as to justify an interference therewith by the Supreme Court pursuant to its ordinary appeal jurisdiction?**

The basic facts

The appellant perpetrated two vicious murders. He had planned to kill five members of the Otner family, who were his employers. He went to the farm of the Otners to execute that plan. He killed the adopted son and the wife of his employer in cold blood with a .308 rifle which he found at the residence of the Otners. He thereafter took some monies from the residence, the keys of a motor vehicle and some wine. He then waited for his employer, Mr Max Otner and two other members of the Otner family, including a child, to return to the homestead. His intention was to shoot and kill them as well. When they did not return after some time, the appellant decided to flee in the motor vehicle, but before that he cut the telephone wires and placed near the body of one of the deceased he had killed, another .308 rifle which he had found in the Otner residence.

The appellant's only excuse for these acts of viciousness was that his employer, Mr Max Otner, had wrongly accused him of stealing four bottles of wine either on the previous day or a few days prior to the murders. The trial judge assumed the correctness of that explanation but rightly pointed out that none of the persons whom the accused had killed had anything to do with that incident, that the murders were committed "on unsuspecting and helpless people" and that they were carefully planned. The trial judge was alive to all the relevant factors in favour of the accused, including the fact that he was a first offender; that he was between 23 and 25 years old and still relatively young; that he was unsophisticated; that he was angry when he committed the

crimes; that he co-operated with the police and the prosecution upon his arrest and that he was a "good worker". The Court concluded nevertheless that -

> "The accused has shown himself as a dangerous person who murdered for the flimsiest of reasons and can do so again because this type of reason can recur in his life at any stage."[3]

In the result, the Court decided that "the aggravating factors greatly overshadow the mitigating factors" and that in this kind of case the factors of deterrence, prevention and retribution deserved "more emphasis and weight."[4] This caused the learned judge to impose the sentences of life imprisonment which counsel now seeks to attack on the appellant's behalf.

Is a sentence of life-imprisonment *per se* unconstitutional?

In order to determine whether a sentence of life imprisonment is *per se* unconstitutional in Namibia, it is necessary to analyse the relevant provisions of the Constitution, to consider the applicable statutory mechanisms pertaining to such punishment and then to enquire whether such statutory provisions are consistent with the Constitution.

The relevant Constitutional provisions.

The Constitution of Namibia, in its preamble, expresses that " recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace"; that "the right of the individual to life, liberty and the pursuit of happiness" is afforded to all "regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status"; and that the Namibian people, by their adoption of a Constitution founded on these values and principles, have articulated their "desire to promote amongst all of

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[3] *S v Tcoeib, supra* n.1, at 635 i-j.

[4] *S v Tcoeib, supra* n.1, at 636 a-b.

us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world".

Chapter 3 of the Constitution defines a number of "fundamental rights and freedoms" to be respected and upheld. Included in these rights and freedoms are those enshrined in articles 6,7, 8 and 18.

Article 6 of the Constitution states that:

> "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia."

Article 7 provides that:

> "No person shall be deprived of personal liberty except according to procedures established by law."

Article 8 stipulates that:

> "(1) The dignity of all persons shall be inviolable.
> (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
> (b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Article 18 prescribes that:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

Article 25 of the Namibian Constitution provides that the Legislature shall make no laws and the Executive shall take no action which abolishes or abridges the fundamental rights and freedoms conferred in Chapter 3 and any law or action in contravention thereof shall be invalid to the extent

of such contravention, provided that a competent Court may direct the appropriate authority to correct the defect in the law or action within a specified period during which time the impugned law or action shall remain valid. These provisions apply *mutatis mutandis* to laws enacted prior to Independence.

The relevant statutory mechanisms.

Section 276(1) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"), which provides that it is competent for a Court of law to impose a sentence of imprisonment upon a person convicted of an offence, does not place any limit on the period of imprisonment which can be imposed. This section must be read together with section 283(1) of the Criminal Procedure Act which provides that:

> "(1) A person liable to a sentence of imprisonment for life or for any period, may be sentenced to imprisonment for any shorter period..."

There is no provision in the Criminal Procedure Act or any other law in Namibia which obliges a Court to impose a *mandatory* sentence of life imprisonment in respect of any particular offence. The sentence of life imprisonment is thus a *discretionary* sentence in Namibia, available for a Court to impose should such Court believe that the particular circumstances of a particular case warrant the imposition of such a sentence.

However, the fact that an accused may be sentenced to imprisonment for life in Namibia does not mean that such an accused is thereby never able to regain his or her freedom. Life imprisonment *may* mean imprisonment for the rest of the natural life of the accused, but this is not always the

position.[5] The sections of the Criminal Procedure Act relating to the discretionary imposition of the sentence of life imprisonment must be read together with those provisions of the Prisons Act 8 of 1959 ("the Prisons Act"), as amended by Act 13 of 1981 (SWA), relating to the treatment of prisoners, the system of release on parole and the granting of Executive pardons.

Section 2(b) of the Prisons Act, as amended by section 2 of Act 13 of 1981 (SWA), states that:

> "(2) The functions of the Prisons Service shall be:
> (a) ...
> (b) as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of industry and labour;
> ..."

Section 61 of the Prisons Act, as amended by section 34 of Act 13 of 1981 (SWA), provides that:

> "An institutional committee shall, with due regard to any remarks made by the court in question at the time of the imposition of the sentence and at such times and intervals (which intervals shall not be longer than six months) as may be determined by the Commissioner or when otherwise required by the Commissioner or release board -
> (a) make recommendations as to the training and treatment to be applied to any prisoner referred to in paragraph (b);
> (b) submit reports ... to the Commissioner and the release board on, *inter alia*, the conduct, adaptation, training, aptitude, industry, physical and mental state of health and the possibility of relapse into crime of every prisoner who is detained in the prison in respect of which it has been established and-
> (i) ...
> (ii) ...
> (iii) ...
> (iv) upon whom a life sentence has been imposed;
> (v) ...
> (vi) ..."

Section 61*bis* of the Prisons Act, as inserted by section 35 of Act 13 of 1981 (SWA), provides that:

> "A release board shall at such times and intervals as may be determined by the Commissioner or when otherwise required by the Commissioner -

[5] See Du Toit et al, Commentary on the Criminal Procedure Act (Juta & Co Ltd) at 28-20A; *R v Mzwakala* 1957 (4) SA 273 (A); *S v Tuhadeleni & Others* 1969 (1) SA 153 (A); *S v Whitehead* 1970 (4) SA 424 (A); *S v Sibiya* 1973 (2) SA 51 (A).

(a) with due regard to any remarks made by the court in question at the time of the imposition of the sentence on the prisoner concerned and of any report on that prisoner furnished to it in terms of section 61(b) by the institutional committee concerned, make recommendations as to -

(i) the release of that prisoner either on probation or on parole at the expiration of his sentence;

(ii) the period for and the conditions on which that prisoner may be released on probation;

(iii) the period for supervision under and conditions on which that prisoner may be released on parole;

(iv) ...

...."

Section 64 of the Prisons Act, as amended by sections 5(2), 36 and 53(a) of Act 13 of 1981 (SWA) and as further read with Article 140(5) of the Namibian Constitution, provides that:

"(1) Upon receipt of a report from the release board regarding a prisoner upon whom a life sentence has been imposed and containing a recommendation for the release of such prisoner, the Commissioner shall submit such report to the President of Namibia;

(2) ...

(3) The President of Namibia may authorize the release of such prisoner on the date recommended by the release board or on any other date, either unconditionally or on probation or on parole as he may direct."

Section 67 of the Prisons Act, as amended by sections 39 and 53(a) of Act 13 of 1981 (SWA) and as read with article 140(5) of the Namibian Constitution, provides that:

"(1) The Commissioner may -

(a)...

(b) on the authority of the President of Namibia or any other competent authority granted under any provision of any law in respect of a prisoner serving any period of imprisonment, and irrespective of whether the imprisonment was imposed with or without the option of a fine, release such prisoner before the expiration of the period in question either on probation or on parole for such period and on such conditions as may be specified in the warrant of release.

(2) If any prisoner so released either on probation or on parole completes the period thereof without breaking any condition of the release, he shall no longer be deemed to be liable to any punishment in respect of the conviction upon which he was sentenced."

<u>Application of the relevant constitutional provisions to the statutory mechanisms</u>

Article 6 of the Namibian Constitution has expressly abolished the death penalty in Namibia. By so doing the Namibian people have recognised, protected and entrenched their commitment to

the inalienable right of every person to enjoy respect for his or her life and dignity.[6] In *Tjijo's case*[7], Levy J expressed the view that life imprisonment was unconstitutional. His reasons for that view were expressed as follows:

> "Mr Small has argued that this Court should take into account the fact that the trial court could have imposed a sentence of "life-imprisonment". In my view, the provision in Article 6 of the Constitution of Namibia that "no Court or Tribunal shall have the power to impose a sentence of death upon a person" categorically prohibits a sentence of life-imprisonment. "Life-imprisonment" is a sentence of death.
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> Furthermore, life-imprisonment, as a sentence, is in conflict with Article 8(2)(b) of the Constitution in that it is "cruel, inhuman and degrading punishment". It removes from a prisoner all hope of his or her release. When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person, one who has paid his or her debt to society. Life-imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living. Article 8 of our Constitution entrenches the right of all people to dignity. This includes prisoners. The concept of life-imprisonment destroys human dignity reducing a prisoner to a number behind the walls of a jail waiting only for death to set him free.
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> The fact that he may be released on parole is no answer. In the first place for a judicial officer to impose any sentence with parole in mind, is an abdication by such officer of his function and duty and to transfer his duty to some administrator probably not as well equipped as he may be to make judicial decisions. It also puts into the hands of the executive where the sentence is life imprisonment, the power to detain a person for the remainder of his life irrespective of the fact that the person may well be reformed and fit to take his place in society. Furthermore, even though he or she may be out of gaol on parole such person is conscious of his life sentence and conscious of the fact that his or her debt to society can never be paid.
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> Life imprisonment makes a mockery of the reformative end of punishment.
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> I am satisfied that it is in the interests of justice and in keeping with the spirit of the Constitution that all sentences should be quantified so that a prisoner knows with certainty what his penalty is. I therefore dismiss any argument suggesting that the appellant could in law have been sentenced to life-imprisonment."

If Levy J was correct in his conclusion that life-imprisonment was a sentence of death, the conclusion that a sentence of life imprisonment is unconstitutional would be inescapable because the death sentence is prohibited by article 6 of the Constitution. I am, however, unable to agree that life imprisonment constitutes a sentence of death. The Constitution itself distinguishes

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[6] See *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC).

[7] *S v Nehemia Tjijo*, High Court of Namibia, 4/9/91, unreported.

between protection of life guaranteed in article 6 and protection of liberty guaranteed in article 7. Life imprisonment does not terminate the life of the imprisoned. It invades his liberty. The two cannot be equated. As was observed in the United States

> "...the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality differs more from life imprisonment than a 100-year prison term differs from on of a year or two."[8]

Both on textual and on inherently conceptual grounds there seems to me to be a clear distinction between the death penalty which is prohibited by article 6 and life imprisonment and I am satisfied that Levy J was not correct in equating the two. The other High Court judges who have refused to equate life imprisonment with the death sentence were in my view correct.[9]

This conclusion does not, however, end the debate on the constitutionality of a sentence of life imprisonment. Even if such a sentence does not conflict with article 6 of the Constitution it might still be unconstitutional if it is inconsistent with article 8(1) of the Constitution which protects the dignity of all persons or article 8(2)(b) which protects all persons from cruel, inhuman or degrading treatment or punishment or if such a sentence is in conflict with any of the other constitutional provisions to which I have previously referred.

Can it properly be said that life imprisonment unconstitutionally violates the dignity of the person sentenced or constitutes an invasion of the right of every person to be protected from cruel,

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[8] *Woodson v North Carolina* 428 US 280 at 305.

[9] See the judgment of O'Linn J in the application for leave to appeal in the present matter, *supra* n 2; see also the remarks of Frank J and Muller AJ in *Tjijo's* case, *supra* n 8; *S v Hilunaye Moses*, High Court of Namibia (CC 2/92) 22/4/1992, unreported; *S v Immanuel Kaukungwa and Three Others*, High Court of Namibia, 12/12/1991, unreported; *S v M Shikongo*, High Court of Namibia, 23/10/91 and *S v Paulus Alexander and Another*, High Court of Namibia (CC 77/92) 29/5/1992, unreported.

inhuman or degrading treatment or punishment? There can be little doubt that a sentence which compels any person to spend the whole of his or her natural life in incarceration, divorced from his family and his friends in conditions of deliberate austerity and deprivation, isolated from access to and enjoyment of the elementary bounties of civilized living is indeed a punishment of distressing severity. Even when it is permitted in civilized countries it is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimize the extreme degree of disapprobation which the community seeks to express through such a sentence. These ideas were expressed by the Court in the case of *Thynne, Wilson and Gunnell v The United Kingdom*,[10] where it stated that -

> "Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk or repetition..."

But, however relevant such considerations may be, there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilized community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his or her release after a few years might

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[10] 13 E.H.R.R. 666 at 669. See also, *S v Letsolo* 1970 (3) 476 (A); *S v Mdau* 1991(1) SA 169 (A).

endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at State expense constitutes a cruelty which can no longer be defended in the public interest. To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past.[11] Those values require the organs of that society continuously and consistently to care for the condition of its prisoners, to seek to manifest concern for, to reform and rehabilitate those prisoners during incarceration and concomitantly to induce in them a consciousness of their dignity, a belief in their worthiness and hope in their future. It is these concerns which influenced the German Federal Court in "the life imprisonment case"[12] to hold, *inter alia*, that -

> "the essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom."[13]

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[11] *S v Acheson* 1991(2) SA 805 (Nm) at 813 A-C; *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994(1) SA 407 (NmS) at 411C-412D. No evidential enquiry is necessary to identify the content and impact of such constitutional values. The value judgment involved is made by an examination of the aspirations, norms, expectations and sensitivities of the Namibian people as they are expressed in the Constitution itself and in their national institutions. Cf the remarks of O'Linn J in the application for leave to appeal in the present matter *supra* n.2. at pages 281f - 287e.

[12] 45 BverfGE 187.

[13] Ibid. 245 (Translation from the German text by Dirk Van Zyl Smit in the article "Is life imprisonment constitutional? - The German Experience" published in Public Law, 1992, page 263 at page 271.)

The German Federal Court in that matter also referred to the German Prison Act in this context and stated:-

> "The threat of life imprisonment is contemplated, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes which go with it. The task which is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the *Grundgesetz*."[14]

It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

The crucial issue is whether this is indeed the effect of a sentence of life imprisonment in Namibia. I am not satisfied that it is.

Section 2(b) of the Prisons Act expressly identifies the treatment of convicted prisoners with the object of their reformation and rehabilitation as a function of the Prison Service and section 61 as read with section 5*bis* provides a mechanism for the appointment of an institutional committee with the duty to make recommendations pertaining to the training and treatment of prisoners upon whom a life sentence has been imposed. Section 61*bis* as read with section 5 of that Act creates machinery for the appointment of a release board which may make recommendations for the release of prisoners on probation and section 64 (as amended) *inter alia* empowers the President of Namibia acting on the recommendation of the release boards to authorise the release of

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[14] Ibid. 238 (Van Zyl Smit's translation, *supra* n.13 at page 270).

prisoners sentenced to life and there are similar mechanisms for release provided in section 67. It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a 'thing' without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms. The realization of that hope depends not only on the efforts of the prison authorities but also on the sentenced offender himself. He can, by his own responses to the rehabilitatory efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realization of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation from what is undoubtedly a humiliating and punishing condition but not a condition inherently or inevitably irreversible.

The nagging question which still remains is whether the statutory mechanisms to which I have referred, constitute a sufficiently "concrete and fundamentally realisable expectation"[15] of release adequate to protect the prisoner's right to dignity, which must include belief in, and hope for, in an acceptable future for himself. It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded.

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[15] Van Zyl Smit, *supra* n. 13, at page 271.

That kind of concern very much dominated the thinking of the German Federal Court in "the life imprisonment case."[16] In my view, however, it would be incorrect to interpret the relevant statutory mechanisms pertaining to the release of prisoners sentenced to life imprisonment as if they permitted a totally unrestrained, unpredictable, capricious and arbitrary exercise of a discretion by the prison authorities. These mechanisms must be interpreted having regard to the discipline of the Constitution as well as the common law. The relevant authorities entrusted with these functions have not only to act in good faith but they must properly apply their minds to each individual case, the relevant circumstances impacting on the exercise of a proper discretion, the objects of the relevant legislation creating such mechanisms and the values and protections of the Constitution. They must not allow their minds to be affected by irrelevant considerations, they must act impartially, without unfairly or irrationally discriminating between different persons and they must refrain from acting oppressively or arbitrarily.[17] If this kind of discipline is not maintained in the application of the statutory mechanisms and the exercise of any discretion pursuant thereto, the prisoner adversely affected might have a legitimate remedy in the Courts. Every prisoner, however dastard be the crime he or she has committed, is entitled to be treated lawfully and fairly and every official entrusted with the administration of the Prisons Act, however eminent be his or her office, is obliged, in terms of article 18 of the Constitution, to act fairly and reasonably. That obligation is a continuing obligation and requires such officials to apply their minds to the merits of the case of each prisoner continuously after the lapse of periods which must reasonably be determined.

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[16] "The life imprisonment case", *supra* n 12 , page 246, (translation in English by Van Zyl Smit, *supra* n. 13, at page 271).

[17] *North-West Townships (Propertary) Limited v The Administrator, Transvaal* 1975 (4) SA (T) at 8; *Johannesburg Stock Exchange v Witwatersrand Nigel Limited* 1988 (3) SA 132 (A).

Properly considered, therefore, the statutory mechanisms to which I have referred and which pertain to the release of prisoners sentenced to life, do not in fact permit the relevant officials charged with the onerous functions of administering these mechanisms, arbitrarily to decide which such prisoners they would consider for release and when they would do so. The objection based on the assumption that they can act so arbitrarily cannot therefore be upheld.

A sentence of life imprisonment sometimes, but not always, has mixed components. One component, in such cases, is intended to reflect the period of imprisonment which the convicted person deserves as a form of punishment for his or her wrongful act, the other component reflects the anxiety of the Court to ensure that the convicted person remains incarcerated after he or she has served the punitive component of his or her sentence, simply because the Court is not satisfied that society may not be endangered by his or her release either because of some mental instability or some other defect in the character of the person. That second component effectively reflects the need for judicial protection of society against the risks of recidivism. The problem which has in recent times engaged some jurists in Europe has been the distinction between these two components and the consequences of such a distinction.[18] It has been suggested, with some force, that upon the expiry of the punitive component of a sentence of life imprisonment, the further continued incarceration of the prisoner should be open to judicial monitoring because some kind of assessment needs periodically to be made about the risk of recidivism at any particular time.[19]

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[18] In the European jurisprudence this is expressed by the difference between "mandatory" and "discretionary" sentences of life imprisonment. The former does not have a mixed component: the whole of the sentence is intended to express the punitive component. In the latter case both components are present. See, for example, *Wynne v United Kindgdom* [1995] 19 E.H.R.R. 333.

[19] *Weeks v United Kingdom* [1988] 10 E.H.R.R. 293; *Thynne, Wilson and Gunnell v United Kingdom, supra* n. 10; *Wynne v United Kingdom supra* n 18 .

In approaching this debate, the European Court of Human Rights has substantially been influenced by article 5(4) of the European Convention on Human Rights, which reads as follows:-

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Applying this article, the European Court of Human Rights has sometimes upheld applications made by prisoners for a declaration that in the particular circumstances of their case their incarceration after the expiry of the punitive component of their sentences of life imprisonment constituted a violation of article 5(4).[20]

Many interesting questions arise from this approach. Firstly, there may be problems following upon the practical difficulties of isolating from a composite sentence of life imprisonment the period which represents the punitive element of the sentence from the element of protection against recidivism. Secondly, there may be considerable debate which may ensue about the merits and the practicability of any system which vests in the Courts the authority to determine the legitimacy of the detention of any sentenced prisoner after the expiry of the punitive period of a sentence at any particular stage, as against the merits of allowing that power, in the first instance, to reside with the executive and administrative organs of the State, with their infrastructure and access to monitoring facilities and psychiatric and sociological expertise. If such power is to be vested in the Courts, there may also be interesting problems about the degree of latitude which must be allowed to the prison and executive authorities in making their assessments and whether or not it is possible to define some judicial standard which is more generous than the ordinary standard of judicial review of administrative actions, but something less than a standard which

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[20] See for example *Thynne's* case, *supra* n 10, page 695, paragraph 81 and *Weeks's* case, *supra* n 19 , page 318, paragraph 68.

would allow a Court to substitute its own discretion for the discretion of the administrative and executive authority.

It is not necessary in the present case to deal with any of these complexities or their consequences for the application of sentences of life imprisonment in this country. This is not an application by a prisoner who claims to have already served any period of imprisonment which could conceivably be said to have constituted the punitive part of the sentence imposed by the Court. Indeed, O'Linn J had in his judgment expressly taken the precaution of recommending to the Executive that the appellant not be released on parole or probation before the lapse of at least 18 years of imprisonment, calculated from the date of the sentence. It is therefore not necessary to anticipate what approach the Court should adopt to any application which might be made in the future by a prisoner sentenced to life who has properly identified the punitive period of his or her imprisonment and who contends that notwithstanding the expiry of that period and notwithstanding the fact that there his or her further incarceration is not necessary for the protection of society, the administrative and executive organs of the State have wrongfully and unreasonably insisted on the perpetuation of that incarceration.

Suffice is it for me to say that if and when such issues are properly raised in the future they will have to be addressed by having regard to the international jurisprudence but ultimately, by the proper interpretation of the relevant provisions of the Namibian Constitution and the applicable statutes to which I have referred.

For the reasons which I have articulated I am unable to hold that life imprisonment as a sentence is *per se* unconstitutional in Namibia, regard being had to the fact that the relevant legislation permits release on parole in appropriate circumstances.

Is the sentence of life imprisonment unconstitutional on the facts of the present case?

Can it be contended that even if the sentence of life imprisonment is not *per se* unconstitutional in this country its imposition in the circumstances of the present case is unconstitutional because it amounts to inhuman or degrading treatment of the appellant or a violation of his dignity?

It may very well be that even if the sentence of life imprisonment is not *per se* unconstitutional its imposition in an particular case may indeed be unconstitutional if the circumstances of that case justify the conclusion that it is so grossly disproportionate to the severity of the crime committed that it constitutes cruel, inhuman or degrading punishment in the circumstances or impermissibly invades the dignity of the accused. This approach finds judicial resonance in some of the jurisprudence of the United States. Where sentences are grossly disproportionate to the offence committed they have sometimes been held to constitute a transgression of the 8th amendment of the Constitution of the United States which prohibits the imposition of cruel and unusual punishment.[21]

Whatever be the merits of such an approach and its proper parameters in Namibia, it can be of no assistance to the appellant in the present case. The offences committed by the appellant were vicious in the extreme. They were executed with singular ruthlessness and premeditation. Having

[21] *Gregg v Georgia* 428 US 153; *Rummel v Estelle* 445 US 263 at 274; *McDonald v Commonwealth* 180 US 311; *Barber v Gladden* (cert. denied) 359 US 948.

executed them remorselessly the appellant waited to repeat the same acts upon other innocent members of the Otner family and when they did not make their appearance he sought insensitively to cut the telephone wires, presumably to obstruct any communication and detection and thereafter cunningly to place near the body of the deceased he had killed, a rifle he had found in the house. The mitigation was tenuous in the extreme: a resentment apparently generated by an accusation of theft which the appellant considered to be untrue. The acts of the appellant were brutal and merciless. There is absolutely nothing disproportionate between the gravity of the offences and the sentences imposed. There is simply no factual basis to support any argument based on the jurisprudential approach which I have just described. The sentence imposed could not, on the facts of the case, conceivably be described as cruel, inhuman or degrading.

The obligation to undergo imprisonment would undoubtedly have some impact on the appellant's dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person *per se*. No such protection in this case has been invaded.

Apart from the constitutionality of the sentence, is the Supreme Court entitled to interfere with the sentence imposed upon the appellant pursuant to its ordinary appeal jurisdiction?

I have already described the seriousness of the offence and the relatively trivial nature of the motivation which prompted it. The learned trial judge was perfectly alive to that motivation, the fact that the appellant was a first offender and all the other facts which were urged in mitigation. He was plainly correct in his conclusion, however, that the mitigating factors were completely outweighed by those which operated in aggravation of sentence. He no way misdirected himself.

He took into account all relevant facts and ignored what was irrelevant. The sentence imposed by him is severe but there is no striking disparity between that sentence and any sentence which I would have imposed if I had sat as a judge of first instance. The sentence imposed by the trial court constituted a proper exercise of the discretion vested in a court of first instance. No sufficient grounds have been advanced which would entitle us to interfere with that sentence. It induces no feeling of shock or outrage in me.[22]

Order

The appeal is dismissed and the conviction and sentence of the appellant is confirmed.

Dated at Windhoek

I. Mahomed
Chief Justice

I agree:

E Dumbutshena
Acting Judge of the Supreme Court of Namibia

I agree:

R N Leon
Acting Judge of the Supreme Court of Namibia

[22] *S v Hlapezula and others* 1965 (4) SA 439 (A) at 444A; *S v Anderson* 1964 (3) SA 494 (A) at 495G-H; *S v Narker and Another* 1975 (1) SA 583 (A) at 585D; *S v Ivanisevic and Another* 1967 (4) SA 572 (A) at 575H.

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