THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

221/2000

In the matter between :

MORNÉ RICARDO BULL **First Appellant**
ANDRÉ MAART **Second Appellant**

and

THE STATE **Respondent**

Before: **VIVIER ADCJ, HOWIE, OLIVIER JJA, CLOETE et BRAND AJJA**
Heard: **21 AUGUST 2001**
Delivered:

In the matter between :
LASTON CHAVULLA **First Appellant**
ANDRÉ DOUGLAS SOLOMON **Second Appellant**
CHARLES ADAMS **Third Appellant**
JOHANNES BRUINTJIES **Fourth Appellant**
DAWID RUITERS **Fifth Appellant**

and

THE STATE **Respondent**

Before: **VIVIER ADCJ, HOWIE, OLIVIER JJA, CLOETE et BRAND AJJA**
Heard: **23 AUGUST 2001**
Delivered:

Constitutionality of ss 286A and 286B of the Criminal Procedure Act - Dangerous Offender legislation - Indefinite imprisonment compared with life imprisonment - Life imprisonment the most severe punishment which can be imposed - Parole for life prisoners.

J U D G M E N T

VIVIER ADCJ

VIVIER ADCJ:

[1] In each of the above appeals, which were heard separately, the constitutional validity of ss 286A and 286B of the Criminal Procedure Act 51 of 1977 ("the Act") was challenged. It is therefore convenient to deal with both appeals together.

[2] In the first appeal ("the Bull appeal") the two appellants were convicted by **Uijs AJ** and assessors in the Cape Provincial Division on two counts of murder, one count of robbery, one count of attempted robbery and one count each of the illegal possession of a firearm and ammunition. The charges all arose out of an armed robbery on the evening of 5 October 1997 at the Superbake Bakery in Mitchell's Plain near Cape Town. After conviction the trial Court directed that an enquiry be held in terms of s 286A(3) of the Act as to whether the appellants were dangerous criminals. At the enquiry expert

psychiatric evidence was led on behalf of both the State and the appellants. Both appellants were thereafter declared to be dangerous criminals and sentenced to undergo imprisonment for an indefinite period. In terms of s 286B(1)(b) the trial Court directed that they again be brought before the court upon the expiration of a period of 35 years for reconsideration of the sentences. With the leave of the Court *a quo* they appeal to this Court against their sentences.

[3] In the second appeal ("the Chavulla appeal") the five appellants were convicted by **Lategan J** and assessors on one count of housebreaking (count 7), one count of robbery (count 8), three counts of murder (counts 9, 10 and 11), one count of attempted murder (count 12) and one count each of the illegal possession of firearms and ammunition (counts 13 and 14). These charges all arose out of an attack at a farm-house at Nieuwoudtville in the

Western Cape on the evening of 24 September 1996. In addition, and arising out of related events in the days which preceded the attack at the farm-house, the second, third and fifth appellants were convicted on one count of robbery (count 2) and one count of housebreaking with intent to steal and theft (count 4). The first appellant was convicted of theft on count 2. The second appellant was convicted of murder (count 1) while Nos 3 and 5 were convicted as accessories after the fact on this count. The second appellant was also convicted of theft (count 3). After an enquiry in terms of s 286A(3) at which expert psychiatric evidence on behalf of both the State and the defence was led, all the appellants were declared to be dangerous criminals and sentenced to undergo imprisonment for an indefinite period. The trial Court directed that the first appellant again be brought before the court on the expiration of a period of 30 years, and that the others be brought before the court on the expiration of 50

years for reconsideration of their sentences. With the necessary leave the appellants appeal to this Court against their sentences.

[4] Sections 286A and 286B, in so far as relevant, read as follows:

> **286A. Declaration of certain persons as dangerous criminals.–**
>
> (1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal.
>
> (2) (a) If it appears to a court referred to in subsection (1) or if it is alleged before such court that the accused is a dangerous criminal, the court may after conviction direct that the matter be enquired into and be reported on in accordance with the provisions of subsection (3).
>
> (b) Before the court commits an accused for an enquiry in terms of subsection (3), the court shall inform such accused of its intention and explain to him the provisions of this section and of section 286B as well as the gravity of those provisions.
>
> (3) (a) Where a court issues a direction under subsection (2) (a), the relevant enquiry shall be conducted and be reported on –
>
> (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; and
>
> (ii) by a psychiatrist appointed by the accused if he so wishes.
>
> (b)-(c) .....
>
> (d) The report shall –
>
> (i) .....

(ii) include a finding as to the question whether the accused represents a danger to the physical or mental well-being of other persons.

(e)-(k) .....

(4) (a) If the finding contained in the report is the unanimous finding of the persons who under subsection (3) conducted the enquiry, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(b) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under subsection (3)(a) conducted the enquiry.

(c) .....

286B. Imprisonment for indefinite period. –

(1) The court which declares a person a dangerous criminal shall –

(a) sentence such person to undergo imprisonment for an indefinite period; and

(b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.

(2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)(b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1)(b) be brought before the court which sentenced him in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.

(3) (a)-(c) .....

(4) (a) Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that the court shall make

no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional Services Act, 1959 (Act No. 8 of 1959).

(b) After a court has considered a sentence in terms of this section, it may –

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;

(ii) convert the sentence into correctional supervision on the conditions it deems fit; or

(iii) release the person unconditionally or on such conditions as it deems fit.

(5)-(7) ....."

[5] Sections 286A and 286B were inserted into the Act by the Criminal Matters Amendment Act 116 of 1993 (which came into operation on 1 November 1993) mainly as a result of the findings and recommendations of the Booysen Commission of Inquiry into the "Continued Inclusion of Psychopathy as a Certifiable Mental Illness and the Handling of Psychopathic and other Violent Offenders" ("the Booysen Commission").

The Booysen Commission's terms of reference were not confined to psychopaths or, to use the more modern terminology of the American

Diagnostic and Statistical Manual of Mental Disorders IV, now generally used in South Africa, persons suffering from anti-social personality disorder. It also investigated and made recommendations concerning the handling and release of dangerous, violent and/or sex offenders in general. It recommended, *inter alia*, that "a new sentence option in respect of 'dangerous offenders' be created to provide for the imposition of an indeterminate sentence of imprisonment with a fixed minimum term as determined by the court" (General Notice No. 49 published in the Government Gazette of 15 January 1993). Then followed in the introduction of ss 286A and 286B in the Act. The declaration of an accused as a dangerous criminal in terms of these sections is now one of the two sentencing options provided for in the Act which result in imprisonment for an indeterminate period. The other is the declaration of an accused as an habitual criminal in terms of s 286 of the Act, although s 286(2)(c) provides

that the latter declaration should not be made if the court is of the opinion that a sentence in excess of 15 years should be imposed.

[6] Legislative provision for preventive detention as a means of dealing with dangerous offenders is not uncommon in other jurisdictions. Floud and Young, *Dangerousness and Criminal Justice* (1981), Heinemann, London, point out (at 102) that the laws of most Western countries provide for the sentencing of dangerous offenders and refer to legislative provisions in Denmark, Sweden, Canada and the United States in this regard. The recent report, *Scottish Executive : A Review of the Research Literature on Serious Violent and Sexual Offenders,* an international survey of the subject up to and including 1999, refers to dangerous offender legislation in a number of other countries including Australia and New Zealand. See also Amy M Lageman, *Dangerous Offender Legislation : A Short Term Solution to a Long Term Problem* (1997) 16 Dickinson Journal of International Law, 203. In

Canada Part XXIV of the Canadian Criminal Code, as it presently reads, provides for the indeterminate detention of a "dangerous offender" who has committed a "serious personal injury offence" as defined in that Act. The constitutionality of the nearly identical precursors to those provisions was upheld by the Supreme Court of Canada in *Lyons v The Queen* 44 DLR (4th) 193. In the United States of America Title 18 of the United States Federal Criminal Code provides for an extended sentence of imprisonment for a "dangerous special offender" who satisfies certain criteria. The constitutionality of this provision has been upheld in several Federal Court decisions. Dangerous offender legislation also exists in several states in America (*Corpus Juris Secundum*, vol 24, paras 1468 and 1526).

[7] Upon a closer analysis of the provisions of ss 286A and 286B of the Act it appears that to trigger the operation of the procedure set out in these sections

it is not necessary for an accused to have been found guilty of any particular prescribed offence. In theory any conviction can do. In terms of s 286A(1) a superior court or a regional court which has convicted an accused of "one or more offences" may, if certain requirements and procedural safeguards have been observed, declare the accused a dangerous criminal. The requirements are, first, that the court must be satisfied that the accused represents a danger to the physical or mental well-being of other persons and, second, that the community should be protected against the accused. The court has a discretion both under subsections (1) and (2) of s 286A. If it appears to the court that the accused is a dangerous criminal, or where it is alleged before the court that the accused is a dangerous criminal, it has a discretion after conviction to direct that the matter be enquired into and be reported on in accordance with the provisions of s 286A(3). Furthermore, even if the court is satisfied that an accused

represents a danger to the physical or mental well-being of other persons and that the community should be protected against the accused, there is no obligation to declare the accused a dangerous criminal (s 286A(1)). Once the court has declared the accused a dangerous criminal it no longer has a discretion: it must sentence the accused to undergo imprisonment for an indefinite period and determine the fixed minimum term (s 286B(1)).

[8] There is a number of procedural safeguards in ss 286A and 286B, the most important of which are the following. Before a declaration that an accused is a dangerous criminal can be made the court must direct that an enquiry be conducted and be reported on by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court, and by a psychiatrist appointed by the accused if the accused so wishes (s 286A(3)(a)). For the purpose of

such enquiry the court may commit the accused to a psychiatric hospital or other place designated by the court (s 286A(3)(b)(i)). Before the court commits an accused for an enquiry the court must inform the accused of its intention to direct that the matter be enquired into and be reported on and must explain the provisions of ss 286A and 286B as well as the gravity of these provisions (s 286A(2)(b)). The reports by the psychiatrists must include a finding on the question whether the accused represents a danger to the physical or mental well-being of other persons. The procedure is similar to that of s 79 of the Act which provides for the examination of mentally disordered persons. The accused has the right to dispute any of the findings in the reports (s 286A(4)).

Where the finding contained in a psychiatric report is the unanimous finding of the psychiatrists who conducted the enquiry and the finding is not

disputed by the prosecutor or the accused, the court may determine the matter on the report without hearing evidence. If, however, the finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court must hear evidence before determining the matter.

[9] The release procedures provided by the legislature in s 286B include the following. The court which declares an accused a dangerous criminal and imposes imprisonment for an indefinite period must direct that the accused be brought before it on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court (s 286B(1)(b)). Within seven days after the expiration of the period determined by the trial Court, the accused must be brought before the court which passed sentence in order to enable such court to reconsider the sentence (s 286B(2)). The court before which an accused is brought after the expiration of the first period has the same

sentencing powers it would have had if it were considering sentence after the conviction of the accused, and the procedure adopted at such proceedings shall apply *mutatis mutandis* during the reconsideration of sentence, with the important difference that no finding shall be made unless the court has considered a report of a parole board as contemplated in terms of s 5C of the Correctional Services Act 8 of 1959 (s 286B(4)(a)). The court may then confirm the sentence of imprisonment for an indefinite period, in which case it shall direct that the accused be brought before the court on the expiration of a further period determined by it. The court may also convert the sentence into correctional supervision or release the accused unconditionally or on such conditions as it deems fit (s 286B(4)(b)).

[10] The constitutional validity of the dangerous criminal provisions in ss 286A and 286B of the Act was challenged before us mainly on the basis that

they infringe the right guaranteed by s 12(1)(e) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), which reads

> "12(1) Everyone has the right to freedom and security of the person which includes the right
>
> .....
>
> .....
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[11] The prohibition against cruel, inhuman or degrading punishment has its origin in the English Bill of Rights of 1688 which prohibited cruel and unusual punishment. Variations of the prohibition are found in the constitutions of the United States of America and Canada and even in countries where such a clause is not explicitly contained in a bill of rights, it may be deduced from provisions protecting human dignity (Van Zyl Smit, *Constitutional Juris-prudence and Proportionality in Sentencing* (1995) 4 European Journal of

Crime, Criminal Law and Criminal Justice, 369). As Steytler, *Constitutional Criminal Procedure*, (1998) points out at 406, the right to be protected against cruel, inhuman or degrading punishment has both historically and universally been recognised as one of the core fundamental rights. It is derived from the right to human dignity which, along with freedom and equality, is one of the basic values of our Bill of Rights. The Constitution does not give a definition of what is to be regarded as "cruel, inhuman or degrading" punishment and the Constitutional Court has declined to give a definitive definition of the phrase. In *S v Williams and Others* 1995(7) BCLR 861 (CC) **Langa J** said with regard to the different formulations of the prohibition in other international human rights instruments, that the common thread running through the assessment of each of these phrases is the identification and acknowledgement of society's concept of

decency and human dignity (at para 35). See also *S v Dodo* 2001(3) SA 382 (CC) at para 35.

[12] In the *Dodo* case **Ackermann J** said that the concept of proportionality goes to the heart of the inquiry as to whether a punishment is cruel, inhuman or degrading (para 37). See also *S v Makwanyane and Another* 1995(2) SACR 1 (CC) para 94. Our Constitutional Court has applied the proportionality principle to sentencing in general and not only to forms of punishment which are inherently cruel, inhuman or degrading. See *Makwanyane's* case, *supra*; *Dodo's* case, *supra*, para 37; *S v Williams and Others, supra* and *Bernstein v Bester NO* 1996(2) SA 751 (CC) paras 54 and 55. See further and generally in this regard Steytler *op cit*, para 5.2 and Van Zyl Smit, *op cit* 372.

[13] In *Smith v The Queen* (1987) 40 DLR (4^{th}) 193 the Supreme Court of Canada held that a mandatory minimum sentence of seven years' imprisonment

for importing narcotics into Canada violated s 12 of the Canadian Charter of Rights and Freedoms which guarantees the right not to be subjected to cruel and unusual treatment or punishment. The majority held that if a hypothetical case could be postulated for which the minimum sentence would be grossly disproportionate to the offence, the legislation which created such minimum sentence was unconstitutional. In the majority judgment **Lamer J** defined the phrase "cruel and unusual" as a "compendious expression of a norm" and held (at 477) that the criterion which must be applied in order to determine whether a mandatory minimum punishment is cruel and unusual is "whether the punishment prescribed is so excessive as to outrage standards of decency". The learned Judge held (at 477) that the test for constitutionality is one of gross disproportionality which is aimed at punishments which are more than merely excessive and warned that

> "We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence."

The gross disproportionality approach adopted in the *Smith* case was accepted in the *Lyons* case, *supra*, and by our Constitutional Court in *Dodo's* case, *supra*, (para 39).

[14] In the *Lyons* case the question for decision was whether the dangerous offender provisions of the Canadian Criminal Code were in conflict with the rights guaranteed by the Canadian Charter of Rights and Freedoms, *inter alia* the right not to be subjected to any cruel or unusual treatment or punishment. In terms of the Canadian legislation, as it presently reads, the court must be satisfied, as I have said, that the offence for which the accused has been convicted is a "serious personal injury offence" tending to cause severe physical danger or severe psychological injury to other persons and that the

accused constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing:

"753(1) ……..

(a) ……..

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint."

The majority of the Court held that the dangerous offender provisions did not violate the Charter. In the majority judgment **La Forest J** said (at 221) that the legislative classification of the target group of offenders met the highest standard of rationality and proportionality that society could expect by defining a very small group of offenders whose personal characteristics and particular circumstances militate strongly in favour of preventive detention which, *per se*, is not cruel or unusual for dangerous offenders. In dealing with the submission that it was the indeterminate quality of the sentence which harboured the potential for cruel and unusual punishment as it could sap the will of the offender to become rehabilitated, **La Forest J** held that the parole process saved the legislation from being successfully challenged under s 12 of the Charter. In this regard the Canadian dangerous offender

legislation provides for review of the sentence at the expiration of three years from its imposition and every two years thereafter.

[15] Reverting to the dangerous criminal provisions of the Act, there could, in the first place, be no constitutional objection to an indeterminate sentence, *per se,* since the protection of society is a legitimate purpose of sentencing, provided that the constitutional principle against gross disproportionality is respected (Steytler, *op cit* at 420).

In recent years the protection of the community and the purpose of prevention of future offences have received greater emphasis by our courts, particularly in cases of violent crime. In the *Makwanyane* case **Chaskalson P** said the following about the interests of society.

> "The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the constitution. The high level

> of violent crime is a matter of common knowledge ..... It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly" (para 117).

Ackermann J put it thus:

> "With the abolition of the death penalty society needs the firm assurance that the unreformed recidivist murderer or rapist will not be released from prison, however long the sentence served by the prisoner may have been, if there is a reasonable possibility that the prisoner will repeat the crime. Society needs to be assured that in such cases the State will see to it that such a recidivist will remain in prison permanently" (para 170).

[16] The fact that ss 286A and 286B of the Act are not limited to offences of any particular nature or severity and that the criteria for designating offenders as dangerous are not as specific and detailed as the dangerous offender provisions in, for instance, the Canadian Criminal Code, does not violate the constitutional principle against gross disproportionality. As I have pointed out,

the Court is not obliged to declare an accused a dangerous criminal even where it is satisfied that all the requirements for such a declaration are present. The Court is furthermore afforded a discretion with regard to the initial minimum period of imprisonment. This enables the provisions of these sections to be applied in conformity with the Constitution. The remarks of **Kriegler J** in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*, 1999 (4) SA 63 (CC) para 74, in regard to a bail provision in the Act, are also apposite to the dangerous offender provisions in the Act:

> "Section 60(11)(a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted."

The same point was made by **Ackermann J** in *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC) at para 43 where he said the following:

> "The presiding judge in these proceedings stands under the Constitution and is both able and obliged to conduct them in conformity with its provisions. An accused is entitled to expect no less. However, judges are human and liable to err. Should this happen, the accused has the right, under s 35(3)(o) of the Constitution, 'of appeal to, or review by, a higher Court'."

Potential misapplication of a statutory provision is not the test for unconstitutionality in South Africa. The issue in the *Dzukuda* case was whether the split procedure created by s 52 of the Act limited an accused's right to a fair trial in relating to sentencing. In dealing with the submission that the High Court's power to call for evidence on any matter and to remit the case to the regional court has the potential for violating the right not to be tried for an

offence in respect of which one has previously been either acquitted or convicted, **Ackermann J** said (at para 48):

> "As indicated above, the true question is whether the provisions under consideration compel the High Court to apply them in contravention of an accused's constitutional rights. As I have indicated, they do not. Potential misapplication of a statutory provision is not the test for unconstitutionality. If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity."

In my view the same applies to the present statutory provisions. They clearly do not compel the court to apply them in contravention of an accused's constitutional rights and are accordingly not unconstitutional.

[17] It was next submitted that the criteria in s 286A for declaring an accused a dangerous criminal are too vague and uncertain to meet the requirements of the principle of legality, namely, that the sentence provided for should be governed by clear legal rules. Floud and Young, *op cit* at 20-25,

discuss the difficulty in identifying and defining dangerous offenders satisfactorily for legal purposes and point out that, as the term is ordinarily used in reference to people, "dangerousness" refers to a pathological attribute of character : a propensity to inflict harm on others in disregard or defiance of the usual social or legal restraints. Yet, as the writers also point out, a "dangerous person" is not a psychological entity, nor is "dangerousness" a scientific or medical concept. It is also not necessarily associated with mental illness. These aspects were highlighted by the psychiatrists who testified in the present cases.

D A Thomas, *Principles of Sentencing*, 2nd ed (1979) 37 defines a dangerous offender as someone "who appears, on the basis of his immediate offence, his previous history and such psychiatric evidence as may be available, to be highly likely to commit grave offences of violence in the future". Floud and Young refer to a widely accepted common-sense definition

of the dangerous offender as "the repetitively violent criminal who has more than once committed or attempted to commit homicide, forcible rape, robbery or assault" and point out that this definition still leaves room for much disagreement. In the end it is for the court to make a predictive judgment of dangerousness and in this regard the writers conclude as follows (at 25):

> "Judicial determinations of dangerousness must take the form of predictive judgments. Evaluations of character alone will not do : predicted harm of some specified kind must be the criterion. But making a predictive judgment is not simply a question of predicting a future event in the same sense as making a retrospective judgment is a question of establishing a past event. Assessing the 'dangerousness' of a legally sane offender does not call simply for an actuarial statement – the answer to the question 'how probable is it that a man like this will cause further harm?' It calls for an evaluation of his individual character and circumstances – an answer to the more complex question: 'In what circumstances would this person now be going to cause harm and what is the strength or persistence of his inclination to do so in such circumstances?' To which must be added the further question: 'How likely is it that he will find himself in those circumstances in the foreseeable future?'"

With the writers' views as summarised and cited above, I agree.

[18] In making a predictive judgment of dangerousness the court must consider, as the psychiatrists did in both appeals, the personal characteristics of the accused, as revealed by psychiatric assessment, the facts and circumstances of the case and the accused's history of violent behaviour, particularly the accused's previous convictions. The Court must draw its own conclusions. Under the Canadian dangerous offender legislation it must be established to the satisfaction of the court that the offence for which the accused has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct and which is substantially or pathologically intractable. The Court must furthermore be satisfied that such conduct is likely to continue and to result in the kind of

suffering the provision seeks to protect, namely, conduct endangering the life, safety or physical or mental well-being of other persons (see the *Lyons* case, *supra* at 211 and 221). In *Neve v The Queen* 1999 ABCA 206 the Alberta Court of Appeal said the following about the Canadian dangerous offender legislation (at 211):

> "The dangerous offender legislation requires a court to focus on the person (and all relevant circumstances relating to what that person has done) and not simply on numbers of convictions. Parliament has not chosen to adopt a formulaic 'three strikes and you are out' approach to dangerous offender designations in Canada. Instead, before imposing one of the most serious sanctions under Canadian criminal law, a court is required to conduct a contextual analysis, concentrating on the offender and on the qualitative, quantitative and relative dimensions of the crimes the offender has committed."

In my view the approach of the Canadian courts affords useful guidelines to our courts when considering the concept of dangerousness in terms of s 286A of the Act. These guidelines will no doubt be refined and

particularised on a case by case basis, as the need arises (cf *Dodo's* case, *supra*, at para 11).

[19] The requirement in s 286A that the accused must represent "a danger to the physical or mental well-being of other persons" is no different in essence from the requirement in the Canadian legislation that the offender must constitute "a threat to the life, safety or physical or mental well-being of other persons". A finding that an accused is a danger or threat is, in effect, a present determination that he or she will continue to be dangerous in future, and cannot be regarded as too vague to satisfy the legality principle.

The openness of the standard triggering the enquiry in s 286A, as opposed to the requirement in the Canadian legislation that the offence for which the offender has been convicted must be a serious personal offence as defined, was criticised for being insufficiently precise to meet the standard of

legality. I do not think that the criticism is justified. Although the offence of which the accused has been found guilty is not specified in s 286A, it must clearly be of such a nature as to justify a present determination of continued dangerousness in future which, as I have shown, requires a pattern of persistent or repetitively aggressive and violent behaviour. The detailed procedures, including psychiatric evidence, provided for by s 286A, ensure that a declaration of dangerousness will not be lightly made. The purpose of the psychiatric evidence is to provide the court with an expert opinion on the interpretation of the accused's past conduct and personal characteristics and the accused's likely future conduct based on that analysis. For these reasons I am of the view that the dangerous offender provisions of the Act do not offend the principle of legality.

[20] Having found that the dangerous offender provisions in the Act are not unconstitutional I turn to consider the sentences imposed in the two appeals. In view of the length of the initial periods determined by the trial Courts (50 years in respect of four of the appellants, 35 years in respect of two and 30 years in respect of one appellant) as well as a number of misdirections in both judgments on sentence (to which I shall refer more fully later), it is necessary at the outset to refer briefly to sentences of life imprisonment, excessively long sentences, the parole regime currently in operation in this country and what a proper sentence would be to impose in terms of s 286B.

[21] Since the abolition of the death penalty this Court has consistently recognised that life imprisonment is the most severe and onerous sentence which can be imposed and that it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society. This

approach appears clearly from the passages quoted in the succeeding paragraphs.

[22] This Court has repeatedly warned against excessively long sentences being imposed by trial Courts in an attempt to circumvent the premature release of prisoners by the executive branch of government. In *S v S* 1987(2) SA 307 (A) this Court warned (at 313 H-J):

> "Die Verhoorregter se houding dat die appellant nie deur langtermyn gevangenisstraf effektief uit die gemeenskap verwyder kan word nie vanweë die waarskynlike optrede van die gevangenisowerheid kom op 'n mistasting neer. Ofskoon 'n regsprekende beampte nie noodwendig sy oë hoef te sluit vir die feit dat 'n gevonnisde moontlik op parool uitgelaat kan word nie ....., bly dit 'n onbekende faktor of 'n gevonnisde in 'n bepaalde geval wel op parool uitgelaat sal word en, indien wel, tot watter mate sy vonnis verminder sal word, en kan sulke gebeurlikhede nie by die bepaling van 'n gepaste straf as 'n waarskynlikheid in aanmerking geneem word nie."

See also *S v Smith* 1996(1) SACR 250 (O) at 256 b-c. In *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) **Harms JA** said the following at 521 g-i:

> "Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained .... courts should also refrain from attempts ..... to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate."

Earlier in his judgment **Harms JA** compared a sentence of life imprisonment with one of 47 years' imprisonment which had been imposed in that case in the following words (at 192 c-e):

> "The court has no control over the minimum or actual period served or to be served. A life sentence is thus a sentence that may, potentially, amount to imprisonment for the rest of the prisoner's natural life; and a sentence of 47 years may, potentially be for the full period. That means that *in law* a life

sentence is potentially (depending upon the life expectancy of the offender) more onerous than one of, say, 47 years."

In *S v Siluale en Ander* 1999 (2) SACR 102 (SCA) **Grosskopf JA** said the following about a sentence of life imprisonment (at 106g-107c):

"Ondanks die erns van die misdade en al die strafverswarende omstandighede van die geval is ek van mening dat die kumulatiewe effek van die opeenvolgende vonnisse meebring dat die effektiewe termyn van gevangenisstraf wat elke appellant opgelê is, so buitengewoon lank is dat dit heeltemal ontoepaslik en onrealisties is. Soos beslis in die saak van *S v Nkosi* 1993 (1) SASV 709 (A) op 717 g-h (waar die termyne van gevangenisstraf gesamentlik 122 jaar en ses maande beloop het) is 'n vonnis van lewenslange gevangenisstraf veel meer realisties in 'n geval soos hierdie, ook 'omdat dit nie een is wat die appellant nooit sal kan uitdien nie'. (Kyk verder *Mhlakaza* se saak *supra* op 522 h-i en 523 c-i; *S v Tcoeib* 1991 (2) SASV 627 (Nm).) Trouens, indien die omstandighede van 'n saak vereis dat die oortreder vir alle praktiese doeleindes permanent uit die samelewing verwyder word, is lewenslange gevangenisstraf die enigste gepaste straf. Dit is bedoel as die swaarste vonnis wat opgelê kan word, maar daar is darem ook erkende prosedures wat parool in gepaste gevalle moontlik maak, bv. waar die oortreder (selfs teen alle verwagting in) werklik hervorm. Om daarenteen so 'n buitengewone lang

termyn van gevangenisstraf op te lê dat dit geen moontlike hoop vir die oortreder inhou dat hy ooit vrygelaat sal word nie, al gebeur wat ook al, pas nie by 'n beskaafde regstelsel nie. Volgens my oordeel is lewenslange gevangenisstraf die mees gepaste vonnis vir al drie die appellante in die onderhawige saak. Die Verhoorregter wou verder klaarblyklik verhoed dat die verlening van parool en moontlike begenadiging deur die uitvoerende gesag enige werklike effek op die appellante se vonnisse sou hê. Daardie oorweging kan egter nooit die oplegging van 'n onrealistiese swaar vonnis regverdig nie. 'n Hof is immers nie bevoeg om deur middel van 'n ontoepaslike vonnis die toekenning van parool te probeer neutraliseer nie (kyk *Mhlakaza* se saak *supra* op 521 e-522 h.)."

[23] It is clear from the above passage in the judgment of **Grosskopf JA** that it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment.

In terms of s 65(5) and (6) of the Correctional Services Act 8 of 1959 a prisoner sentenced to life imprisonment may be released on parole by the Minister upon the recommendation of the National Advisory Committee

established under that Act. The recommendation is made after considering a report by the parole board and having regard to the interests of the community. No minimum period is laid down before a prisoner serving a life sentence can be released on parole.

Subsections (5) and (6) of s 65 were amended by the Parole and Correctional Supervision Amendment Act 87 of 1997 but none of the provisions of this Act has yet come into force. Section 9(d)(v) of the latter Act provides that a prisoner serving a life sentence shall not be placed on parole before serving at least 25 years of the sentence save that parole may be granted at the age of 65 years after serving at least 15 years. The new Correctional Services Act 111 of 1998, which has not yet come into operation, contains a similar provision (s 73(6)(b)(iv)). In terms of s 73(5)(a)(ii) of this Act it is left to the court to determine when a prisoner sentenced to life imprisonment may

be released on parole. The last-mentioned Act has not yet come into force It is, as confirmed by counsel for the State, presently the policy of the Department of Correctional Services that a prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or on reaching the age of 65 years and after serving at least 15 years of the sentence (see the Department's release policy published in Government Gazette No. 17386 of 30 August 1996 by Notice 1222 of 1996).

[24] Section 65(4)(a) of the Correctional Services Act 8 of 1959 provides that a prisoner serving a determinate sentence shall not be considered for parole before having served half of the sentence, save that the date may be brought forward by the number of credits earned. Section 65(4) was amended by s 9 of the Parole and Correctional Supervision Amendment Act 87 of 1997. The new provision to be substituted for s 65(4)(a) also requires a prisoner for whom a

non-parole period was not fixed by the sentencing court to serve half the sentence before being considered for parole, save that no prisoner shall serve more than 25 years before being considered for placement on parole. Section 73(6)(a) of the Correctional Services Act 111 of 1998 provides that all prisoners must be considered for parole after they have served 25 years of their sentences. This does not, however, apply to a sentence imposed under s 286B of the Act.

[25] To sum up, at the time of the imposition of the sentences in the present cases, a prisoner sentenced to life imprisonment became eligible for release on parole after serving 20 years of the sentence and a prisoner sentenced to a determinate sentence had to serve half the sentence before parole could be considered. This is still the present position.

[26] Although the High Court in this country previously had such power in any event, statutory provision for the imposition of a sentence of life imprisonment was first made by s 3 of Act 107 of 1990, amending s 276(1)(b) of the Act. In my view the intention of the legislature in enacting ss 286A and 286B (which, as I have said, came into operation on 1 November 1993) was not to provide a more severe or onerous sentencing option than a sentence of life imprisonment. This appears from the fact that also a regional court can impose a sentence in terms of ss 286A and 286B. Furthermore, as was pointed out in *S v T* 1997(1) SACR 496 (SCA) at 514 b-c, the sections confer a potential advantage on an accused in that instead of the sentence being finally determined (as far as the courts are concerned) there is the prospect that after serving the initial period there may be some amelioration of the sentence. The accused may even be released and, depending on the length of the initial

period fixed by the court, that may be much sooner than if a sentence of life imprisonment or a long determinate sentence had been imposed.

[27] In terms of s 286B(4) the court has three options when a prisoner is brought before it for a reconsideration of the sentence: it may confirm the sentence for an indefinite period, in which case it must fix a period upon the expiration of which the prisoner must again be brought to court, it may convert the sentence into correctional supervision or it may release the prisoner unconditionally or on such conditions as it deems fit. The subsection thus provides for the confirmation, conversion or termination of the sentence but not for a new sentence to be imposed. It follows, therefore, that if, when reconsidering the sentence, the court is not satisfied that the prisoner is still dangerous, the prisoner must be released. The court reconsiders the prisoner's continued dangerousness in the light of new evidence using the same powers

as the sentencing court. On the other hand, in the case of a prisoner serving a life sentence, a number of factors are usually considered before release on parole and if the parole conditions are violated the parole may be revoked (s 65(3)(c) and (d) of the Correctional Services Act 8 of 1959).

[28] Because ss 286A and 286B do not provide for any review during the initial period, the Court, when fixing that period in terms of s 286B(1)(b) should have regard to what sentence it would have imposed as a determinate sentence. If that sentence would have been, say 20 years' imprisonment, the accused would have been eligible for parole after 10 years and if the sentence would have been one of life imprisonment the accused could have been released on parole after 20 years (according to the current regime). In my view an initial period in excess of half the term of imprisonment which would have been imposed, or in excess of 20 years if a sentence of life imprisonment

would have been imposed, could be unjustified as it would deprive the accused of the right to be considered for parole when he might no longer be dangerous. For this reason the dangerous offender legislation in Queensland and Victoria in Australia requires the court when imposing an indeterminate sentence to specify the nominal sentence that it would have imposed if the sentence had been a determinate one. The nominal sentence determines the timing of the review of the sentence. In Queensland the sentence must be reviewed for the first time within six months after the offender has served one half of the nominal sentence, or if the nominal sentence is life imprisonment, within six months after the offender has served 13 years' imprisonment. Subsequent reviews must occur within two years of the date of the last review. In Victoria the first review of the sentence takes place as soon as practicable after the expiry of the nominal sentence which must at least be equal to the non-parole

period which the court would have imposed if the sentence had been a determinate one.

[29] In the light of the considerations set out in the preceding paragraphs I return to the sentences in issue in the present appeals. I shall deal first with the Bull appeal. As I have said, all the charges arose out of an armed robbery at the Superbake Bakery in Mitchell's Plain on the evening of 5 October 1997 during which the owner's son, Tajudien Badroodien, and a customer, Zoeraida van der Schyff, were killed. The trial Court found that the first appellant had shot Badroodien and that the second appellant had shot Van der Schyff. It was common cause that a third robber ("Calvert") had also taken part in the robbery. He died, however, before the commencement of the trial.

[30] On behalf of the second appellant it was submitted in this Court that the trial Court had erred in finding that it was the second appellant who had shot

Van der Schyff and that this finding, although it did not affect his conviction of murder on this count, had influenced the sentence imposed upon him. Two eyewitnesses, Faltheema Lee and Lance Februarie, testified that they were standing behind the counter near the cash register when the three robbers entered the shop. The tallest of the three came towards them, pointed a gun at them and demanded money while the other two went to the office at the back of the shop where Badroodien was sitting. Lee opened the till and the robber who had demanded money took the money and put it in a bag which he had with him. The second appellant admitted in his evidence that he was the tallest of the three robbers and that he was the one who took the money out of the till. While he was doing so two customers, Van der Schyff and another woman entered the shop. Lee testified that the one who had taken the money from the till went up to Van der Schyff and held his gun to her head while the first

appellant came from the back of the shop and grabbed the other customer's handbag. Badroodien came out of his office and told the robbers to leave the customers alone. The first appellant approached Badroodien and fired two shots at him. One of the bullets hit him in the back of the head, killing him instantly, and the other struck him in the stomach. According to Lee the robber who had been holding his gun against Van der Schyff's head, then fired a shot which hit Van der Schyff in the back of the head. He fired a second shot at Lee. She ducked behind the counter and the bullet hit the refrigerator behind her. The robbers fled and later divided the spoils of the robbery between the three of them.

The uncontested ballistic evidence showed that of the four spent cartridges found at the scene two had been fired by one firearm and the other two by another firearm. Two were found near Badroodien's body and clearly

came from the first appellant's firearm. This means that the shot which killed Van der Schyff and the one fired at Lee were fired by the same firearm.

The Court *a quo* accepted Lee's evidence that it was the second appellant who had shot Van der Schyff. His evidence denying that he had shot Van der Schyff was rejected. On appeal Lee's evidence was criticised in a number of respects, all relating to minor and unimportant details which do not in any way affect Lee's reliability as a witness and leave me unpersuaded that the trial Court erred in accepting her evidence. Her evidence is supported by the ballistic evidence that the shot which killed Van der Schyff and the one which struck the refrigerator were fired by the same firearm. The second appellant's evidence, on the other hand, was so far-fetched and unlikely that it was correctly rejected by the trial Court. In my view, accordingly, the trial Court's finding that he had shot Van der Schyff cannot be disturbed.

[31] At the enquiry held in terms of s 286A(3) of the Act Dr Kaliski, head of the department of forensic psychiatry at Valkenberg Hospital and Dr Magner, head of the department of psychiatry at the Lentegeur Hospital, testified on behalf of the state and the defence respectively. Both agreed that three factors in particular must be considered in assessing dangerousness namely the personal characteristics of the offender, the facts and circumstances of the case and the offender's history of violent behaviour, particularly previous convictions.

[32] Dr Kaliski expressed the view that both appellants showed marked anti-social personality traits and presented a significant danger to the physical or mental well-being of other persons. In the case of the first appellant he based his view on a pattern of anti-social activity for almost 10 years, gang membership and the way the present offences were committed. The first

appellant was born on 10 March 1977 and was thus 20 years old when the robbery occurred. He has no previous convictions.

In the case of the second appellant Dr Kaliski based his opinion on "a long-standing pattern of criminal behaviour which often involved violence, gang membership and cold, calculated behaviour during the present offences". The second appellant was born on 13 April 1976 and was thus 21 years old at the relevant time. He has three previous convictions for robbery, one for housebreaking and theft and one for theft. There was no indication of what violence, if any, these robberies involved. They were committed when he was sixteen years of age. Dr Kaliski was not prepared to say that either appellant would still be dangerous after 10 years.

[33] Dr Magner did not consider either appellant to be a dangerous criminal although he said that both showed anti-social personality traits. He emphasised their youth and the lack of information about their past history.

[34] In the judgment declaring the appellants to be dangerous criminals the trial Court said that the question of dangerousness depends not only on psychiatric evidence, which is of course perfectly true. It then proceeded, however, to ignore not only the psychiatric evidence but also the requirements for determining dangerousness set out in s 286A. The trial Court attached much weight to the fact that both appellants were gang members. In my view, however, gang membership, *per se*, is not necessarily indicative of dangerousness since it is well-known that some people join gangs for no other reason than self-protection or peer pressure. For these reasons the trial Court misdirected itself in declaring the appellants to be dangerous criminals.

[35] On a proper approach to this issue, applying the requirements of s 286A(1) and the guidelines set out above, I am not satisfied that a declaration of dangerousness was justified in the case of either appellant. The offences of which the two appellants were found guilty are undoubtedly of an extremely serious nature. It was a pre-planned armed robbery during which two innocent and harmless victims who offered no resistance were ruthlessly killed in cold blood. Yet, in view of Dr Magner's evidence, the appellants' youth, the first appellant's clean record, and the second appellant having no record of serious violence, a predictive judgment of dangerousness was not justified. I would accordingly set aside the declarations of dangerousness and in the case of each appellant impose a sentence of 25 years' imprisonment.

[36] In the Chavulla appeal the facts which are no longer in dispute may briefly be summarised as follows (the record in this appeal consists of 57

volumes running to some 5500 pages). On Saturday 21 August 1996 the deceased in count 1, Willem Mongia, was robbed of his BMW motor vehicle ("the BMW") near Malmesbury in the Western Cape by the second, third and fifth appellants (count 2). In the course of the robbery the second appellant killed Mongia by stabbing him with a knife (count 1) after which the third and fifth appellants helped him to bury Mongia's body. They intended using the BMW to commit further crimes and put this plan into action two days later when they broke into a farm-house in the district of Velddrift and stole a large quantity of goods (count 4). The stolen goods were conveyed to Atlantis near Cape Town in the BMW and sold with the help of the first appellant. The fourth appellant then joined them and all five appellants left Atlantis in the BMW intent on committing further crime. The first appellant's evidence that

he was forced to accompany the others was correctly rejected by the trial Court.

[37] From Atlantis the five appellants travelled up the Cape West coast, passing through the small villages of Doringbaai, Lutzville, Klawer and Vanrhynsdorp. At some stage during the journey the second appellant stole petrol from Loxton Motors (count 3). Eventually, during the early evening of Tuesday 24 September 1996, they reached the farm Heldersig near Nieuwoudtville. They left the BMW near the farm-house from where they proceeded on foot and entered the house by forcing open and climbing through a bedroom window. Inside the house were the owner, Hendrina Louw, and three guests: Aileen Fairbanks Smith, her four year old daughter, Emma, and Johan Viviers. Emma was already asleep in one of the bedrooms and the other three had just sat down for dinner in the kitchen when the appellants entered

the house. Louw, Fairbanks Smith and Viviers were grabbed and forced out of the kitchen. The hands and feet of Fairbanks Smith and Viviers were tied. Fairbanks Smith was taken to the bathroom where she was repeatedly struck over the head with a heavy object and stabbed with a knife until she died. Viviers was thrown face down on a bedroom floor and repeatedly stabbed with a knife. He survived because he lost consciousness and his attackers left him for dead. Louw was first taken to her car to explain how to operate it and she was then bound and stabbed to death. Emma was also stabbed to death. Throughout the attack which, according to the uncontested evidence of Viviers, lasted for 3 to 4 hours, the women and Emma cried and pleaded for mercy.

[38] The brutality, gruesomeness and mercilessness of the attack appears from the post-mortem evidence. Fairbanks Smith sustained 20 stab or cut wounds as well as 21 wounds caused by blunt force. Louw sustained 27 stab

or cut wounds and 12 blunt force wounds. Emma sustained 29 penetrating wounds some of which partly cut her throat. A boot was then placed on her face and a knife inserted at the base of her skull to sever her spinal cord. Viviers sustained 12 cut and stabwounds and was left with a knife blade protruding from both sides of his neck.

After the attack the appellants loaded the goods stolen from Louw's house into BMW and Louw's motor car and returned to Atlantis.

[39] Drs Kaliski and Magner testified at the s 286A(3) enquiry. Dr Kaliski's view was that the second, third, fourth and fifth appellants all showed marked anti-social personality traits and represented a significant danger to the physical or mental well-being of other persons in the medium term. It was, however, not possible to determine with certainty whether this risk would continue beyond a period of 10 years. Dr Kaliski said that if it was found that

the first appellant had not acted under duress he was as dangerous as the others, despite the fact that he had no previous convictions. Dr Kaliski testified that each of the appellants had shown that he had a capacity for extreme brutality and that the prospects of rehabilitation of any of them were very slim.

[40] Dr Magner testified that all the appellants displayed degrees of anti-social personality traits and said that the second and fifth appellants were psychopaths and very dangerous, the third and fourth appellants less dangerous, and the first appellant not dangerous, to the physical or mental well-being of others.

[41] The first appellant was 26 years old at the time of the commission of the offences and had no previous convictions. He was subsequently found guilty of assault with intent to commit serious bodily harm committed after the

commission of the present offences. The second appellant was 24 years old and had three previous convictions involving violence, including one for rape. Subsequent to the commission of the present offences he was again found guilty of housebreaking with intent to steal and theft. The third appellant was 35 years old and had no fewer than 21 previous convictions, including five for assault with intent to commit serious bodily harm, three for robbery, two for rape and one for attempted murder. He was subsequently found guilty of murder and kidnapping, committed before the commission of the present offences, for which he was sentenced to an effective 18 years' imprisonment. The fourth appellant was 30 years old at the time of the commission of the offences and had nine previous convictions, including one each for robbery and assault. He was subsequently found guilty of the same murder and kidnapping involving the third appellant, for which he received an effective

sentence of eight years' imprisonment. The fifth appellant was 36 years old when the present offences were committed and he has 16 previous convictions, including nine for housebreaking with intent to steal and theft and four involving violence.

[42] The first, third and fourth appellants were on bail and the fifth appellant on parole when the present crimes were committed. The first appellant was subsequently found not guilty of the offence for which he was on bail.

[43] The judgment of the trial Court declaring the appellants to be dangerous criminals contains several misdirections. The first one is that the trial Court, despite its fully justified view that the farm-house murders were crimes of the most extreme seriousness, did not consider imposing a sentence of life imprisonment in respect of any of the appellants. Secondly, the trial Court was under the mistaken impression that the legislature had intended the dangerous

offender provisions to replace the death sentence. It said in this regard that after the abolition of the death sentence and until the introduction of the dangerous offender provisions into the Act no punishment existed which adequately provided for the protection of the public, and that the dangerous offender provisions were enacted for this purpose. The trial Court thus overlooked the fact that the dangerous offender provisions had been on the statute book since 1 November 1993 which was long before the death sentence was declared unconstitutional in the *Makwanyane* case, *supra*, on 6 June 1995. The trial Court further misdirected itself in regarding a sentence in terms of s 286B as the most severe sentence it could impose. As I have pointed out, this is not correct. It also misdirected itself in concluding that, in order to achieve its stated purpose of removing the appellants permanently from society, s 286B entitled it to impose non-parole sentences of 50 and 30 years'

imprisonment. In so doing the trial Court overlooked the fact that such sentences could keep the appellants in prison even if the justification for the sentences i.e. their dangerousness, no longer existed and ignored the fact that, in the case of the second to the fifth appellants, the fixed periods imposed exceeded their probable life expectancy. Furthermore, the denial of the right to be considered for parole for such long periods was not only improper but also amounted to cruel and inhuman punishment.

[44] In view of the trial Court's misdirections in declaring the appellants to be dangerous criminals the declarations cannot stand and must be set aside. Had the trial Court properly considered its sentencing options it would not, in my view, have acted in terms of ss 286A and 286B but would, instead, have sentenced each of the appellants to life imprisonment. The first appellant has no previous convictions but he is no less to blame for the crimes committed at

Nieuwoudtville than the others. Like the other appellants, he deserves no other sentence than the most severe sentence which a court can impose, namely one of life imprisonment.

[45] Judicial and public disquiet concerning unwarranted parole releases of dangerous convicts is the likely reason for the massive sentences with which this Court has had to interfere in these cases and other recent matters and there can be little doubt that such sentences have been prompted by the overriding and legitimate motive to protect society. It is to be noted that the new Correctional Services Act 111 of 1998 involves more stringent parole procedures than presently exist but that Act, although passed and published, is not yet in operation. Its parole provisions, particularly with regard to persons sentenced to life imprisonment, need implementation as soon as possible. The fact that nearly three years have passed since its promulgation constitutes an

unusual and undesirable state of affairs which can only serve to increase public concern even more. If the reason for non-implementation is inadequacy of the State's financial and personnel resources to administer the entire Act there would seem to be no good reason why some parts of it – particularly the parole provisions relative to prisoners sentenced to life imprisonment – should not be brought into operation sooner than others. Section 138(2) of the new Act provides for exactly that. It is therefore appropriate to direct the Registrar to ensure that this judgment is brought to the notice of the respective Directors-General of Justice and Correctional Services.

[46] In the result the appeals of all the appellants are upheld. The sentences imposed by the Courts *a quo* are set aside and substituted with the following sentences.

A. <u>The Bull appeal</u>

Taking all the counts together for purposes of sentence, each appellant is sentenced to imprisonment for a period of 25 years.

B. <u>The Chavulla appeal</u>

Taking all the counts together for purposes of sentence, each appellant is sentenced to life imprisonment.

The Registrar of this Court is directed to transmit copies of this judgment to the Director-General, Justice and the Director-General, Correctional Services.

W. VIVIER ADCJ

HOWIE JA)
OLIVIER JA) **CONCUR**
CLOETE AJA)
BRAND AJA)