CASE NO.: SA

3/98 IN THE SUPREME COURT OF NAMIBIA

In the matter between

APPELLANTS

FIRST

RESPONDENT SECOND

THOMAS NAMUNJEPO AND OTHERS

And

THE COMMANDING OFFICER, WINDHOEK PRISON

THE MINISTER OF PRISONS AND CORRECTIONAL

SERVICES

CORAM: Strydom, C.J.; Silungwe, A.J.A, et

Levy, A.J.A. HEARD ON: 1999/04/15

DELIVERED ON: 1999/07/09

APPEAL JUDGMENT

STRYDOM. C.J .: At the time when this application was launched in the High Court the Appellants were all detained in the Windhoek Prison as awaiting trial prisoners.

Appellant No. 1, together with numbers 2, 3 and 4, escaped from prison on 11 August 1997. Appellants 1, 2 and 3 were recaptured on 16 August 1997 and Appellant No. 4 on 12 September 1997. Following their recapture all four Appellants were put in "chains". The First, Second and Third Appellants were put in chains on 16 August 1997 and the Fourth Appellant on 12 September 1997. Although the Fifth Appellant did not escape

it was alleged that he attempted to escape and he was put in chains on 11 August 1997. It was alleged that at the time when the application was launched all the Appellants were still in chains. That would mean that First, Second, Third and Fifth Appellants were in "chains" for periods exceeding six months and Fourth Appellant for a period exceeding five months.

Although the application was served on the Respondents there was no opposition when the matter came before Hannah, J, on the 27th February 1998. The following Rule *nisi* was issued by the learned judge, namely:

> " 1. That the rules of the above Honourable Court in respect of forms, service and time periods are dispensed with due to the urgency of this application.
>
> 2. That a Rule *nisi* is hereby issued, calling upon the Respondents to show cause, if any, on Friday, 27 March 1998 at lOhOO, why a final order should not be granted in the following terms:
>
> 1. That First Respondent be directed to remove forthwith the irons, mechanical restraints or chains presently placed on Appellants' bodies.

2. Declaring Respondents' conduct or practice of placing prisoners in irons, mechanical restraints or chains to be unconstitutional.

3. Declaring the following sections of the Prisons Act, Act No. 8 of 1959 ("the Prisons Act"), to be unconstitutional and setting aside these sections:

4. the phrase "and, in addition in the alternative, if necessary, to be placed in irons or subjected to some other approved means of mechanical restraint" in section 80(1);

5. the phrase "any such restraint or" in section 80(2);

6. the phrases "and, if necessary, subjected to mechanical restraint", "or restraint" and "or restraint" in section 80(3);

7. the phrases "restraint or" in section 80(5)(a);

8. the phrases "restraint or" and "restraint or" in section 80(5)(b);

9. the phrase "Or subjected to mechanical restraint" in section 80(6).

10. Declaring regulation 102 of the Prisons Regulations, made in terms of section 94 of the Prisons Act, to be unconstitutional and setting it aside.

11. In the alternative to paragraphs 2.2, 2.3 and 2.4 above, declaring the subjection of Applicants to irons,

mechanical restraints or chains to be unlawful.

12. That Second Respondent pays the costs of this application, first Respondent to be so liable only in the event of his opposing this application."

Subsequent to the issue of a Rule *nisi* the Respondents filed a notice of opposition and the Commanding Officer of the Windhoek Central Prison deposed to an affidavit in which it was stated that the Respondents had no objection to the confirmation of subparagraph

2.1 of the Rule *nisi,* I.e. releasing the Applicants forthwith from irons, mechanical restraints or chains placed on their bodies. The deponent also stated in his affidavit that the Applicants were in fact so released. The Commanding Officer further denied that section 80 of the Prisons Act was unconstitutional and opposed the relief claimed in terms of subparagraphs 2.2, 2.3 and 2.4.

The return day of the Rule *nisi* was finally heard on the 8th May 1998 before Teek, J. (as he then was) and O'Linn, A.]. The Court (O'Linn, A.J.) confirmed paragraph 2.1 of the Rule *nisi* but dismissed paragraphs 2.2 as amended and 2.3 as well as 3.4 and 3.5 of the Rule *nisi* (paragraphs 3.4 and 3.5 should read 2.4 and 2.5). During argument before the Court a *quo* Mr. Light, who appeared on behalf of the Appellants, applied for the amendment of subparagraphs 2.2 and 2.3.6 of the Rule *nisi,* by deleting the words "mechanical restraints" and "or subjected to mechanical restraint" where they appear in the subparagraphs. This was done because the words "mechanical restraints" also include handcuffs and any declaration of unconstitutionality would therefore also prohibit the use of handcuffs which was not the purpose of the application.

On appeal Mr. Light and Mr. Botes again appeared respectively for the Appellants and the Respondents.

At this stage it is necessary to give a short chronology of the fate of the Prisons Act, Act 8 of 1959. The judgment in this matter was delivered on 5 August 1998. On 22 June 1998 a new Prisons Act was published which repealed the whole of Act No. 8 of 1959. This new Act became law on 26 August 1998. (See G.N. No. 206 published in Government Gazette 1927 of 15 August 1998.) Therefore, by the time that this Appeal was heard on 15 April 1999, Act.8 of 1959 was replaced by the new Act, Act

17 of 1998. The question then arose whether this Appeal had not become an abstract or academic exercise and if so whether this Court should hear it? (See I.T. Publishing (Ptv) Ltd and Another v Minister of Safety and Security and Others, 1997(3) SA 514 (CC).)

Although Mr. Light conceded that there was no comfort in declaring something unconstitutional which no longer existed he argued that the new Act, Act 17 of 1998, also provided for placing prisoners in mechanical restraints and that any ruling by this Court would therefore not be wholly academic but would serve as a guideline for the implementation of the new Act. Counsel further informed the Court that various prisoners had instituted civil claims against the Government on the basis of the unconstitutionality of sec. 80 of the repealed Prisons Act (hereafter referred to as the Prisons Act) and/or the unlawfulness of putting prisoners in chains in ways which were not sanctioned by the section.

It is, in my opinion, in this latter regard that the rights of the Appellants are affected and which makes it necessary that this Court should deal with the Appeal. The Rule *nisi* was dismissed by a Full Bench of the High Court which decision would bind any single]udge sitting on the civil claims. A decision of this Court in favour of the Appellants will have an effect on the rights of the Appellants in their civil claims. A decision by this Court

against them will effectively put paid to claims based on the unconstitutionality of sec. 80 of the Prisons Act. That would save time and costs as Appellants would then be limited to their claims, if any, based on the unlawful actions by employees of the State.

The challenge to the unconstitutionality of sec. 80 and Regulation 102 was based on Article 8 of the Constitution. Section 80 of the Prisons Act provides as follows:

"(1) As often and for as long as It Is urgently and absolutely necessary to secure or restrain any prisoner -

13. who has displayed or is threatening violence; or

14. who has been recaptured after escape or who there is good reason to believe is contemplating escape;

the member of the Prisons Service in charge of the prison may order that prisoner to be confined in an isolation cell, and, in addition or in the alternative, if necessary, to be placed in irons or subjected to some other approved means of mechanical restraint for such period as may be considered absolutely necessary, but not exceeding one month.

15. The powers conferred upon a member of the Prisons Service by sub section (1) may likewise be exercised by him upon the written order of the medical officer recommending any such restraint or confinement in an isolation cell for medical reasons.

16. A member of the Prisons Service in charge of a prison may order any prisoner to be

confined in an isolation cell and, if necessary, subjected to mechanical restraint if such confinement or restraint is requested by the police authorities in the interests of the administration of justice, but the period of any such confinement or restraint shall not be longer than is necessary for the purpose required.

(4)(a) The member of the Prisons Service who issues an order under this section shall immediately make an entry in a book to be kept for the

purpose, recording the particulars thereof and if such member is not a commissioned officer, he shall without delay send notice of his action to the commissioned officer under whose command he falls, stating the facts and making his recommendation.

(b) Such commissioned officer shall at the earliest opportunity visit the prison and confirm or set aside such member's order. (5)(a) If it is considered absolutely necessary to continue such restraint or confinement in an isolation cell for a period exceeding one month, the member of the Prison Service in charge of the prison shall report to the commissioner stating the facts and making his recommendation, (b) Upon receipt of the said report and recommendation the commissioner may order the extension of the period of restraint or confinement in an isolation cell for two additional months, but no such restraint or confinement shall exceed a period of three months without an order under the hand of the Minister. (6) Save as is provided in section seventy-nine and in this section, no prisoner, other than a person under sentence of death or in the course of transfer or while temporarily outside the precincts of the prison, shall, unless sentenced to solitary confinement by

a court of law, be confined in any isolation cell or subjected to mechanical restraint."

Regulation 102 of the Prisons Regulations provides that -

"Limitation and object of restraint .

17. Restraint shall only be applied in the circumstances and for the purpose prescribed in section 80 of the Act and shall in no circumstances whatsoever be used as punishment.

18. All forms of mechanical restraint and the manner in which they are applied, shall be prescribed: Provided that chains exceeding five kilogram in mass shall not be used."

Article 8 of the Constitution provides 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 persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Article 8 was on more than one occasion the subject of interpretation before the High and Supreme Courts of Namibia. The first occasion was when the Supreme Court considered the constitutionality of corporal punishment by

organs of State. See Ex parte: Attorney General: *in* re Corporal Punishment by Organs of State, 1991 (3) SA *76* (NmSc).

As to what a Court's approach to Article 8(2)(b) should be Mahomed, A.J.A., (as he then was) stated that the words "to torture or to cruel, inhuman or degrading treatment or punishment" should be read disjunctively and they therefore seek to protect the citizens from seven different conditions namely:

"(a)torture;

19. cruel treatment;

20. cruel punishment;

21. inhuman treatment;

22. inhuman punishment;

23. degrading treatment; and

24. degrading punishment."

p. 86 A-C

Furthermore the learned Judge stated that no derogation from the rights entrenched by Article 8 are permitted and that the State's obligation was absolute and unqualified. "All that is therefore required to establish a violation of art. 8 is a finding that the particular statute or practice authorised or regulated by a State organ falls within one or other of the seven permutations of Art. 8(2)(b) set out above; 'no questions of justification can even arise' (Sieehart The International Law of Human Rights at 161 para 14.3.3)" p. 86 D-E.

The learned Judge further pointed out that:

> "The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the court. (S v Ncube and Others *{supra)* at 717 I.)
>
> It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms,

aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a

> just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today." P. 86 H - p. 87 A.

After also reviewing the situation in various other jurisdictions the Court had no hesitation to declare corporal punishment by organs of State unconstitutional, also in regard to juveniles.

The next case in which Article 8 played a role is S v Tcoeib, 1993(1) SACR 274 (Nm). This is a judgment by C'Linn,]. and concerned the constitutionality of life imprisonment. The learned Judge discussed various cases and more particularly Ex parte: Attorney-General: In re: Corporal Punishment and summed up the law as follows:

> "(a) When the court must decide whether or not a law providing for a particular punishment is cruel, inhuman or degrading and thus in conflict with Article 8 of the Namibian Constitution and whether such law and such punishment is therefore unconstitutional and forbidden, the Court must have regard to the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution, as well as the consensus of values or 'emerging consensus of values' in the 'civilised international community'.
>
> 25. The resultant value judgment which the court must make, must be objectively articulated and identified, regard being had to the aforesaid norms, etc., of the Namibian people and the aforesaid consensus of values in the international community.

26. Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such *ss* the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America, the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people.

27. In order to make an objective value judgment, an enquiry of some sort is required, which must at least comply with the mandatory provisions of the Supreme Court Act and the High Court Act as well

> as with the elementary requirements for a judicial tribunal In deciding Issues of fact and law in any proceeding." (p. 286 J-287 d.)

The case of Tcoeib went on appeal to the Supreme Court of Namibia. The Court, Mahomed, C.J., tested the various legislative provisions which provide for a sentence of life imprisonment against *inter alia,* Article 8(1) and 8(2)(b) of the Constitution. The learned judge came to the conclusion that if, in the Namibian context, life imprisonment should mean incarceration of the prisoner for the rest of his or her natural life then that would reduce the prisoner to a thing without any continuing duty to respect his or her dignity. Such sentence would be unconstitutional (p. 399 a - b). However, after a review of the relevant legislation, the learned Chief justice came to the conclusion that sufficient provision is made for the release of a prisoner after some time and that life imprisonment was therefore not *perse* unconstitutional.

Thereafter the learned judge considered whether, on the facts of the particular case, it could be said that the sentence of life imprisonment was unconstitutional. The court came to the conclusion that the imposition of such a sentence would 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" (p. 402 f-g).

In the case of S. v Sipula, unreported, judgment by O'Linn, J, in which I concurred, the Court accepted for purposes of the judgment that the case of Ex parte: Attorney-General: In re: Corporal Punishment, *supra,* also outlawed corporal punishment imposed and executed by the Khuta (a customary court), in terms of customary law. It was

however pointed out that the Khuta was an institution of the Namibian people and as it did not have an opportunity to put Its views before the Court in the Ex parte: Attorney-General-case, *supra,* it was doubtful whether the accused, who was only executing the order of the Khuta, was aware of the unlawfulness of his act.

In S. v Vries, 1996(3) SACR 638 (Nm) a Full Bench of the High Court of Namibia considered the constitutionality of the minimum sentence imposed by *sec.* 14(1)(b) of the Stock Theft Act, Act No. 12 of 1990. Frank, J., in whose judgment Gibson,]., concurred, came to the conclusion that Article 8(2)(b) was absolute. To determine whether a particular legislative Act infringes the Article "is a value judgment that could vary from time to time but which is one not arbitrarily arrived at but which must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may or may not coincide with the norms of any particular judge" (p. 641 b - c). The learned judge came to the conclusion that minimum or mandatory sentences are not *perse* unconstitutional (p 646 e).

In order to determine whether a particular minimum sentence was unconstitutional the Court reviewed American and Canadian cases where the Courts declared unconstitutional a sentence which was grossly or excessively disproportionate

to the wrongdoing or severity of the offence (p 642 c - j). The learned judge then stated that the disproportionality test was the same test that was originally used to determine whether a sentence was shocking in the sense that it was one which no reasonable man would have imposed (p. 643 h-i).

O'Linn, j., came to the same conclusion as the majority of the Court but for different reasons. The learned judge stated that Ant. 8(2)(b) was not absolute and he reasoned

that first of all the content or meaning of the fundamental right must be ascertained (p. 651 b). The Court considered the onus and concluded that in the case of fundamental rights the onus was on the person alleging an infringement of his right to prove on a balance of probability that that right was constitutionally violated (p. 665 - *667* g). To decide the meaning and content of the right contained in Article 8(2)(b) in the context of the Constitution it is necessary to make a value judgment as expressed in the Ex parte: Attorney-General: In re: Corporal Punishment-case, *supra,* (p 667 h). Although no evidence was placed before the Court concerning the general norms and aspirations held by the Namibian people the Court was entitled to take judicial notice of notorious facts (p. 671 h). The learned Judge in conclusion applied the proportionality test which he saw as part and parcel of the current values test, the former providing a more precise and practical yardstick for the Court to apply (P. 673 c - 674 d). Strong emphasis was placed by the learned Judge on determination by the Court of the present values and aspirations of the Namibian people and examples are given of how this determination can be achieved, (p. 671 h - 672 c).

Lastly there is the case of S v Muronea Ionas Likuwa, a Full Bench Judgment of the High Court of Namibia, unreported, delivered on 23 March 1999. It also concerned a

minimum sentence namely that imposed by sec. 38(2)(a) of the Arms and Ammunition Act, 1996. The Judgment by Hannah, J., was concurred in by Mtambanengwe, J., and Mainga, A.J. The court accepted that there can be no derogation from the rights entrenched by Article 8 and confirmed the approach of Mahomed, A.J.A, (as he then was) in the Ex parte: Attorney-General: In re: Corporal Punishment-case, *supra,* at p. 188 D that the determination of Constitutionality or otherwise involves a value judgment based on the contemporary norms, aspirations and expectations of the Namibian people.

The Court again applied the proportionality test as set out by Frank, J. in the Yrjej-case, *supra.*

Bearing in mind the above judgments it seems that there is general consensus that to determine whether there is an infringement of Article 8(2)(b) involves a value judgment based on the current values of the Namibian people. In instances where the infringement is based on the constitutionality or not of a mandatory minimum sentence the proportionality test was applied as a yardstick by the Courts. In instances where it concerns the type of sentence, such as corporal punishment and whether life imprisonment is *per se* unconstitutional, the proportionality test can not always be applied to determine the current values of the Namibian people. In such cases the Court will have to determine such values as expressed in the Constitution and other institutions of the people and, if necessary, resort to some or other form of enquiry as was suggested by O'Linn,]., in the Tcoejb-case, *supra,* and the present case.

Although, at first blush, it seems that the Judges are not argreed as to the issue of whether Article 8(2)(b) is absolute or not, a reading of the cases shows that all the Judges applied the current values test. That, in my opinion, presupposes that such exercise is undertaken to give content and meaning to the words used in the Article. Once this is

done there is no basis on which legislation which is in conflict therewith can be found to be constitutional and in that sense all agreed that the Article is absolute. Lastly it was accepted in all these cases that the people of Namibia share basic values with all civilized Countries and for that reason it is useful and important to look at interpretations of other jurisdictions although the determining factor remains the values expressed by the Namibian people as reflected, *inter alia,* in its various institutions.

In the matter before Court Mr. Light submitted that the placing of Appellants in irons *per se* violates their right to dignity and constitutes cruel, inhuman and degrading treatment or punishment of the Appellants. Counsel's argument was based on the law as set out in the case of Ex parte: Attorney General: In re: Corporal Punishment, *supra.* Counsel therefore accepted that before it can be said that a particular treatment or punishment was inhuman or degrading, a value judgment based on the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in their national institutions and Constitution and the emerging consensus of values in the civilised international community, is required. (Ex parte: Attorney-General: in re: Corporal Punishment-case, *supra,* p. 86H - 87A.) See also S v Tcoeib, *supra,* at 398e and 398c.

Dealing with the position in International Law Mr. Light submitted that Namibia has acceded to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and the International Covenant on Civil and Political Rights ("ICCPR") which both contain provisions similar to our Article 8 of the Constitution. Namibia also acceded to the First Optional Protocol to the "ICCPR" which allows for complaints by individuals to go before the Human Rights Committee. Counsel further referred to the Standard Minimum Rules for the Treatment of Prisoners and more particularly Rules 33 and 34 thereof which deal with

mechanical restraints and prohibit the use of chains and irons. Counsel were agreed that such Rules do not create legal obligations but serve as guidance in interpreting the general rule against cruel, inhuman or degrading treatment or punishment. (See Van Zvl Smit. South African Prison Law and Procedure, p. 81.)

Mr. Light also referred the Court to cases in various other jurisdictions such as India, European Court of Human Rights, United States of America and Legislative provisions in

South Africa and the United Kingdom concerning the use of mechanical restraints. There is no doubt that the majority of these authorities show a movement away from and an abhorrence of the arbitrary and unnecessary use of mechanical restraints in regard to prisoners. Most of the Countries opted for the use of mechanical restraints only in instances where it was absolutely necessary and then under strict control and for shorter duration. Counsel did not maintain that such chaining constitutes cruel treatment or punishment.

Mr. Botes argued that an investigation of the case-law and legislative provisions of other Countries show that mechanical restraints are still accepted throughout the civilised world although some Countries have moved away from the practice of chaining or placing a prisoner in irons. Section 80 of the Prisons Act provides for specific instances where the placing in irons is permissible and then only when absolutely necessary. Furthermore *sec.* 102(1) of the Prison Regulations specifically forbids the placing in irons as a means of punishment. Counsel consequently submitted that sec. 80 of the Prisons Act and Regulation 102, and more particularly the parts objected to, were not unconstitutional.

At this stage it is perhaps necessary to point out that imprisonment does not deprive a prisoner of all or every

basic right which the ordinary citizen enjoys. In the case of Goldberg and Others v Minister of Prisons and Others. 1979(1) SA 14(A) the following was stated by Corbett, J.A., at 39 C - E:

> "It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties are very considerable. He no longer has freedom of movement and

> has no choice In the place of his imprisonment. His contact with the outside world Is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribed how he must conduct himself and how he is to be treated while in prison. Nevertheless, there Is a substantial residuum of basic rights which he cannot be denied; and if he is denied them, then he is entitled, in my view, to legal redress."

Although the learned Judge was in the minority when he made these observations this general approach was accepted by the South African Appeal Court in the case of Minister of Justice v Hofmevr, 1993(3) SA 131 (AD). See also Mandela v Minister of Prisons, 1983(1) SA 938 (AD) at 957 E - F.

I respectfully agree with what was stated in these cases. To imprison a person would in many respects invade his or her rights and also the right to dignity but these inroads are the necessary result of the incarceration and are sanctioned by the Constitution, Article 7. That does not mean that a prisoner can be regarded as a person without dignity. Putting a prisoner in irons where that is not absolutely necessary would, at least, constitute degrading treatment as that word was understood in the case of Ex parte: Attorney-General: In re: Corporal Punishment-case, *supra,* p. 86 G. In this regard the Court looked at the dictionary meaning of the words "inhuman" and "degrading". According to The Oxford English Dictionary "inhuman" means "destitute of natural kindness or pity; brutal; unfeeling;

cruel; savage; barbarous." To "degrade" means "to lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase". These meanings are also accepted for purposes of this case.

Concerning the question whether sec. 80 of the Prisons Act and Regulation 102 are unconstitutional no evidence as to the contemporary aspirations, norms, expectations and sensitivities of the Namibian People was placed before the Court a *quo* or this Court. In

all the circumstances there is no reason why this Court shall not approach this issue as was laid down by Mahomed, C.J., in S. v Tcoeib, *supra,* p. 398 I, footnote 11, namely:

> "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."

In determining what the contemporary norms, sensitivities, ideals and aspirations of the people at a given time are, the Court is not free from certain constraints. Firstly the words used by the Constitution have their usual and grammatical meanings, which cannot be totally ignored. A Court interpreting a Constitution will give such words, especially those expressing fundamental rights and freedoms, the widest possible meaning so as to protect the greatest number of rights. It must further also be understood that present day values cannot possibly change what is utterly cruel or inhuman or degrading into something which is not cruel or inhuman or degrading. Secondly the very aspirations expressed by the Constitution may set the tone and explain present day norms and sensitivities held by the people.

in dealing with the current day values of the Namibian people as expressed in their Constitution, Mahomed, C.J.,

after analysing the provisions of the Constitution, stated the following in S. v. Tcoeib, *supra,* p. 398 d - f, namely:

> "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 shame of its racist and colonial past. Those values require the organs of the society continuously and consistently to care for the conditions 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."

Without such hope and a belief in his or her own worthiness and dignity any attempt at rehabilitation of a prisoner stands little or no chance of success.

As stated in the Namibian cases quoted herein before the Court should also look at the situation in the international community. In this regard both Counsel have referred us to various cases in other jurisdictions as well as conventions and protocols drafted and accepted by various institutions and countries. As to the general situation the following is stated by the learned writers Strydom, Pretorius and Klinck in their book International Human Rights Standards, Vol 1, p. 280, namely -

> "The use of such apparatus in coercive circumstances rightly bears implications that are morally repugnant to civilized conduct. The use must therefore, be strictly controlled and avoided where possible. There are, however, inevitably occasions in which physical restraint need to be applied with the additional help of specifically designed equipment or instruments in order to prevent physical injury to the prisoners concerned or to the staff, escape or unacceptable damage. These rules are designed to set acceptable limits within which such restraint may be employed."

The rules to which the learned authors were referring to

are the Revised European Standard Minimum Rules for the Treatment of Prisoners. As sec. 39 of the Rules completely prohibits the use of chains and irons the above excerpt cannot be seen as authority for the application of irons and chains as mechanical restraints. As was conceded by Mr. Botes many countries did away with mechanical restraints in the form of irons and chains.

Another instrument which is very much to the same effect as the Europeon Standard Minimum Rules is the United Nations Standard Minimum Rules for the Treatment of Prisoners. Rules 33 and 34 thereof indicate what restraints are permitted and under what circumstances they could be applied. The Rule further expressly prohibits the use of chains or irons as a form of restraint. Bearing all the aforegoing in mind it seems to me that the better opinion is that countries should move away from the coercive application of any restraints. Furthermore that the application of restraints, where permissible, are only to be used when necessary and even then under strict control. The application of irons and chains is not accepted by some countries. Although instruments such as the Minimum Standard Rules have no legal standing its provisions are often relied upon as an interpretative help in the application of domestic legislation concerning penal institutions. (See S. v. Staeeie. 1990(1) SACR 669 (C); S. v. Daniels, 1991(2) SACR 403 (C); International Human Rights Standards, *supra,* p. 153.)

The Court was also referred to the role played by irons, chains and fetters during the period when slavery was rife and when these instruments were used to shackle people together before abducting them by force. The stigma which attaches to the chaining of human beings who were taken away in bondage still echoes after all these years and is

associated with such implements.

As was pointed out by O'Linn, J., in the Court *a quo,* Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people. Therefore the accession of Parliament to both the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment ("CAT") and the International Convenant on Civil and Political Rights ("1CCPR") on 28 November 1994 is .significant. Both these instruments contain

provisions similar to our Article 8 and Article 10.1 of the ICCPR provides specifically that-

> "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Acceptance of the above instruments by Parliament at least makes it clear that there can be no misunderstanding that it was also accepted that issues such as humanity and respect for dignity of the human person continue to exist also in regard to those who are put behind bars, in S. v. Tcoeib, *supra,* p. 300 a, Mahomed, C.J., had this in mind when be said that if life imprisonment in the Namibian context would mean detention for the rest of the prisoner's natural life it would be unconstitutional because without hope of release the prisoner is reduced to a thing and stripped of all dignity. The acceptance by Parliament of these Conventions as well as the First Optional Protocol to the ICCPR is a continued expression of and confirmation of the high norms and values of the Namibian people as contained in the Constitution and expressed by other Institutions. When the Court must now make its value judgment it can also not ignore previous expressions in those judgments which were based on those very norms, sensitivities and aspirations and as a result of which certain constitutional principles were articulated.

Against the above background it is now necessary to look at the allegations set out in the affidavits of the Appellants. First Appellant stated that the chains consist of two metal rings with a fastener that is usually welded close or sealed in such a way that he cannot remove the ring. A metal chain connects the two rings. This chain is approximately 30 cm long. A ring is placed on each leg, just above the ankle. First, Second and Third Appellants were placed in chains on their recapture on 16 August 1997. Fourth

Appellant was placed In chains on his recapture on 12 September 1997 and Fifth Appellant was placed in chains on 11 August 1997. In regard to the Fifth Appellant he did not escape but it was alleged by the prison authorities that he had attempted to escape. At the time when this application was launched, i.e. 26th February 1998, all the Appellants were still chained. In this regard it was alleged that the Appellants wore these chains uninterruptedly since they were first placed in them. Because of the shortness of the chains it is difficult to walk and it is also not possible to exercise properly.

It is furthermore alleged that the metal rings bump against the ankles, causing pain and discomfort and also causing abrasions around the ankles. First Appellant found it difficult to sleep whilst the chains were on and he said that he could not shower because it was difficult to remove ones trousers with the chains on. First Appellant further stated that they were all closely guarded and were kept in single cells which made it impossible for any of them to escape. First Appellant therefore says that they were chained not to prevent them from again escaping but just to punish them.

The Respondents, in their answering affidavit, did not reply to any of these allegations and the fact that the chains were removed from all the Appellants, without more

ado, after they had instituted this application, seems to suggest that they were kept in chains longer than what was even prescribed by sec. 80 of the Prisons Act.

Bearing all this in mind the question is whether our Constitution, which outlawed the death penalty, which, through application of the present values of its people, put a stop to corporal punishment in respect of both adults and juveniles by Organs of State and which will not accept life imprisonment unless there is hope of release for the prisoner, will sanction the use of irons and chains in regard to prisoners under any circumstances? In

my opinion it would not. Whatever the circumstances the practice to use chains and leg-irons on human beings is a humiliating experience which reduces the person placed In irons to the level of a hobbled animal whose mobility is limited so that it cannot stray. It is furthermore still a strong reminder of days gone by when people of this continent were carted away in bondage to be sold like chattels. To be continuously in chains or leg-irons and not to be able to properly clean oneself and the clothes one is wearing sets one apart from other fellow beings and is in itself a humiliating and undignified experience. To sanction the chaining of a prisoner just because he had escaped constitutes in my opinion punishment (Sec. 80(1) (b)).

There is, as was found by the Court a *quo,* a general outcry against the escalating incidence of crime. This is quite understandable and also natural but it would in my opinion be wrong to equate this with a hardening of the public opinion against prisoners and read into it a sanction for those who may have escaped to be put in chains or irons on recapture. That seems to be very much a case of closing the stable door after the horse has bolted. In the present instance it must also not be forgotten that all the Appellants were still trial awaiting prisoners who were presumed innocent until proven guilty.

Furthermore reference was made to Regulation 103 of the Prison's Regulations which provides for a system of complaints by prisoners. However this possibility cannot rescue the situation once it is found that the practice to chain or to put prisoners in irons is in conflict with Article 8(I) and/or 8(2)(b) of the Constitution.

I am therefore of the opinion that the placing of a prisoner in leg-irons or chains is an impermissible invasion of Article 8(I) and contrary to Article 8(2)(b) of the Constitution as it at least constitutes degrading treatment. The Court should therefore declare such

practice unconstitutional. In view of the fact that Act No. 8 of 1959 was repealed It Is not necessary to make any declaration in that regard. Likewise Regulation 102, if it had survived the repeal of Act No. 8 of 1959, does not contain any empowering provision and no declaration need therefore be made in that regard. Appellants are entitled to their costs of appeal and costs in the Court a *quo.*

The following order is made:

28. The appeal succeeds and it is, in addition to the order made in the Court a *quo,* further declared that the Respondents' conduct or practice of placing prisoners in leg-irons or chains is unconstitutional.

29. The Respondents are ordered to pay Appellants costs of appeal and costs in the Court *a quo.*

STRYDOM, CJ.

I agree.

SILUNGWE,

A.J.A.

I agree.

LEVY, A.J.A.
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