HANGINGS

PRESIDENT F.W. de Klerk's moratorium is over but can the government pay the price of having judicial executions resume? CARMEL RICKARD examines the issues confronting both State and abolitionists.

THE moratorium on judicial executions, announced by state president F.W. de Klerk on February 2 last year is over, and it now seems only a matter of time until hangings resume.

Following De Klerk's announcements, many abolitionists hoped the moratorium would lead — in practice if not in law — to the scrapping of the death penalty.

They believed while the state might not wish to pay the political cost of abolishing the death penalty, it was equally reluctant to pay the price of using these powers.

Then in March Justice Minister Kobie Coetsee announced death row prisoner Paul Bezuidenhout would be executed, after the Appellate Division refused his appeal against the death penalty.

A last minute Supreme Court application won him a temporary reprieve while a fuller report on his mental condition is researched and submitted to Coetsee as part of a petition for the death penalty to be commuted.

But Bezuidenhout's close brush with the gallows brought home to the human rights community that the threat of a resumption in hangings was very real.

Abolitionists face several serious problems: The revised legislation continues to allow executions; but because it was amended very recently, it is unlikely the law will be changed again in the near future; Public opinion, according to Coetsee, mostly favours the death penalty. This makes a campaign for abolition more urgent, yet more difficult; Finally, many abolitionists pin their hope on political change, anticipating a new government which is committed to ending the death penalty. Even if they are proved correct, however, such a government is unlikely to be in office for several years yet.

In the meantime, civil rights lawyers are faced with the problem of how to respond to the existing situation, and must continue devising new strategies to ensure as many prisoners as possible escape the noose.

The new law, embodying some important changes, presents obvious challenges and opportunities.

Under the old legislation, lawyers for an accused had to show there were extenuating circumstances surrounding the crime. If they could not prove EC's existed the judge was obliged to sentence the accused to death.

In terms of the new law, judges are no longer obliged to sentence anyone to death. They have to consider all the mitigating and aggravating factors and then use their discretion to decide whether the death penalty would be appropriate.

This should act to the benefit of the accused because mitigation is a wider concept than extenuation.

Since Coetsee has indicated hangings are likely to resume, all lawyers in South Africa who act for accused persons in murder trials will have to develop the field of researching and presenting evidence on mitigation more thoroughly, so as to give their clients the benefit of the changes to the law.

Schooled in the nuances of EC's, defence lawyers will have to take the broader view and learn from countries such as the United States where this section of a murder trial can take an average of a week, far longer than the norm in South Africa.

There are serious practical difficulties, chief of which is funding. The presentation of mitigation is a sophisticated aspect of defending a capital case. Yet when the new legislation providing for mitigation was introduced last year, it was not accompanied by the provision of additional government legal aid resources which would have enabled lawyers to translate the concept into reality.

The crucial role a well-prepared mitigation case can play was recently illustrated in the appeal against the outcome of a trial initially assumed by many to be a "clear cut hanging case".

Five accused, four of them sentenced to death, were convicted following the murder of four scabs during a national strike by railway workers during 1987.

The appeal, by Wilson Matshili and four others, illustrates a fully developed mitigation case of the kind which could increasingly be heard by the courts — where finances permit proper research and presentation.

In their initial trial, held under the old law, defence for Matshili and his co-accused put up what was believed to be the most extensive extenuation argument yet heard by a South African court.

By the time their appeal was heard the law had changed, and their defence "converted" their argument into an even more extensive mitigation presentation.

It reviewed the circumstances of the strike as perceived by the workers, and, as background to their actions, outlined the build-up of anger and frustration at what they believed was intransigence and unfair behaviour by management.

But the significant innovation in the argument was the presentation of a fully-developed picture of the social psychology dynamics involved during regular meetings of the strikers in the basement of Cosatu House.

It was argued that the meeting place was hot and airless, with the windows permanently closed against police teargas. People sang and danced, emotions were high, a strong feeling of group solidarity prevailed and people became increasingly angry and hungry as their money ran out without any sign that management would act justly and resolve the problems which had given rise to the strike.

Matshili's defence said this was the potentially explosive situation which transformed normally law-abiding "salt of the earth" workers into men capable of participating in a mass killing.

In heads of argument stretching over 200 pages, the defence outlined the findings of five expert witnesses including University of Los Angeles social psychology professor, Scott Frazer, and another social psychologist from the University of Leicester, Andrew Colman. Several previous cases have involved evidence on de-individuation and related factors, but this has always tended to be piecemeal. In the Matshili case however the

Broadening the grounds for pleading in mitigation

defence developed a whole theory of social psychology combined with evidence on crowd behaviour. Counsel argued the trial court erred in its assessment of the overall impact of group dynamics, giving too little weight to the "extraordinary processes inherent in de-individuation, the effect of situational forces, frustration-aggression, obedience, group polarisation and associated themes."

In argument the defence outlined these theories and how the conditions prevailing before and at the scene of the killings were likely to have impacted on the accused in line with these theories.

Detailed attention was also given to each accused individually and how he was affected both by the background from which he came, and by his circumstances immediately before the killings.

Counsel submitted that the involvement of the accused in the strike and the "final fateful steps" which led to their participating in the killings should be seen as "a tragic culmination of a lifetime of law-abiding effort to make ends meet and to provide sufficient food and clothing to ensure their survival and that of their families."

A sketch of the backgound of each accused was given including "their morality, religious beliefs, obedience to law, employment history and their history as fathers and/or husbands", as these factors became important in establishing mitigating circumstances.

It was argued in detail, on the basis of the experts' reports, that Matshili for example, was undoubtedly de-individuated", that he was frustrated, literally without food, subject to powerful conformity pressure, profoundly affected by a sense of relative deprivation and that he "perceived the power of the group as sovereign".

The hard work of compiling and presenting this evidence in mitigation paid off, and the death sentence of each of the accused was commuted.

The 12 year sentence of one accused not sentenced to death was however upheld.

The AD reviewed the circumstances of the killing and agreed with the trial court that the murders were brutal and gruesome, adding the deceased were "barbarically and ruthlessly slaughtered" and that they must have suffered greatly. The AD found that the accused did not act impulsively and that quite a few hours passed between the time the decision was taken to kill the deceased, and the implementation of this plan.

Outlining the aggravating factors, the AD also considered the motive for the killings — not just to punish the deceased for not striking, but also to coerce other non-strikers to stop working and thus compel management to come to terms with the strikers. "The murders were an act of intimidation; indeed one of terror."

"The unfortunate victims were innocent, law-abiding citizens who had simply been exercising their right to work and earn a living. They were given neither the opportunity of explaining their actions, nor the chance of ceasing their employment. They were shown no mercy." And yet, despite finding these strongly aggravating factors which added up to making it a "particularly serious case", the AD was persuaded there were strongly mitigating factors.

Death penalty will go either through abolition by parliament or through attrition with constant legal efforts undercutting its imposition.

As a result of the evidence placed before the court by the defence, the AD came to the conclusion that it was reasonably possible that because of the prevailing circumstances the accused suffered from "a lack of self-restraint which it is fair to assume they would otherwise have exercised."

"They therefore acted with diminished responsibility. This being so, their moral guilt must, despite the brutality of the crimes and however reprehensible their conduct, be regarded as having, for this reason, been reduced."

The AD then asked whether these factors were enough, given the horrendous crime.

"Normally they would have merited the utmost rigour of the law. I have come to the conclusion however that the cumulative effect of the mitigating factors is such that the death sentence is not imperatively called for.

"(They) were subjected to psychological forces which caused them to act in an uncharacteristically violent manner towards persons against whom they had intense resentment. So these crimes were committed under abnormal circumstances.

"There is no reason to think that (they) cannot be rehabilitated. Nor would the deterrent aspect of punishment be inadequately catered for by the imposition of a period of imprisonment. In all the circumstances, the interests of society would in my view be adequately served by (their) lives being spared."

Commenting on the decision to set aside the death sentences, instructing Attorney David Dison, said that the outcome was significant.

"It will hopefully be a reported case on the question of mitigation and the death penalty and will help establish that social psychology dynamics — concepts like by-stander apathy, de-individuation, conformity — can be grounds for mitigation.

Dison's view is that there are two routes to the demise of the death penalty. Either through abolition by parliament, or through attrition, with constant legal efforts undercutting its imposition. "We seem to be going the second route in South Africa," he said. "Cases such as this continue to wear away the grounds for imposing the death penalty, widening the understanding of mitigation and making it increasingly rare for executions to take place."

One difficulty about the "second route" is that it is slow and painstaking work, involving enormous research efforts. But this in turn requires massive funding, which is simply not available to most prisoners charged with a capital offence.

Academic research has indicated that the fate of an accused may be influenced by the judge who hears the case, with some more likely to pass the death penalty than others.

Apart from scrapping the death penalty altogether, there is little that can be done about this problem.

But at least each accused person should be entitled to the best possible defence to save him or her from the gallows. And that means adequate funding. Otherwise, the complaint can continue that the size of one's bank balance determines the chances of escaping the noose. ●