IN THE SUPREME COURT OF THE)
) No. SCC 111 of 1992
AUSTRALIAN CAPITAL TERRITORY)

THE QUEEN

v.

DAVID HAROLD EASTMAN

SENTENCE

Carruthers A.J.

10 November 1995

SENTENCE

CARRUTHERS AJ:

The prisoner, David Harold Eastman, was arraigned before me and a jury of twelve on 16 May 1995 upon an indictment containing one count, namely, that he on the 10th day of January 1989 at Canberra in the Australian Capital Territory did murder Colin Stanley Winchester. To this indictment the prisoner pleaded not guilty whereupon the trial commenced. During the course of the trial it became necessary for me to discharge one juror due to illness and on 28 August I ordered that the trial proceed with eleven jurors pursuant to sub-s.8(3) of the *Juries Act 1967*.

Following a trial which lasted for five and a half months, the jury of eleven returned a verdict of guilty on Friday, 3 November. The prisoner now comes forward for sentence; submissions on sentence having been made by Mr. O'Donnell, counsel for the prisoner, and Mr. Adams, QC for the Crown on 7 November.

Sub-section 12(2) of the *Crimes Act 1900* (the Act) provides that "a person who commits murder is guilty of an offence punishable, on conviction, by imprisonment for life". It is open to me, however, to impose a determinate sentence if that is considered to be appropriate punishment.

The prisoner was born on 29 September 1945 and is accordingly presently 50 years of age. His father was in the Australian Diplomatic Service and consequently he spent his early years both in Australia and in various countries overseas. As far as his secondary education is concerned, he attended firstly St. Ignatius College, Riverview in Sydney. The family then

went overseas and upon their return to Canberra, he attended Canberra Grammar School in 1961. His achievements at Canberra Grammar were quite significant. He became Dux and was a house prefect. He played competition cricket (1st eleven) and rugby (2nd fifteen) for the school. He attended Sydney University for some time and then, because of his father's commitments in the Diplomatic Service, he attended the University of Sussex in the United Kingdom.

In 1965 he graduated from the University of Sussex with an honours degree in Economics. He then went to India to do a year's teaching under the British Voluntary Scheme called Voluntary Service Overseas.

He returned to Australia in December 1965 and obtained a position with the Australian Public Service commencing as an Administrative Trainee with the Public Service Board. He held a permanent position in the Service for eleven and a half years working in a variety of departments. The concluding three and a half years were spent in the Treasury Department. He was a finance officer in the Foreign Investment Division advising on matters relating to foreign investment in Australia. During the whole of that period his substantive position remained the same, however, at intervals he acted in a higher position and for approximately half the time that he was in Treasury he received higher duties allowance.

It is noteworthy that in 1967 he took time off to care for two members of his family who were disabled from birth and needed special care and assistance. His parents were then stationed in Kuala Lumpur.

In 1977 the prisoner was working in the Treasury Department at the equivalent of Clerk Class 9. However, in circumstances which it is not necessary to relate, he voluntarily resigned from the Public Service.

Shortly thereafter he successfully applied to have his resignation reclassified as retirement on the grounds of invalidity. This gave him two choices in relation to benefits available to him. He could either elect to take a pension or he could choose to receive a "once and for all" lump sum in lieu thereof. At the end of January 1978 he elected to take the lump sum. He came to regret this election and in 1980 sought to have the election reversed so that he could obtain a pension, anticipating thereby that his return to the Public Service would be facilitated. As time progressed, additional claims were made by him for various forms of compensation from the Public Service.

I do not need to traverse the large amount of evidence that was put before the jury dealing with what was referred to in the trial as the Public Service campaign, which evidence was directed to the Crown case on motive. It is sufficient to note that the Crown led evidence on the following matters:

1. The prisoner's resignation from the Public Service and his election to accept a lump sum payment.
2. His protracted endeavours to reverse the election to accept a lump sum and to obtain in lieu thereof a pension.
3. His protracted endeavours to obtain the benefit of accumulated sick leave credits.
4. His protracted endeavours to obtain compensation in relation to the alleged failure of the Service to counsel him prior to his resignation.

5. His protracted endeavours to obtain certification that he was medically fit for re-employment in the Public Service.
6. His protracted endeavours to obtain re-employment in the Public Service.

I am satisfied, for sentencing purposes to the requisite standard, that the prisoner became increasingly frustrated and angry at the lack of progress which he was making with regard to these matters, and this developed to the extent of overt expressions of anger and threats of violence to various persons. Clearly threats of extreme violence were made to two senior officers in the Service, Messrs Frodyma and Kennedy. These threats were made but not carried out.

In December 1985 the prisoner was seeking advice from Mr. and Mrs. Bewley in relation to problems Mr. Bewley had encountered with the Commissioner for Superannuation, and in relation to his own problems, when he said words to the effect, "Well, sometimes I get so frustrated I could just get a gun and kill someone".

Then, in early 1988 he told Ms. Vick, the Principal Private Secretary to Senator Janine Haines, "I'll probably have to kill someone to get the attention paid to the injustice that's been done to me". Both Mr. Kennedy and Ms. Vick were so concerned about the intensity of the statements made by the prisoner that they notified the police.

The prisoner suffered a serious setback in his campaign when the Administrative Appeals Tribunal handed down a unanimous decision on 4 November 1986 upholding a decision of the Commissioner for Superannuation that he was not then considered fit for re-employment in the

Australian Public Service. Significantly, this decision contained a number of adverse findings so far as the prisoner was concerned. Inter alia, the Tribunal said:

> "And the past, as is often the case, is the best guide to the future. Even in flawless conditions the applicant will still need to interact with somebody. He has demonstrated over and over again that he is simply unable to deal with the ordinary tracasseries of life."

And later:

> "In fact, it seems to us that because of the discipline structure of the Service, the need to manage and relate to people in the Service, who are required to harmonise with people outside the Service, in short, the people intensity of the Service, the Australian Public Service as a whole is egregiously unsuitable for the applicant".

However, the prisoner maintained his campaign and ultimately achieved some significant progress. In December 1988 the Delegate of the Commissioner for Superannuation was required to determine whether he was then in such a restored state of health as to enable him to be re-employed in the Australian Public Service.

The Delegate had before him (inter alia) reports of Dr F. Hocking, psychiatrist, dated 24 October 1988 and 15 November 1988, respectively. In his decision dated 16 December 1988, the Delegate noted that Dr Hocking concluded from his own psychiatric assessments of the prisoner that he was unable to detect anything that would lead one to consider him as unfit for return to the Australian Public Service.

However, the Delegate pointed out that in his report dated 15 November 1988, Dr Hocking accepted that the prisoner should be allotted "self paced projects that entail minimum contact with other people", because of the medical and employment history available to him. But again he

emphasised that, based on his own interview with the prisoner, "it would not be possible to recommend that any restrictions be placed on his working conditions".

The Delegate also noted that Dr Roantree (the prisoner's general practitioner) made an assessment on 26 May 1988 that he would, on review, be found fit for employment.

The Delegate went on to say:

> "Accordingly, I am satisfied that there is no recent medical evidence available to this Office which would allow me to reach any conclusion other than the conclusion that Mr. Eastman's health has improved".

And further:

> "Therefore, if I were confined to consideration of the current medical evidence alone I would, perhaps, be constrained by Dr Hocking's findings to reach a conclusion that Mr. Eastman was fit to return to his duties and that no qualifications should be placed on this conclusion".

The Delegate referred, however, to the fact that in the 1986 AAT decision the Tribunal concluded that it was proper to have regard to evidence other than medical evidence and that the Commissioner was entitled and probably bound to have regard not only to the duties performed by the applicant before his retirement but also to any other matters that might have a bearing upon his ability to resume performance of those duties. The Delegate expressed the view, therefore, that in reaching his decision he was entitled to have regard to matters other than the medical opinions from Doctors Hocking and Roantree.

Thus the Delegate went on to have regard to the relatively short-term duration of Mr. Eastman's employment in the period since his retirement, and

the difficulties he had experienced in inter-personal relations as outlined in the AAT 1986 decision.

The Delegate also stated that he had taken into account prior recommendations that a graduated return to employment of persons who had been absent from the workforce for some time or who have suffered from any significant physical or mental conditions was desirable.

The ultimate decision of the Delegate was that the health of Mr. Eastman had become so restored as to enable him properly to perform clerical duties in a middle management position at the Administrative Service Officer Class 5 to 7 level, involving self-paced projects and minimal contact with other people.

The prisoner responded on 22 December 1988 by requesting the Commissioner to re-consider the Delegate's decision in accordance with the relevant provisions of the *Superannuation Act 1976*. Reasons for this application were set out in the letter. The variations sought were that the Delegate's decision be varied to the effect that only Administrative Service Officer Class 7 duties be regarded as suitable and by deleting the qualification regarding self-paced projects and minimal contact with other people. The letter concluded:

> "I take this opportunity, while expressing my pleasure at the basic decision, to voice my judgment that co-operation from the Department of the Treasury in finding me a position is very unlikely to be forthcoming, and that therefore it may be necessary to write to other departments such as Prime Minister's, Finance, Foreign Affairs and Trade, and DITEC, in order to find a position."

So far as the Public Service campaign evidence is concerned, it concludes with the last mentioned letter from the prisoner. I have dealt with

this aspect of the evidence in a little detail for two reasons. Firstly, it demonstrates that the ultimate position reached in the dispute was still a fluid one and that the prisoner faced significant difficulties in obtaining re-employment within the Service, particularly bearing in mind the terms of the 1986 AAT decision, which would, in all probability be considered by a prospective employing Department. Secondly, it is the most up to date evidence before me as to the prisoner's mental condition. (See s.429A(1)(k) of the Act)

It is now necessary to back track a little. On 17 December 1987 the prisoner and one Andrew Russo (a fellow tenant of Jerilderie Court, Reid) were involved in an altercation over a car parking space. Both sustained some injury in the altercation. The prisoner attended the City Police Station to complain and to seek to have Mr. Russo charged. The prisoner then went to the Royal Canberra Hospital where Mr. Russo was receiving treatment. As it transpired, however, the Police decided to charge the prisoner with having assaulted Mr. Russo instead of the converse. In this regard the investigating police officers relied upon a statement from Mr. Russo together with persons who were said to be supporting witnesses. This angered the prisoner because he took the view primarily that this alleged change of tack was the result of a Senior Constable who was antipathetic to him, wrongly influencing a fairly inexperienced constable to lay the charge against him.

There was much evidence as to the altercation itself and the succeeding disputation between the prisoner and the police officers (at various levels within the Force) who declined to take steps to have the charge

withdrawn and (he claims) to deal appropriately with his complaints about Mr. Russo. Ultimately, the matter was placed in the hands of the Director of Public Prosecutions and, therefore, the most that the Police could do thereafter would have been to make recommendations to the Director that the matter not proceed.

The prisoner complained in evidence that he was treated by a number of police officers with a lack of consideration and co-operation, and with aggression and hostility.

The relevant Police witnesses, on the other hand, claimed that despite every attempt to satisfy the complaints of the prisoner and to inquire into them, he was never satisfied and, indeed, in the case of a number of police officers, he was abusive and threatening to them and refused to co-operate when asked for statements.

The Police conduct (as he saw it) outraged the prisoner and he was incensed at what he envisaged to be the injustice of their treatment of him. This aggravated the sense of bitterness, frustration, anxiety and anger which he was still experiencing in relation to his disputation with the Public Service. I am satisfied that he considered that a conviction for assault could well operate as an impediment to his obtaining re-employment within the Service.

His frame of mind can clearly be seen by the explosive passage in a letter dated 24 December 1987 which he wrote to a penfriend in Germany, Ms. Irene Finke. I quote:

> "To make matters worse, I was assaulted by a neighbour one week ago after an argument over a parking space. He punched me and gave me a black eye. But he has 2 friends as witnesses. They went to the Police and lied. Now I am to be charged with assaulting him. This injustice, on top of thinking about my father's will, is driving me crazy. Now I want to

> kill the neighbour, his friends, and the bastard Police as well. I have been to a solicitor of course, he doesn't care except that this is a chance to make some more money. I sympathise with men who kill hundreds, thousands, millions. Now you know the truth."

The jury were, of course, given careful directions in relation to the legal effect of the various parts of this passage.

This passage has an added significance in that on 19 January 1988 the prisoner commenced to search for a weapon. Inquiries were made by him in January of a number of persons who had advertised weapons for sale in *The Canberra Times*. In all there were ten separate inquiries or attempted inquiries in that month. This search culminated in the purchase of a .22 Stirling semi-automatic rifle with a telescopic sight on 10 February from one Geoffrey Bradshaw. In order to obtain this weapon, the prisoner endorsed the Notice of Disposal on the reverse side of Mr. Bradshaw's licence with a false name and address. In addition he sought to disguise his handwriting and forged the signature "J.F. Thompson".

He test fired this rifle and then returned it to Mr. Bradshaw claiming that it had jammed. I accept the evidence of Mr. Bradshaw that when the rifle was returned to him, the prisoner said that he would like to keep the "scope" and Mr. Bradshaw agreed to sell it to him for $20. The balance of the purchase money was repaid by Mr. Bradshaw.

Then on 13 February the prisoner bought a Ruger .22 S/A rifle from James Leneghan, who had advertised it in *The Canberra Times* on that day. The prisoner did not buy the telescopic sight which was available for sale with this rifle.

The prisoner at some stage placed this rifle and a quantity of .22 cartridges in a gun bag which he had purchased. He deposited the bag, the rifle and the cartridges in a stormwater drain under the old Federal Highway in the Gungahlin area. The prisoner had test fired the rifle before it was deposited in the drain. I am satisfied that he left the rifle in this drain with the intention later of repossessing it. However, it was accidentally discovered by one Julian Woods on 1 May 1988 and handed over to the Police. Because there was no documentation in relation to the transaction the rifle could not be traced back to the prisoner.

However, I am satisfied that because the weapon was no longer available to him after 1 May 1988, it was necessary for him to renew his search for a weapon. Thus it was that on 4 June 1988 the prisoner inspected a .22 Ruger rifle advertised on that day by one Scott Thompson in *The Canberra Times*. Later on or about 20 November 1988 he made inquiries about another Ruger which was advertised for sale in *The Canberra Times*.

I accept that the Bradshaw and Leneghan rifles were purchased by the prisoner and the other inquiries were made by him in relation to weapons because he had resolved by the beginning of 1988 that someone was going to pay for the injustice which he had suffered. There is, however, no evidence indicative of any particular person having been identified at that stage as a prospective victim.

In evidence the prisoner asserted that he had purchased the above rifles and made the other inquiries because he needed a rifle (which he carried loaded and cocked in the boot of his car) to protect him from what he

perceived to be the threat associated with Mr. Russo's possession of a pump-action shotgun. In the light of the totality of the evidence, this explanation was not only inherently lacking in credibility and plausibility but could obtain no support from the nature and content of the contemporaneous complaints which the prisoner had so frequently made to police officers about his concerns with regard to Mr. Russo. I have no doubt that it was rejected as a plausible explanation by the jury.

That leads me to 31 December 1988. The evidence of Mr. Webb, finding support as it does in other parts of the evidence in the case, particularly the compelling forensic evidence, leaves me with no doubt that on that day the prisoner purchased from Mr. Klarenbeek at Queanbeyan what transpired to be the murder weapon, namely a 10/22 Ruger rifle which had originally been owned by one Fynus Caldwell, sold to one Noel King and then further on sold to the late Mr. Klarenbeek.

The purchase of the Klarenbeek weapon followed an unsuccessful meeting with Assistant Commissioner Winchester at his office on 16 December 1988. That meeting had been arranged by the then shadow Attorney-General, Mr. Neil Brown, QC, who was making representations on behalf of the prisoner, who had heard favourable reports about Mr. Winchester. It is clear that the meeting became quite heated and that the prisoner became angry at what he perceived to be Mr. Winchester's negative attitude towards taking steps directed towards having the charge withdrawn. Mr. Winchester, on the other hand, I have no doubt, became heated when serious allegations were made against his subordinate officers and he

expressed a determination to defend his officers. The meeting ended on a sour note in that the prisoner declined to shake Mr. Winchester's hand when it was proffered to him. There is some minor dispute about what was said by the prisoner at the time, although the various variations do not differ significantly. It is sufficient to note that Mr. Brown deposed that the prisoner said to Mr. Winchester, "I'm not going to shake hands with you. I want this investigated properly and I won't shake hands with you until that is done".

Mr. Winchester wrote to Mr. Brown on 20 December informing him that he could not be of assistance to the prisoner.

Hasty representations were then made to the Commissioner of the Australian Federal Police, Mr. McAuley. The need for haste arose from the fact that the committal proceedings in relation to the Russo charge were listed for 12 January 1989. These submissions also proved to be unsuccessful and indeed I am satisfied (although this is far from being a critical point) that the letter informing the prisoner that his representations had been unsuccessful, was received by him on 10 January 1989 - the morning of the murder which took place at about 9.15 p.m. that evening.

I am satisfied that after the unsuccessful meeting with Mr. Winchester, the prisoner focused his hatred of the police and his need for revenge upon Mr. Winchester. Thus, the generalised hatred descended to the particular.

It seems clear, however, that prior to the evening of 10 January, the prisoner had "stalked" the deceased's premises and given some thought as to how the death of Mr. Winchester could most suitably be achieved. It is, of course, impossible to discern with precision his mental processes at about

this time, but insight can be obtained from the evidence of Mr. Barbara and Dr Roantree. Neither of these witnesses was challenged by cross-examination. Although Mr. Barbara could not be precise about dates, he said that the prisoner said to him in either late November or early December 1988, "I'll kill Winchester and I'll get the Ombudsman too".

At a consultation in the afternoon of 6 January 1989, i.e. four days before the murder, Dr Roantree said that the prisoner told him that he was worried about the pending assault charge that had been brought against him and that he had been to see the Police Commissioner (sic) with a political figure and he hadn't received any help there at all. (This was clearly a reference to Mr. Winchester.) In fact, he said, that he had been thrown out or virtually thrown out of the office.

Dr Roantree responded by saying, "You can't do things like that. You can't push Police Commissioners off their chair". Dr Roantree sensed extreme anger on the part of the prisoner towards that comment. The prisoner responded by saying that he was not listened to at all and that he was furious.

Dr Roantree then deflected the conversation to the prisoner's medical condition which was the subject of consultation. However, the prisoner made the comment that the police should be taught a lesson. He said, according to Dr Roantree, "Every time something happens he feels - felt that he was suspected and that every time he reports - reported anything, he got the blame".

At the conclusion of the consultation he exclaimed as he was leaving, "I should shoot the bastard".

When one considers the statements made to Mr. Barbara and Dr Roantree in the light of the totality of the evidence in the case, they have a very chilling effect indeed. The totality of the evidence makes it perfectly clear that they were in fact threats which were not only intended to be taken seriously, but were in fact acted upon.

It is convenient to note, at this stage, that the investigation of Mr. Winchester's murder involved a prolonged investigation by Australian forensic experts in relation to ballistics (taking as a starting point two PMC .22 cartridge cases located at the murder scene) and in relation to gunshot residues located on the body of the deceased, on the exterior and in the interior of the deceased's Ford, at the murder scene, and in the boot and the interior of the prisoner's Mazda. This forensic investigation obtained powerful support from overseas independent forensic experts retained by the Director of Public Prosecutions to review in certain respects the work carried out by the Australian experts and their expressions of opinion. The overseas experts came from such diverse jurisdictions as the United Kingdom, the United States of America and Israel. This investigation must surely rank as one of the most skilled, sophisticated and determined forensic investigations in the history of criminal investigation in Australia.

The totality of the evidence (including, of course, the forensic evidence) satisfies me that on the evening of 10 January 1989, the prisoner lay in wait for Mr. Winchester to return to his home.

Upon his return the prisoner approached his stationery car from behind and at almost point blank range, fired two bullets from a rifle into Mr. Winchester's head, killing him instantly. That rifle was a 10/22 Ruger fitted with a silencer and probably a telescopic sight.

After the murder the weapon was placed in the boot of the prisoner's Mazda and he decamped.

The fact that the murder weapon has never been found is of no consequence because the ballistics evidence cogently establishes that the rifle which fired the cartridge cases located at the scene, was the one sold by Mr. Klarenbeek to the prisoner on 31 December 1988.

When interviewed by police officers on the day following the murder, the prisoner asserted that he had no recollection of his precise movements on the previous evening between the hours of 8 p.m. and 10 p.m. The jury could well have taken the view that this assertion (which was repeated under oath at the trial) was so inherently implausible as to be untrue and was in reality merely an attempt to avoid disclosure of the true situation, the revelation of which would be damning to him.

As the trial progressed, the cogency of the Crown case became clear. Regrettably, however, from the outset of the trial the prisoner attempted to avoid the consequences of the damning nature of the Crown evidence by adopting a process of manipulating the trial process and attempting to frustrate its progression in any conventional manner. Despite the persistence of this approach, the trial process nevertheless managed to overcome the obstacles presented and reached finality. This tactical manoeuvring on the

part of the prisoner must, nevertheless, not be taken into account in the assessment of the appropriate punishment to be afforded to him, both as a matter of general principle and by the application of s.429B(f) of the Act.

This case does, however, warrant close study by those concerned with the proper administration of the criminal law. It would be most unfortunate if what happened in this case became a commonplace forensic technique.

I turn then to the question of sentence.

The touchstone on the question of sentence is to be found in sub-s.429(1) of the Act, which requires that "the sentence imposed by a Court for an offence shall be just and appropriate". In this regard the statute mirrors the well-established common law principle.

The Crown submits that the maximum penalty of life imprisonment prescribed for this offence should be imposed because this case falls "within the worst category of cases for which that penalty is prescribed". (*Veen v. The Queen [No. 2]* (1987-1988) 164 CLR 465 at 478.

Mr. O'Donnell of counsel, who appeared for the prisoner on sentence, said, "Your Honour, in relation to the question of remorse or contrition, I am instructed that the accused maintains his plea of not guilty and maintains his innocence and therefore it isn't appropriate to canvass that matter any further. That is not said in any endeavour to go behind the jury's verdict".

Mr. O'Donnell went on to say, "I could not but agree that this case clearly falls within a worse (sic) category of the most serious offence".

Thus it was that no attempt was made on behalf of the prisoner to put before me any evidence or to make any submissions directed towards

establishing a diminution in the high degree of criminality involved in the objective circumstances of the murder. That is, of course, the prisoner's right and he is entitled to maintain his innocence, if he is so minded, for the remainder of his life. However, the reality of the position is that nothing has been put before me directed to reducing the high degree of criminality demonstrated by the objective facts. The evidence unerringly points to the fact that this was a pre-meditated, carefully planned and carried out murder of a high public official, motivated purely by desire on the part of the prisoner to revenge himself for wrongs which he perceived he had suffered.

There is, of course, much learning about the circumstances in which the maximum penalty of life imprisonment is appropriate bearing in mind that sentencing is, and probably always will be, an inexact science. I will merely touch upon three of the authorities. In *Veen [No. 2]*, to which I referred earlier, the majority of the High Court (Mason CJ, Brennan, Dawson and Toohey JJ) said at 478:

> "The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v. The Queen* (1987) 163 CLR 447 at 451-452. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

Veen [No.2] was considered by the Full Court of the Supreme Court of Victoria (Young CJ, Murray and McGarvie JJ) in *R v. Dumas* [1988] VR 65. At 71 the Court said:

> "In cases of offences which are of lesser gravity than the crime of murder it is often said that the maximum term of imprisonment provided for the offence by statute is justified only for the worst offence likely to be encountered in practice: see *R v. McMahon* (1978) 19 A.L.R. 448. It is, however, always possible to imagine an offence which is worse than the

> one in contemplation and this fact will not necessarily lead to the conclusion that the maximum sentence cannot be imposed. Obviously, the legislature intended that the maximum sentence could and should be imposed in an appropriate case. In *R v. Lawrence* (1980) 32 A.L.R. 72 Moffitt P. said (at p.110): 'There is no rule that the maximum is to be reserved for the most devilish instance of crime that judicial imagination can conceive, so that rarely, if ever, should the maximum be imposed. The primary task of the trial judge is to impose a sentence appropriate to the criminality of the prisoner's conduct .....': see also *R v. Bensegger* [1979] W.A.R. 65. The maximum sentence may be appropriate in a wide variety of cases according to the nature of the offence and the character of the offender."

When assessing the degree of criminality involved in the subject offence, there is one very significant matter which must be addressed. It is clear from the totality of the evidence that Mr. Winchester lost his life because, in the exercise of his discretion as a very senior police officer, he rejected a plea by the prisoner that he intervene with regard to the criminal proceedings which had been instituted against the prisoner arising out of the alleged assault upon Mr. Russo. It is true, of course, that Mr. Winchester could not cause the proceedings to be withdrawn, but it was open to him to make representations to the Director of Public Prosecutions with regard to the matter. This he declined to do. Persons in authority who are required impartially to make decisions in the course of their duty are entitled to the full protection of the law. It goes without saying that the community cannot provide protection from harm to all public officials who make decisions. However, they are entitled to know that the law will impose appropriate punishment upon those who would seek to revenge themselves for what they believe to have been an unfair exercise of discretion. The corollary is that persons who would seek to inflict harm by way of revenge on those in whom

our community has vested decision-making authority, must realise that they will face condign punishment for such conduct.

Reference may conveniently be made here to *R v. Kocan* [1966] 2 NSWR 565. Kocan pleaded guilty in the Central Criminal Court, Sydney to the attempted murder of the Hon. Arthur Calwell MHR, who was then the leader of the Federal Opposition. The Chief Justice, Sir Leslie Herron, sentenced Kocan to life imprisonment.

An appeal from this sentence was dismissed by the Court of Criminal Appeal (Sugerman, JA, McClemens and Maguire JJ).

McClemens J. said (at 571):

> "This country has been mercifully free from attacks on public men and it is the Court's duty to take such steps as are available to it to see this state of affairs remains so. Therefore the Courts should indicate very plainly that this type of thing is not to be permitted. This is a matter central to the reasons given by the learned Chief Justice, where, at the conclusion of his reasons for imposing the sentence he did, he said this: 'I believe that it is necessary for me to pass such a sentence as may deter any other person from even considering the molestation and any attempt upon the life and safety of our public men. They must be allowed to go about their affairs of State with an entire appreciation that they are protected to the full extent of the law'."

If I may respectfully say so, those remarks carry as much force now as they did in 1966 - if not more force.

Thus I have before me a case which, on the unchallenged objective circumstances, presents as falling into the worst category of cases of murder. It is necessary then that I turn to the subjective circumstances which must be balanced against the objective circumstances.

It is convenient, however, if I first refer to the relevant legal framework so far as the imposition of the sentence of life imprisonment in the Australian Capital Territory is concerned.

No question arises of the imposition of a non-parole period by reason of sub-s.7(2)(d) of the *Parole Act 1976.*

The service of a life sentence imposed by the Supreme Court of the Australian Capital Territory is subject to the exercise of the Royal prerogative of mercy. Section 72 of the *Australian Capital Territory (Self-Government) Act 1988* provides:

> "Before tendering any advice to the Governor-General in respect of the exercise of the Royal prerogative of mercy in relation to an offence against an enactment or subordinate law, the Commonwealth Minister shall consult with the Chief Minister and consider any comments given by the Chief Minister."

"The Commonwealth Minister" means the Minister of State administering that Act and has the additional meaning given by s.19A of the *Acts Interpretation Act 1901.* The Chief Minister is, of course, the Chief Minister for the Territory.

The exercise of the Royal prerogative of mercy includes the power to release a prisoner serving a life sentence upon conditions which would allow recall: see *Kelleher v. The Parole Board of NSW* (1984) 156 CLR 364. Hence, as Sugerman JA pointed out in *Kocan* (at 567), a sentence of life imprisonment is spoken of as a more merciful sentence than a long fixed-term sentence and its flexible character is emphasized. (See also (1965) Crim. L.R. at 694.)

I am required by law to have regard to the catalogue of matters set out in sub-s.429A(1) of the Act and I have carefully applied my mind to each of those matters. There is no need for me to address those matters seriatim. A number of them have no relevance to this case. Perhaps, the most troubling

is para.(l), namely, "the prospect of rehabilitation of the person". The prisoner, as I have indicated earlier, maintains his innocence and consequently no material has been put before me with regard to the prospects of rehabilitation. It is not, therefore, a matter about which I can express an opinion. Further, as the prisoner adheres to his assertion of innocence, this precludes any reliance by him upon para.(v), namely, "whether the person has demonstrated remorse".

It goes without saying that the absence of evidence from which I could make a favourable finding to the prisoner in respect of the matters adverted to in those two paragraphs does not mean that I shall take them into account as in any way increasing what would otherwise be the appropriate penalty for this offence.

As far as character, which requires consideration under para.(k), is concerned, it is relevant to note that the prisoner raised good character at the trial. The Crown responded by reliance on matters arising in the evidence which they contended negatived any material put before the jury from which an inference of good character could be drawn. The jury were given full directions with regard to this matter and I have little doubt that they were unable to conclude that the prisoner was a person of good character. From the relevant evidence in the trial I am unable to conclude that the prisoner was, independently of this offence, a person of good character and therefore this is a matter which can be put to one side in the sentencing process.

I do take into account from a subjective point of view that the prisoner, who is a highly intelligent person, assiduously devoted himself to his studies

in his earlier years in preparation for a successful professional career. Further, he served for over eleven years in the Australian Public Service and attained a senior position in the Department of Treasury. However, I regret to say that since his retirement from the Public Service, his conduct has been marked by some most unfortunate events which reflect no credit upon him. He has no prior relevant convictions and has performed charitable work at various times.

As far as para.(k), "the cultural background, character, antecedents, age, means and physical and mental condition of the person" are concerned, I can merely note that the prisoner is presently 50 years of age, unmarried, but with some siblings still living. He suffers from no apparent physical disability and no evidence has been put before me either by the Crown or the prisoner that he suffers from any psychiatric condition. As I have earlier said, the evidence in that regard before me, rests with the final report of Dr Hocking, who detected no mental abnormality.

I also take into account that it is now some six years and ten months since the commission of the offence and the prisoner has no doubt been living in a state of uncertainty over that period. There are, of course, a whole concatenation of circumstances which have brought about the delay and no useful purpose could be served by traversing them here.

The prisoner has been in custody with regard to this matter since 29 June 1995, when I revoked his bail, prompted by his disruptive conduct in the court.

As required by law, I have specifically refrained from taking into account any of the matters contained in s.429B of the Act.

It goes without saying that I have not attempted exhaustively to outline all the relevant objective factors, nor each subjective factor. Having presided over this trial for almost six months, I am alive to the nuances of the evidence.

It merely remains for me to balance the objective and the subjective circumstances and the matters that I am required to take specifically into account under s.429A of the Act and determine the sentence for the offence which is just and appropriate. Above all, I have not overlooked that sentencing calls for a rational rather than an emotional response. The exercise of mercy must be tempered with well balanced judgment. (See *R v. Kane* [1974] VR 759 and *R v. Rushby* [1977] 1 NSWLR 594)

Taking the most generous view of the subjective circumstances in the balancing exercise, I am, nevertheless, compelled to the conclusion that the just and appropriate sentence for this grave offence is the maximum provided by law.

DAVID HAROLD EASTMAN FOR THE MURDER OF COLIN STANLEY WINCHESTER I SENTENCE YOU TO IMPRISONMENT FOR LIFE.