[J-17-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 114 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Judgment of Sentence in
	:	the Court of Common Pleas of
	:	Philadelphia County entered December
v.	:	12, 1994 at Cap. No. 8406-1394-1396
	:	
	:	
ALFRED JASPER,	:	
	:	ARGUED: January 28, 1997
Appellant	:	
	:	
	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: July 21, 1999**

I respectfully dissent from the majority's decision because I believe that a new penalty hearing is not warranted in this case. The majority held that the trial judge improperly reduced the jury's responsibility for imposing sentence by mentioning the appellate process. It is important to put the trial judge's instruction as quoted by the majority in its proper context and view the charge as a whole rather than focusing on one portion of it as the majority has done. The trial judge charged the jury that the jury was "not going to make a recommendation here. You are actually going to decide the sentence." N.T. 12/9/94 at 106. Later, the court stated, "Your verdict, as I mentioned before is the

actual punishment and is not merely a recommendation." N.T. 12/9/94 at 111. The court then charged the jury as follows:

> Now, with regard to the death penalty, you know what that implies. Somewhere down the line, if you do impose the death penalty, the case will be reviewed thoroughly. And after thorough review the death penalty may be carried out. I won't go into all the various reviews that we have. That shouldn't concern you at this point.

N.T. 12/9/94 at 120. In response to appellant's counsel's concerns regarding this passage, the trial judge repeated his second caution to the jury on this issue and stated that the jury's "sentence would be the actual sentence and not a mere recommendation." N.T. 12/9/94 at 126.

The majority found that the court's instructions concerning appellate review minimized both the jurors' sense of personal responsibility for the ultimate sentence and their expectation that the death sentence would ever be carried out. I find that this statement, when read in the context of the charge as a whole and considering the three separate statements made by the court that the jury's sentence would be the actual sentence and not merely a recommendation, fully apprised the jury of its responsibility and the gravity of its undertaking and did not give rise to any expectation by the jury that a sentence of death would not be carried out.

The majority held that this Court's decisions upholding death sentences in Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (1989) and Commonwealth v. Beasley, 524 Pa. 34, 568 A.2d 1235 (1990), support the grant of a new penalty hearing in the instant case. I disagree. In both of those cases, the prosecutor made comments regarding the appellate process, and this Court held that the propriety of such remarks must be evaluated on a case-by-case basis. Here, the trial judge's comments were given

in the context of responding to a defense comment that while "the laws could change," appellant would not be eligible for release if sentenced to life imprisonment. N.T. 12/9/94 at 73-74. The court's comments were addressing the issue of the possibility of commutation and parole, not the appellate process. In fact, immediately following the quoted passage, the trial judge discussed the process for commutation of sentence:

> In Pennsylvania there is a procedure called commutation of sentence. Now, I don't have the statistics as to how often this happens, but it's certainly in the minority of cases, not the majority.
>
> The parole board in Harrisburg, consisting of several people, may after a hearing recommend to the Governor that the sentence be commuted. That's called commutation of sentence.

N.T. 12/9/94 at 121. Because the court's comments were made in response to a defense argument and did not directly address the appellate process, I would affirm the judgment of sentence.

Madame Justice Newman joins this dissenting opinion.