



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 109/06

In the matter between:

THE STATE

APPELLANT

v

THOMAS BALFOUR

RESPONDENT

Neutral citation: *S v Balfour* (109/2006) [2008] ZASCA 116 (25 September 2008).

Coram: BRAND, PONNAN JJA *et* LEACH AJA

Heard: 16 September 2008

Delivered: 25 September 2008

Summary: Respondent convicted of murder and sentenced to 14 years' imprisonment, wholly suspended on certain conditions for five years. Sentence altered on appeal to 12 years' direct imprisonment.

ORDER

On appeal from: High Court, Mthatha (Dukada AJ sitting as court of first instance).

The appeal succeeds. The sentence imposed by the trial court is set aside and is replaced with a sentence of twelve years' imprisonment.

JUDGMENT

LEACH AJA (BRAND, PONNAN JJA concurring):

[1] This is an appeal brought by the State under s 316B of the Criminal Procedure Act 51 of 1977 against the sentence imposed on the respondent after he had been convicted of murder. It arises from an incident which occurred on 3 December 1996 when the respondent, an off-duty policeman, shot and killed one Maxim Mboneli ("the deceased") during an altercation that took place at the rural home of his father, Mzwandile Balfour, in the former Transkei. The respondent was charged with the deceased's murder but the subsequent proceedings against him moved at a snail's pace and it took four years before the matter came to trial before Dukada AJ in December 2000. The trial thereafter proceeded in fits and starts until it concluded on 17 July 2001 with the respondent being convicted of murder and sentenced to 14 years imprisonment, wholly suspended on certain conditions for five years.

[2] Disenchanted by the leniency of this sentence, the State sought leave to appeal from the court a quo. Unfortunately, although its application for leave

was lodged without delay on 26 July 2001, it was not speedily dealt with but, for a variety of reasons, was postponed time and again. Eventually it was heard, and dismissed, some three and a half years later on 13 January 2005. However, on 2 March 2005, leave to appeal was granted by this court.

[3] But once again, there followed an undue delay. There is a suggestion that problems were experienced in preparing a record and it appears to have taken about a year for the trial judge to revise and correct a transcript of his judgment. Further delays were caused by the respondent's attorney withdrawing as attorney of record and the respondent failing to appoint a replacement. Consequently, it is now almost 12 years since the fatal incident occurred, seven years since the respondent was convicted and sentenced, and three and a half years since leave to appeal was granted. This is unacceptable. It must be remembered that justice delayed is justice denied, and this court has previously stressed the need of the State to bring appeals of this nature without delay.¹ Even though the respondent has himself significantly contributed towards the delays that have taken place since sentence was imposed, the State was the driving force behind these proceedings and should not have adopted the relatively supine attitude it did. It ought instead to have exerted ongoing pressure upon those responsible for delaying the speedy resolution of the appeal. It failed to do so and I trust that the National Director of Public Prosecutions will ensure that similar delays do not occur in matters of this nature in the future.

[4] The appeal was initially set down for hearing in this court on 7 May 2008, but there was no appearance on behalf of the respondent at that stage. As it was desirable for him to be represented, the matter was postponed and the Bloemfontein Justice Centre approached to provide the respondent with representation. This was done, and when the matter was called on 2 September 2008 Ms Kruger of that office appeared on behalf of the respondent. Unfortunately, the Justice Centre had not been able to obtain a mandate to act for the respondent. This led to the appeal being postponed

¹ *S v Roberts* 2000 (2) SACR 522 (SCA) para 24.

once more. When called again on 16 September 2008, thanks in no small part to the assistance rendered by the Deputy Director of Public Prosecutions, Grahamstown, to whom I wish to express this court's gratitude, the respondent was present in court. I also wish to further express our gratitude to Ms Kruger for her efforts in tracing the respondent and for appearing on his behalf.

[5] I turn to the facts. The State's principal witness, Melissa Balfour, a traditional healer and the sister of the respondent's father, Mzwandile, lived in her own hut at the homestead where the fatal shooting took place. The deceased, an apprentice traditional healer who was being trained by Melissa in the skills of her craft, also resided there at the time. About a week before the fatal incident, the deceased and Melissa became embroiled in an argument with an artisan who was doing some plastering work at the homestead. As a result, the artisan downed tools and abandoned the work. A few days later, the respondent arrived at the homestead to visit his father. While he was there, he and Melissa ended up arguing when he accused her of having interfered unnecessarily with the artisan.

[6] The following day, Melissa confronted Mzwandile for not having supported her during the course of her argument with the respondent. This led to a heated debate between them. The deceased then arrived on the scene and interceded by striking Mzwandile on the forehead with a stick, causing an open wound. News of this incident spread, and came to the ears of the respondent later that day. He immediately returned to his father's homestead. On his arrival, he entered Mzwandile's hut, spoke to him and ascertained that he had indeed suffered an open wound on the forehead. He promptly left the hut and confronted Melissa and the deceased who were seated nearby, asking if they had assaulted his father. The deceased answered in the affirmative. In response the respondent, without more ado, took out his service pistol and fired a shot at the deceased who was kneeling with his hands on the ground in front of him. The deceased collapsed and died soon afterwards.

[7] At his trial, the respondent admitted having had a confrontation with the deceased as a result of the earlier assault upon his father. However, he testified that the deceased had charged at him with a knife and that he had been obliged to shoot at him in self-defence. This version was correctly rejected by the trial court. The question of sentence thus falls to be determined in the light of the evidence adduced by the State as set out above.

[8] The respondent was some 28 years of age at the time of the shooting. He was married and had three children. He had joined the police force in 1988 and was therefore a policeman of some experience at the time. In imposing sentence, the acting judge in the court *a quo* correctly stressed the severity of the crime and stated that a very heavy sentence was justified. However, while he also took into account the possibility that the conviction might lead to the respondent losing his employment, he went on to state that he felt that he should give the respondent the opportunity to live the ‘. . . life of a policeman who is appointed by the State to protect people, not to kill them’. He therefore imposed a wholly suspended period of 14 years imprisonment on the respondent which, he said, would allow the respondent to pay for his crime by making a contribution to the community.

[9] Of course, the imposition of sentence is a matter falling pre-eminently within the judicial discretion of a trial court and this court, on appeal, cannot interfere merely because it would have imposed a different sentence. It can only do so if the sentence is shockingly inappropriate or if the trial court substantially misdirected itself either on the facts or by placing undue emphasis on certain issues and underplaying others.² It was submitted by the State that the trial judge had erred in both these respects.

[10] In considering the appropriateness of the sentence imposed on the respondent, it is hardly necessary to state that the length of a period of imprisonment imposed on an offender reflects the gravity of the offence

² See e.g. *S v Salzwedel & Others* 2000 (1) SA 786 (SCA) para 10, *S v Sadler* 2000 (1) SACR 331 (SCA) para 6-10 and *Director of Public Prosecutions: Transvaal v Venter* (430/2007)[2008] ZASCA 76 para16.

committed. A sentence of 14 years imprisonment is only appropriate in a matter of considerable severity. In the light of the obvious gravity of the respondent's offence, I have no difficulty with the imposition of a lengthy period of imprisonment upon him. But I cannot say the same about the decision to suspend the sentence in its entirety.

[11] Wholly suspended sentences are designed to keep offenders out of prison in the hope that the suspended sentences hanging over their heads will deter them from future criminal conduct. A sentence may also only be suspended for no more than five years³ and its beneficial influence will be restricted to that extent. It is accordingly understandable that, as a general rule, wholly suspended sentences are imposed for crimes of lesser severity for which a sentence of direct imprisonment is not warranted.

[12] It is therefore self evident that the longer the sentence of imprisonment, the less appropriate it will be for it to be suspended in its entirety. Bearing that in mind, a sentence of 14 years imprisonment (which is suggestive of a serious offence deserving severe punishment) being wholly suspended (which in turn reflects an offence of lesser severity) is in itself a contradiction in terms. It is hardly surprising that in *S v Roberts*, Marais JA described a similar sentence imposed for murder as 'highly unusual'⁴ and went on to state that ' . . . it is plainly undesirable to impose a sentence of so great a length and then to wholly suspend it. . . .'⁵ Those comments are equally apposite to the present case.

[13] The respondent's crime was brutal and merciless. I accept that he may have been angered by the deceased having earlier struck his father over the head with a stick and that the deceased's actions amounted to a serious insult to the head of a household who provided him with accommodation. But there was no reason to resort to the extreme violence he used. Taking out his firearm and shooting the deceased, who constituted no threat to him, was a

³ Section 297(1)(b) of the Criminal Procedure Act 51 of 1977.

⁴ 2000 (2) SA 522 (SCA) para 1.

⁵ Para 19.

shocking response to what had occurred. As a trained policeman, the respondent knew what steps he could take to deal with an assault upon his father. Instead, he took the law into his own hands and imposed the death penalty as it were, for the deceased's relatively minor transgression. In these circumstances, a wholly suspended sentence of imprisonment is clearly inappropriate.

[14] There seems to me to be no doubt that in his desire to impose a sentence which would hopefully reform the respondent, the trial judge lost sight of the very serious nature of the crime committed and the expectation of society that persons who take the lives of others should feel the full weight of the law. While the attempt to ensure that the respondent played a meaningful role in the community in the future was laudable, punishment, rather than rehabilitation tends to come to the fore in this case. While the trial judge correctly purported to stress the severity of the crime and the necessity to impose a heavy sentence, he appears in fact to merely have paid lip service to those considerations. Instead, the sentence he imposed, aimed as it was primarily at the well-being of the respondent at the expense of the other aims of sentencing, was the product of distorted judicial reasoning.⁶

[15] In my view, the trial judge therefore misdirected himself by not taking proper account of all relevant considerations. But in any event, imposed a sentence so startlingly inappropriate that, for that reason alone, this court is at large to interfere and impose an appropriate sentence.

[16] As the offence took place in 1996, the minimum sentencing provisions contained in the Criminal Law Amendment Act 105 of 1997 are of no application in the present case. I must therefore deal with the matter without reference to those provisions. Had I sat as a court of first instance I may well have imposed a sentence of direct imprisonment in excess of 15 years. But as seven years has passed since sentence was imposed, it would be unjust to consider sentence at this stage solely upon the information that was available

⁶ Compare *S v Botha* 1998 (2) SACR 206 (A) at 211.

to the trial judge. The appellant's personal circumstances have substantially changed. We were told from the bar, and this was accepted by the State, that his wife has since died, leaving him to care for three teenage children aged between 10 and 15 years. He has also been promoted and has now risen to the rank of detective inspector in the police force. These facts must be taken into account in considering what would be an appropriate sentence to now impose upon him.

[17] It is also relevant to take into account the uncertainty as to his future with which the respondent has had to live for the past seven years pending the outcome of this appeal. In *Roberts*,⁷ Marais JA felt that a delay of less than two and a half years from the date of sentence until the finalisation of the appeal and the associated 'mental anguish which respondent must have endured' warranted 'a significant reduction of the notional period of imprisonment that would have been appropriate' at the date of sentence. The anguish in the present case has endured far longer.

[18] Then there is the fact that the respondent, although not incarcerated, has essentially served the sentence imposed on him. As already pointed out, a suspended sentence is designed to attempt to keep an offender from straying during a period of no more than five years. That period has passed, and the respondent has not strayed. Effectively, he has served the penance imposed upon him by the trial court. That should be recognised by this court in determining an appropriate sentence. In addition it is important to take into account the apparent beneficial effect the suspended sentence appears to have had upon him as shown by his advancement in rank since sentence was imposed and his failure to make himself guilty of similar conduct since then. It would be wrong not to recognise these as mitigatory factors in determining an appropriate sentence.

[19] Of course a sentence of direct imprisonment will have disastrous consequences for the respondent's career in the police force. But that and the

⁷ Supra at para 22.

devastation his incarceration will have upon his family life flows from his callous disregard of the sanctity of his victim's life. It would be wrong to allow one's sympathy for his present plight to deflect the imposition of an appropriate sentence, regard being had to the nature and the severity of his crime.

[20] In my view, given the circumstances of this case and taking all the above considerations into account, there is no alternative but to impose a fairly lengthy period of imprisonment. At the same time, the sentence must allow the respondent to return from life behind bars with the prospect of playing a meaningful role in the community in the future. This will hopefully be achieved by the order that follows. As the respondent has not been incarcerated pending this appeal, there is no reason to ante-date the sentence now imposed.

[21] The appeal succeeds. The sentence imposed by the trial court is set aside and is replaced with a sentence of twelve years' imprisonment.

L E LEACH
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant : M W Siyo
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