THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 412/10

In the matter between:

THE STATE **Appellant**

and

STEPHEN ROMER **Respondent**

Neutral citation: *State v Romer* (412/10) [2011] ZASCA 46 (30 March 2011)

Coram: LEWIS, BOSIELO JJA and PETSE AJA

Heard: **25 February 2011**
Delivered: **30 March 2011**

Summary: Sentence ─ Murder and attempted murder committed when respondent in a state of diminished responsibility ─ Sentence of ten years' imprisonment wholly suspended, coupled with a sentence of correctional supervision ─ appeal by state.

ORDER

On appeal from: Eastern Cape High Court (Port Elizabeth) (Jansen J as court of first instance):

Both the application for leave to lead further evidence by the respondent and the appeal against sentence by the State are dismissed.

JUDGMENT

PETSE AJA (LEWIS and BOSIELO JJA concurring)

[1] The respondent, Mr S Romer, was convicted by Jansen J in the Eastern Cape High Court, Port Elizabeth on one count of murder and two counts of attempted murder. The high court found, however, that Romer was in a state of diminished responsibility (though not acting as an automaton) at the time of the shootings. Romer was sentenced to ten years' imprisonment wholly suspended for five years on the usual conditions. In addition he was sentenced to three years' correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. An application for leave to appeal by the State in terms of s 316B of the Act was refused by the court a quo but was subsequently granted by this court.

[2] The murder and attempted murder charges against Romer arose when Romer shot three people in Port Elizabeth on 17 October 2007. Mr G du Mordt was fatally wounded and Ms K Heuer and Mr E G Janse

were seriously injured. The shooting incidents took place at three different locations and were witnessed by various witnesses, amongst whom were police officers who pursued Romer as he drove from one crime scene to the other. Romer was arrested and detained on the same day after having been cornered by the police.

[3] The appeal before us is brought by the State which contends that the sentence imposed on Romer is disturbingly lenient given the serious consequences of his conduct, and thus warrants interference by this court. However, before I turn to consider this question there is a preliminary issue that requires to be addressed and it is this. Romer brought an application (opposed by the State) in terms of s 22(a) of the Supreme Court Act 59 of 1959 to adduce further evidence on appeal in relation to the sentence imposed. We refused the application, for the reasons that follow.

[4] The further evidence is contained in two affidavits. The first one is that of Ms A Ferreira who is the social worker responsible for monitoring the correctional supervision and community service of Romer. The second is that of Dr Y Lucire who describes herself as a medical practitioner, specialising in forensic and medico-legal psychiatry, who formerly practised in the State of New South Wales, Australia.

[5] Ferreira's evidence pertains to facts which occurred after the imposition of sentence on Romer. The purpose of the affidavit is to demonstrate to this court that the conditions imposed by the court a quo have been complied with by Romer who has been fully integrated as a useful member of society. This is of no relevance to the appropriateness of the sentence at the time of its imposition.

[6] The evidence of Lucire seeks to bolster Romer's case that when he committed the crimes he was suffering from sane automatism. The same evidence was adduced when he sought leave from this court to appeal against his conviction. Leave was refused and the application to place Lucire's evidence before the court was accordingly also refused. Its relevance to the question of sentence, as I understood Ms Crouse, counsel for Romer, was that the evidence was the basis of his opposition to the appeal: that at all material times he was acting under circumstances of severe diminished responsibility.

[7] Section 22 of the Supreme Court Act provides:

'The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power ─

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and

(b) . . . .'

[8] It is trite that s 22 vests in the appeal court a wide discretion to receive further evidence in order to do justice between the parties. However the circumstances under which the appeal court will exercise such discretion are circumscribed and the factors to be borne in mind in the exercise of such discretion have crystallised over the years. This court almost a century ago (dealing with a similar provision contained in s 4 of the Appellate Division Further Jurisdiction Act 1 of 1911) held in *Shein v Excess Insurance Company Ltd*[1] that the following are some of the factors to be borne in mind: (a) neither party should be placed at an unfair

[1] *Shein v Excess Insurance Company Ltd* 1912 AD 418 at 428-429.

advantage by the reception of further evidence; (b) special grounds should be fully set out substantiating the application; (c) the nature of the further evidence sought to be adduced must be set out, including its material relevance to the issue on appeal; (d) the appeal court should not lightly exercise its power in favour of granting the application more especially on points which have been contested and decided at the trial; and (e) there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to be adduced was not led at the trial.

[9] It is thus apparent that, ordinarily, the appeal court will receive further evidence on appeal only if special grounds underlying such request exist, such as that the evidence was either not available during the trial or could not have been obtained despite due diligence to procure it.[2]

[10] There are two fundamental objections to allowing Lucire's evidence. First, it is not capable of being properly tested in this court. In *In Re Certain Amicus Curiae Applications: Minister of Health & others v Treatment Action Campaign & others*[3] the Constitutional Court, in the context of an application to place further evidence before that court, said:

'[H]owever, this is subject to the condition that such facts "are common cause or otherwise incontrovertible" or "are an official, scientific, technical or statistical nature, capable of easy verification". This Rule has no application where the facts sought to be canvassed are disputed.'

Lucire's evidence, on her own account, is controversial. Secondly, it is relevant only to Romer's conviction, and that is not the subject of the appeal. There is no basis for its admissibility. And as indicated, Ferreira's

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[2] *Deintje v Gratus & Gratus* 1929 AD 1 at 6-7.

[3] *In Re Certain Amicus Curiae Applications: Minister of Health & others v Treatment Action Campaign & others* 2002 (5) SA 713 (CC) para 8.

evidence is irrelevant to the imposition of sentence.

[11] I turn then to the question of the appropriateness of the sentences imposed on Romer. As indicated earlier, Romer was charged with one count of murder and two counts of attempted murder. He pleaded not guilty and raised a defence of sane automatism substantiated by a comprehensive written plea explanation under s 115 of the Criminal Procedure Act. The State called several witnesses, one of whom was Professor Visser, a member of the panel that examined the accused at Fort England Hospital in Grahamstown, pursuant to an order made under s 79 of the Criminal Procedure Act. Romer testified in his defence and called three other witnesses: his son, Mr Derick Romer, Mr Ian Meyer who is a clinical psychologist practising in Port Elizabeth and Professor Daya who was the Head of the Pharmacology Department at Rhodes University, Grahamstown.

[12] The evidence relating to the three shooting incidents in various streets of Port Elizabeth and the fact that the accused fired shots through the driver's window, windscreen and front passenger window of his motor vehicle whilst occupying the driver's seat was largely common cause and need not be traversed here. It was also not disputed that shortly before the shootings, Romer had visited a friend, drunk a beer and had agreed to return to the friend's home later in the evening for a braai. The evidence of his friend that he had appeared normal at the time was also not contested.

[13] The evidence of the three experts who testified at the trial was directed at establishing whether Romer, in firing such shots, was acting in a state of sane automatism at the time. Visser for the State was of the

view that he was not, whereas both Meyer and Daya held the opposite view.

[14] Romer's bizarre conduct on the day when he shot three strangers, randomly and at different places, was attributed by his expert witnesses to an intake of anti-depressant medication that had been prescribed for him by various doctors including psychiatrists as well as over-the-counter medication. He had consulted doctors about his emotional upheaval triggered by the disintegration of his marriage. Romer's depression had begun in December 2001 when he had caught his wife with her lover, and subsequently divorced her.

[15] In December 2001 he was admitted to St Mark's Clinic in East London where he was diagnosed by a psychiatrist as having an adjustment disorder. He was treated as an in-patient for two weeks and medication was given to him. He was thereafter on several occasions re-admitted to St Mark's Clinic for treatment. His successful career as a car salesman in East London came to an abrupt end.

[16] During 2007 Romer moved to Port Elizabeth where he stayed with his son, Derick, who testified that there had been a steady deterioration of Romer's mental state from the end of 2000 which rendered him a shell of his former self. On occasions Romer would remain in bed for up to a week at a time, getting up only for short periods. Derick observed Romer experiencing frequent nightmares, accompanied by violent tremors. There came a point when Derick could no longer cope with living together with his father in his house and requested him to leave. Romer then went to live with a relative, Gary Romer, in Sardinia Bay in the Port Elizabeth district.

[17] Meyer's view was that when Romer fired shots at his victims he was not acting rationally: his acts were a consequence of the combined effects of depression aggravated by the intake of anti-depressants, and the taking of four sleeping pills the night before the shootings. This, testified Meyer and Daya, resulted in Romer's automatism.

[18] However, the high court found that although Romer had suffered from diminished responsibility he had not acted in a state of sane automatism when shooting. The court accepted the evidence of Visser that Romer had been able to direct his actions: he had driven some distance, in peak traffic, in unfamiliar areas and through traffic circles and lights. He had, for the most part, obeyed traffic rules. He had deliberately tried to evade police vehicles, driving at speed to escape them. Accordingly, he was not acting as an automaton when he shot his three victims.

[19] But the court, in imposing sentence, did place great emphasis on Romer's condition, induced by drugs. Of course Romer's conduct and its consequences are horrific. They could be aptly described in the words of Marais JA in *S v Roberts*[4] where he said that '[v]iewed objectively and in isolation' the crimes were 'horrific'.

[20] In considering what a suitable sentence should be that would satisfy the objectives of punishment the court a quo took cognisance of the following factors:
'(a) that Romer had committed the crimes under circumstances of severe diminished responsibility; (b) that he expressed genuine contrition; (c) that he took full responsibility for the hardship, misery and agony that he

[4] *S v Roberts* 2000 (2) SACR 522 (SCA) para 5.

caused to his victims and members of their families; (d) that when symptoms of his emotional disintegration precipitated by the irretrievable breakdown of his marriage caused by his wife's infidelity manifested themselves he sought professional help; (e) that he was prescribed drugs by doctors which far from alleviating the state of his emotional upheavals aggravated it; (f) that the accused had over an extended period of time in his adult life lived a model and exemplary life; (g) that the accused was no longer taking drugs, abstained from alcohol, undergoing counselling and psychological therapy which all evinced a determination on his part to rehabilitate himself; (h) that the chances of him ever repeating what he did were extremely remote; and (i) that imposing direct imprisonment in order to deter others would serve no useful purpose but rather amount to sacrificing Romer on the altar of deterrence.' This approach is, in my respectful view, unassailable.

[21] By way of prelude I want to say that had I sat as the court of first instance I would in all probability have imposed a direct custodial sentence with a portion suspended on suitable conditions, given that Romer acted with diminished responsibility. But we are a court of appeal.

[22] It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal has been shown to exist.[5] Only then will the appellate court be justified in interfering. These grounds are that the sentence is '(a) disturbingly inappropriate; (b) so totally out of proportion to the magnitude of the offence; (c) sufficiently disparate; (d) vitiated by

[5] See *S v Mtungwa en 'n ander* 1990 (2) SACR 1 (A).

misdirections showing that the trial court exercised its discretion unreasonably; and (e) is otherwise such that no reasonable court would have imposed it.' See *S v Giannoulis*;[6] *S v Kibido*;[7] *S v Salzwedel & others*.[8]

[23] In *S v Matlala*[9] it was held that in an appeal against sentence the fact that the sentence imposed by the trial court is wrong is not the test. The test is whether the trial court in imposing it exercised its discretion properly or not. Consequently, the circumstances in which an appellate court will interfere with the exercise of such discretion are circumscribed. In *S v Sadler*[10] Marais JA, writing for a unanimous court, had occasion to re-state them when he said the following:

'The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in *S v Shapiro* 1994 (1) SACR 112 (A) at 119j-120c:

"It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 857D-F:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal ─

(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or

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[6] *S v Giannoulis* 1975 (4) SA 867 (A) at 873G-H.
[7] *S v Kibido* 1998 (2) SACR 213 (SCA at 216 g-j.
[8] *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) para 10.
[9] *S v Matlala* 2003 (1) SACR 80 (SCA) at 83d-e.
[10] *S v Sadler* 2000 (1) SACR 331 (SCA) paras 6-9.

misdirection or is disturbingly inappropriate".'

Counsel for the State submitted that the trial court had misdirected itself in various material respects when imposing sentence. I do not find it necessary to reach any firm conclusion in that regard. I shall assume in favour of respondent that no such misdirections exist.

The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because a appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised.

The problem is to give practical content to these notions. The comparison involved in the exercise may sometimes be purely quantitative, say three years' versus six years' imprisonment or a fine of R50 000 versus a fine of R100 000, or it may be qualitative, say a custodial versus a non-custodial sentence. Where quantitative comparisons are involved there is the problem of deciding how great the disparity must be before it attracts the epithet 'striking' or 'startling' or 'disturbing'. Where qualitative comparisons are involved one faces a similar problem. When compared with a sentence of wholly suspended imprisonment which an appellate Court considers would have been appropriate, a trial court's decision to impose a substantial fine with an alternative of imprisonment may not be regarded as giving rise to a disparity of that character. As against that, the distinction which exists between a non-custodial and a custodial sentence, as those terms are commonly understood, is so generally recognised to be profound and fundamental that, save possibly in rare instances, the conclusion that a custodial sentence was called for where a non-custodial sentence has been imposed (or vice versa) will justify interference with the

sentence imposed.'

[24] In imposing sentence the high court had regard, inter alia, to a probation officer's report that had been prepared at its behest and took into account the recommendations of the probation officer. It is not necessary, for present purposes, to traverse the various grounds of appeal against sentence relied upon by the State. It suffices merely to record that the common thread running through all of them is that the trial court overemphasised the personal circumstances of Romer at the expense of the gravity of the crimes committed, the interests of society and the interests of the victims.

[25] Mr Nel SC, who appeared for the State, sought to persuade us that it was manifest from the sentence imposed by the court a quo that the learned judge misdirected himself in several respects. He stressed that, given the gravity of the offences of which Romer was convicted, a long term of imprisonment was called for and that the court erred in suspending the sentence when in the nature of things a sentence of 15 years' imprisonment would have been appropriate.

[26] In my view there are at least two fundamental fallacies inherent in Mr Nel's submission. First, this argument entirely ignores the fact that the term of ten years' imprisonment, albeit wholly suspended, is in itself punishment. Second, in *S v Shapiro*[11] this court had occasion to observe (remarks that I find apposite in this context) that:

'[Counsel for the State's] main argument was that although he did not dispute [the opinion of the psychologist called by the defence], this Court should not lose sight of the unchallenged evidence of independent by-standers, that Shapiro's actions

[11] *S v Shapiro* 1994 (1) SACR 112 (A) at 123c-f.

appeared to be cool, calm and calculated. Outwardly he gave no sign of emotional confusion. Moreover, the provocation he experienced was limited. He brutally executed a man who was helpless and dying. He acted without compunction, and thereafter showed a callous indifference to what he had done.

The assumption underlying this argument is that the conduct of a person who has been found to have diminished criminal responsibility is to be measured by the same yardstick as the conduct of a person with undiminished criminal responsibility. Such an assumption is fallacious, for a person who has diminished criminal responsibility is by definition a person with a diminished capacity to appreciate the wrongfulness of his act, or to act an accordance with an appreciation of its wrongfulness.' (My emphasis.)

The learned acting judge of appeal went on to say this:[12]

'I do not think that in the light of the finding of diminished responsibility this case is one which is clamant for retribution. It does not appear from the evidence that Shapiro is likely to again commit a violent crime. He has no previous convictions relevant to show propensity for violence. It does not seem that he is a danger to society which would call for his separation from the community for a long time. In regard to the deterrence of others, it does not seem to me that in the present case a long prison sentence is called for. The concatenation of circumstances was highly unusual and is unlikely to occur again.'

[27] I also understood Mr Nel to contend that the sentence of correctional supervision was not only a slap on the wrist but also had the effect of trivialising the gravity of the crimes committed by Romer with no deterrent effect on both Romer himself and other would-be offenders. To underscore his contention Mr Nel asked, somewhat indignantly, whether 'picking up cigarette ends' (what he termed stompies) at a police station was an appropriate punishment when, given the gravity of the crimes committed by Romer, the retribution element of punishment should have been brought to the fore. I do not agree. More than a decade

[12] At 124b-d.

ago this court recognised the utility of a sentence of correctional supervision. In *S v R*[13] Kriegler AJA was at pains to point out that the statutory dispensation introduced by s 276(1)(h) of the Criminal Procedure Act (viz correctional supervision) was intended to distinguish between two types of offenders, namely those who ought to be removed from society and imprisoned and those who, although deserving of punishment, should not be removed from society. He exhorted judicial officers to take advantage of this statutory provision in appropriate cases.

[28] There are two other pertinent decisions of this court that followed *S v R*. The first is *S v Ingram*[14] where the accused was sentenced to eight years' imprisonment for shooting and killing his wife. Smalberger JA had the following to say in relation to s 276(1)(h) of the Act at 8j-9c:

'Murder, in any form, remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence; but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment. In this respect the trial Judge held, in my view correctly, that the deterrent aspect of punishment does not play a major role in the present instance. The appellant is not ever likely to repeat what he did. Deterrence is therefore only relevant in the context of the effect any sentence may have on prospective offenders. A suspended period of imprisonment is accordingly rendered largely superfluous.'

[29] The second is *S v D*[15] in which Nicolas AJA expressed himself in these terms:

'In its nature a sentence of correctional supervision is not denunciatory. It does not

[13] *S v R* 1993 (1) SACR 209 (A) at 221g-i.
[14] *S v Ingram* 1995 (1) SACR 1 (A).
[15] *S v D* 1995 (1) SACR 259 (A) at 266c-d.

follow, however, that such a sentence is necessarily inappropriate because the case is one which excites the moral indignation of the community. The question to be answered is a wider one: whether the particular offender should, having regard to his personal circumstances, the nature of his crime and the interests of society, be removed from the community.'

[30] Finally on this point there is also the minority judgment of Cloete JA in *Director of Public Prosecutions, Transvaal v Venter*[16] where he said:

'So far as the deterrence is concerned, the respondent is a first offender; there is no suggestion that he is a violent person ─ indeed the panel of psychiatrists found that his amnesia was in keeping with a suppression of events which were "out of character with his personality"; and it does not seem that the respondent is a danger to society at large, so his removal from the community for a long time is not necessary for that reason. In such circumstances, this court has repeatedly held that deterrence of a person who commits murder acting with diminished responsibility, is not an important factor when it comes to punishment: see, for example, *S v Campher* [1987 (1) SA 940 (A) at 964C-H and 967D-E]; *S v Smith* [1990 (1) SACR 130 (A) at 136b); *S v Ingram* [1995 (1) SACR 1 (A) at 96]; and *S v Shapiro* [1994 (1) SACR 112 (A) at 124c-d]. Deterrence of others is also not important in a case such as the present. This court held in *S v Shapiro*:

"In regard to the deterrence of others, it does not seem to me that in the present case a long prison sentence is called for. The concatenation of circumstances was highly unusual and is unlikely to occur again."

The same applies here. I would merely add that to my mind there would seem to be little purpose in attempting to deter a person not in full control of his or her faculties.'

[31] I am thus not persuaded that the court a quo committed any misdirection in imposing the sentence it did or that such sentence is disturbingly inappropriate. I am satisfied after much anxious consideration that deterrence of Romer or others is not an overriding

[16] *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) para 61.

consideration, regard being had to 'the concatenation of circumstances' which were of a highly unusual, if not bizarre, nature and which are unlikely to recur.

[32] In the result the following order is made:

Both the application for leave to lead further evidence by the respondent and the appeal against sentence by the State are dismissed.

XM Petse
Acting Judge of Appeal

APPEARANCES

APPELLANT:	CDHO Nel SC Instructed by the Director of Public Prosecutions, Port Elizabeth; The Director of Public Prosecutions, Bloemfontein.
RESPONDENT:	(Ms) L Crouse Instructed by Legal Aid Board, Port Elizabeth; Legal Aid Board, Bloemfontein.