THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No 940/2013

In the matter between:

SCHALK WILLEM DU PLOOY **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Du Plooy v The State* (940/13) [2014] ZASCA 200 (28 November 2014).
Coram:	Brand, Willis JJA *et* Meyer AJA
Heard:	**26 November 2014**
Delivered:	**28 November 2014**

Summary: Sentence – two charges of murder and one of theft – mitigating factors – relied upon in the main – youthfulness and influence of 'drugs' – sentence of 12 years imposed by high court – interference on appeal unwarranted.

ORDER

On appeal from: Circuit Local Division of the High Court for the Delmas Circuit District (Carelse J sitting as court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

Brand JA (Willis JA and Meyer AJA concurring):

[1] This is an appeal against sentence. The appellant is Schalk Willem du Plooy. He was born on 10 April 1993. During the evening of 6 December 2010, when he was seventeen years and eight months old, he brutally assaulted and killed his adoptive parents, Mr Schalk Willem and Mrs Theresa du Plooy in the family home at Rhodes Street, Dunnottar in the district of Nigel. Thereafter his friend, Mr Morne Labuschagne, who was 23 years old at the time, assisted him literally to dump the bodies of his parents in a veld near Brakpan. The two of them then sold some of the deceaseds' belongings in order to buy drugs.

[2] Arising from these events, the appellant and Labuschagne appeared before Carelse J and two assessors in the Circuit Local Division of the High Court for the Delmas District on two charges of murder and one of theft. The appellant pleaded guilty as charged while Labuschagne pleaded guilty on the charge of theft and as an accessory after the fact to the murder charges. In the event, they were convicted in accordance with their pleas and sentenced as follows: the appellant to twelve years' imprisonment on each of the two murder charges and two years' imprisonment on the charge of theft. It was, however, ordered in terms of s 280(2) of the Criminal

Procedure Act 51 of 1977, that all three sentences should run concurrently. The effective sentence imposed on Labuschagne on the three charges was six years' imprisonment. Labuschagne did not appeal his sentence. The appellant, on the other hand, exercised his automatic right of appeal to this court in terms of s 84 of the Child Justice Act 75 of 2008.

[3] Neither the appellant nor Labuschagne gave evidence at the trial. As to what happened during the fateful night of 6 December 2010, we are therefore largely dependent, firstly, on what the two of them said in their respective statements following upon their guilty pleas, as envisaged by s 112 of the Criminal Procedure Act and, secondly, on the accounts given by the appellant to the experts who interviewed him in preparation for their evidence during the sentencing proceedings. Further obfuscation is added by the substantial conflicts in the appellant's disparate accounts. The same uncertainty essentially arises with regard to the appellant's childhood background and his relationship with his late parents. Save that in case of the latter some more objective assistance can be derived from the testimony of his parental grandmother – who was called to testify on his behalf – and of his father's brother – Dr Johannes du Plooy – who was called on behalf of the State.

[4] The narrative that follows must thus be read subject to the inherent unreliability of the appellants' varying accounts as the untested main source in certain crucial areas. The Du Plooys, who were both qualified pharmacists, were unable to have children of their own. They therefore adopted the appellant when he was five days old. As appears from the introduction, he was named after his father. Mrs du Plooy stopped working to spend time with the appellant. The appellant only

learnt that he was an adopted child when he was eleven years old. By all accounts, the news had a seriously detrimental effect on him because he felt that he had been abandoned by his biological parents. He also blamed his adoptive parents for not telling him earlier. Another occurrence which, according to the appellant's version, had a severely negative influence on him was when, at the age of fifteen, his cricket coach, for whom he had high regard, molested him by touching him inappropriately on two occasions.

[5] At the age of about twelve the appellant started using alcohol. By the age of fourteen he had added cannabis, crack and heroin to his list of abuse. To feed his habit, he started stealing from his parents. On occasion, he broke into his father's pharmacy. When his parents found out about his drug abuse, they first enrolled him in a private school and then had him admitted to rehabilitation centres on two occasions. The last of these was during 2010 when he spent ten months in the Nieuwenfontein Centre near De Aar. It is there that he met Labuschagne and the two of them entered into a very close association.

[6] The appellant's relationship with his mother was not good. Although she was the one who stayed at home and, for example, regularly took him to cricket practice there were constant arguments between them. It appears that Mrs du Plooy had drinking problems of her own which exacerbated the intensity of these arguments. By contrast, the appellant's relationship with his father was a good one. By all accounts Mr du Plooy was a soft-hearted person who often played the role of peacemaker between the appellant and his mother. After the death of Mr du Plooy, a letter, which he wrote to the appellant, was discovered in his safe. This letter, which

was handed in at the trial, was a moving one. Every paragraph starts with 'I am sorry' which Mr du Plooy underlined. He then proceeded to apologise for the things he thought he had done wrong – such as not spending enough time with his son – which he obviously believed contributed to his son's life going so wrong.

[7] This brings me to the tragic events of 6 December 2010. According to the appellant, he spent the day drinking and smoking crack or 'rock' with a friend. When they ran out of drugs he went home to obtain more money. He arrived there at about 5pm. His parents were not at home so he proceeded to drink six beers from the fridge. When his parents eventually arrived some two or three hours later, he asked them for money. They were both intoxicated and an argument ensued. He was followed to his room by his mother who continued to argue with him about his drug abuse which made him very angry. His father also said that it would perhaps be better if he left the house. When his father turned around, he hit him with a cricket bat behind the head. His mother then tried to attend to his injured father whereupon he hit her with the bat behind the head as well. He must have hit them very hard because the post mortem reports reveal that they both sustained fractures to the skull.

[8] While both his parents were lying motionless in the hallway, so the appellant said, he took R400 from his father's cupboard for drugs. He then telephoned Labuschagne to come and help him. Labuschagne indicated that he was only willing to help if the deceased were both dead. As a result, the appellant took a knife from the kitchen; he turned his mother on her back and stabbed her in the chest several times. Although the appellant could not remember how many times he stabbed her,

the post mortem report reflects more than twenty stab wounds. He then turned his father over and stabbed him about twenty times as well.

[9] Thereafter the appellant took his mother's car and drove to Brakpan where he met Labuschagne. They bought and used crack and heroin whereafter they returned to his parents' home. His mother was still in the hallway, but his father was no longer there. He was lying on his bed in the main bedroom. He was still alive. The appellant wanted Labuschagne to put his father to death, but the latter would not do so. The appellant thereupon finally executed his father – according to the post mortem reports and the photographs handed in at the trial – by slitting his throat from ear to ear. The appellant and Labuschagne then wrapped the two bodies in blankets and placed them in Mr du Plooy's Landrover. Labuschagne drove off in the Landrover while the appellant followed in his mother's car. They dumped the bodies in a veld near Brakpan and abandoned the Landrover in Daveyton to suggest a hijacking. Thereafter the appellant went to his grandmother's house from where he telephoned the police to report that his parents had disappeared.

[10] One of the experts called on behalf of the appellant during the sentencing proceedings was Dr Johanna Meeding, a general practitioner specialising in the treatment of drug abuse. According to her evidence, crack – also known by the colloquial term 'rock' – is cocaine in solid form. Unlike cocaine, which is usually inhaled in powder form, crack is heated and inhaled as a vapour. It produces a state of intense euphoria which only lasts for about five to ten minutes. After this follows a state of agitation, paranoia and confused thinking which often leads to violence and homicide. Because of these unpleasant after-effects which follows the state of

euphoria, the user often compulsively smokes again which creates an irresistible craving for the drug. Although Dr Meeding never spoke to the appellant and did not know how much crack he had used, she was quite confident in her view that the appellant's conduct on the fatal night of 6 December 2010 should be ascribed to his imbibing drugs and alcohol.

[11] Although somewhat more nuanced, the views of the other experts on behalf of the appellant demonstrated the same recurring theme: that the appellant's conduct should be blamed on his drug abuse and that he should therefore be treated in a rehabilitation centre rather than punished for his deeds. Sensitive to this approach, Carelse J called a witness who is employed as a social worker by the Department of Correctional Services. She pertinently asked him about the rehabilitation programmes provided by the department, particularly with regard to drug dependence. According to his evidence, the most sophisticated programme for rehabilitation of these prisoners is offered by the Zonderwater Prison, which has a good success rate in the rehabilitation of drug addicts, partly by reason of the fact that it is a high security prison. In this light, the court a quo recommended that the appellant be detained in the Zonderwater Prison during the period of his imprisonment. In addition, the court directed the Department of Correctional Services to render a full report to the Registrar of the Court rgarding the rehabilitation programme followed by the appellant, within a period of three years.

[12] The contention on behalf of the appellant was that the sentence of twelve years' imprisonment was shockingly inappropriate. In support of this contention the appellant sought to rely on four mitigating factors, namely: (a) youthfulness; (b)

influence of drugs; (c) provocation; and (d) influence of an older person. The latter two considerations are, in my view, unsustainable on the facts. Hence I propose to deal with them first.

[13] As to the contention that the appellant was provoked by his parents before he killed them, it needs to be borne in mind that what we are looking for in this context is provocation that reduced the moral blameworthiness of the appellant's conduct. That being so, I cannot see how an argument which arose from the parents' refusal to give the appellant more money for drugs qualifies as such. The proposition that the appellant was acting under the influence of Labuschagne, was equally unsupported by evidence. The mere fact that Labuschagne was five years older than he does not justify that inference. In addition, it will be remembered that the appellant contacted Labuschagne only after he had already viciously attacked his parents.

[14] The appellant's youthfulness, on the other hand, is clearly mitigatory. As Cameron J said in *Centre for Child Law v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 477 (CC) paras 26 and 28:

'The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability . . . They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults . . . These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a

misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.'

[15] But that is not the whole picture. The other side is portrayed with the same clarity by Cameron J when he continued (para 29):

'This is not to say that children do not commit heinous crimes. They do. The courts, which deal with child offenders every day, recognise this no less than Parliament . . . The Constitution does not prohibit Parliament from dealing effectively with these offenders. The children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that "(a) child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else", but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment.'

(See also *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 19.)

[16] When one looks at the offences under present consideration and the interests of society, I can come to one conclusion only: the offences for which the appellant had been convicted were so severe that incarceration cannot be avoided. In that sense it is 'the last resort of punishment'. The cruel and savage way in which the appellant killed two people who were kind to him; who sustained him from the early age of five days; who tried to deal with his drug addiction; who treated him as their own child, fills one with revulsion. It boggles the mind. The fact that they may not have been perfect parents does not detract from this. Very few parents are. The mistakes they might have made in his upbringing do not begin to justify the brutal

attack on them. Any attempt by the appellant and his experts to suggest otherwise, are completely devoid of merit. Any sentence which fails to recognise the severity of these crimes may lead to society losing its confidence in the criminal justice system. Especially in a society where violence has become prevalent and endemic, one simply cannot afford that risk.

[17] Another factor which is clearly mitigatory is that the appellant had a substance dependence problem and that, at the crucial time, he was under the influence of narcotic drugs. In fact, it must be accepted that the abhorrent nature of the crimes must, at least to some extent, be ascribed to that influence. Precisely by reason of the fact that the appellant had failed to take the court into his confidence, the exact degree of that influence will, however, remain obscure. It is true that some of the appellant's experts tend to blame it all on the influence of drugs. That diagnosis is accompanied by the proposition that the appellant should be committed for treatment under the Prevention and Treatment of Drug Dependency Act 20 of 1992 – now the Prevention of and Treatment for Substance Abuse Act 70 of 2008, which came into operation on 30 March 2013.

[18] It must be remembered, however, that medical experts, by the nature of their profession, have a different perspective. Their purpose is to diagnose, to heal and to rehabilitate their patients. As a rule they do not have to consider the perspectives which the courts ar obliged to keep in view. Our sentencing function is quite different. Apart from rehabilitation we also need to have regard to other interests such as prevention and rehabilitation. To focus exclusively on the well-being of the accused

person is likely to result in a distorted and warped sentence (see eg *S v Lister* 1993 (2) SACR 228 (A) at 232e-i).

[19] The sentencing judge committed no misdirections. Once direct imprisonment is recognised as the only appropriate sentence in this case, our authority to interfere on appeal is rather limited. I say that because it is difficult to think of a period of imprisonment which is appropriate in the circumstances, and at the same time so much less than twelve years that this sentence can be labelled shockingly harsh. This is especially the case where the court a quo's judgment reflects a well-considered balancing of all the disparate interests involved. In consequence I do not believe that we are entitled to interfere with the imposed sentence.

[20] For these reasons the appeal against sentence is dismissed.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	F van As Instructed by: Legal Aid SA, Pretoria c/o Justice Centre, Bloemfontein
For the Respondent:	J J Jacobs Instructed by: Director of Public Prosecutions, Pretoria c/o Director of Public Prosecutions, Bloemfontein