IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case No: 273/98

In the matter between:

THE STATE	APPELLANT
and	
CYRIL SALZWEDEL	FIRST RESPONDENT
DARRYL IVOR LOTTERING	SECOND RESPONDENT
CHARL JUSTIN LOTTERING	THIRD RESPONDENT
BARRY QUINTIN LOTTERING	FOURTH RESPONDENT

CORAM: MAHOMED CJ, SMALBERGER, OLIVIER JJA, MELUNSKY and MPATI AJJA

DATE OF HEARING: 4 NOVEMBER 1999

DATE OF JUDGMENT: 29 NOVEMBER 1999

JUDGMENT

. . . MAHOMED CJ

MAHOMED CJ

[1] The four respondents in this appeal were charged with three offences in the court *a quo*. The first charge was that they had murdered Mcoseleli Christia Benta ("the deceased") in East London on 12 March 1994. The second charge was that they had assaulted Tommy Orie with intent to do grievous bodily harm. The third charge was that they had been guilty of malicious damage to property by wrongfully and unlawfully damaging a motor vehicle belonging to Orie on the same occasion.

[2] Jones J convicted all the respondents on the first and third charge. On the first charge of murder, each of the respondents was sentenced to ten years imprisonment but the whole of the sentence was suspended for five years on certain conditions which included the condition that the relevant respondent submits himself to three years correctional supervision. The order of correctional supervision was itself subject to various provisions including an obligation by the relevant respondent to:

(a) subject himself to house arrest for three years, except for certain purposes pertaining to his health and employment, and for the purpose of cultural, recreational, education or social activities designated by the Commissioner for Correctional Services;

(b) perform community service without compensation for a period of sixteen hours per month at certain specified institutions during the full term of three years.

[3] In addition to the suspended term of imprisonment each of the respondents was ordered in terms of section 297(1)(b) read with (1)(a)(i)(aa) of Act 51 of 1977 to pay an amount of R3000 into the Guardian's Fund for the benefit of the minor children of the deceased in monthly instalments of R50. The first instalment was

to be paid on or before 7 August 1997 and the remaining instalments were to be paid on the seventh day of each and every subsequent month.

[4] On the third charge each of the respondents was sentenced to twelve months imprisonment the whole of which was suspended for five years on the condition that the relevant respondent was not again convicted of the offence of malicious injury to property and sentenced therefor to a period of imprisonment without the option of a fine committed during the period of suspension. Each of the respondents was also directed to pay an amount of R150 to Tommy Orie on or before 7 October 1997.

[5] Mr Turner who appeared for the State both at the trial and on appeal took the view that the sentence imposed in respect of the charge of murder was "glaringly inadequate". Pursuant to the provisions of section 316(B) of Act 51 of 1977 he

applied for and obtained leave from the trial Judge to appeal to this Court against the sentence imposed on each of the respondents.

[6] The circumstances which led to the sentence and conviction of the respondents are substantially undisputed. On 12 March 1994 the deceased and three others were travelling from Beacon Bay to East London in a red Cortina vehicle in the lawful possession of Tommy Orie and which had a Ciskei registration number. The deceased and his companions were all black males. Before they could reach their homes in East London and while they were passing the largely white residential area of Cambridge, the battery in the Cortina failed. The car stalled and its lights went off. Orie who was the driver pulled off the main road and parked on the "grass verge". One of the occupants decided to walk home, but because they did not wish to expose the vehicle to vandalism, the others remained behind.

[7] The first three respondents together with a number of other young white men and women, including Theresa de Wet (who was the main witness for the prosecution) had been part of a group of young persons within the Afrikaner Weerstands Beweging ("AWB") who had taken to arming themselves, masking their identities and patrolling certain white areas in East London at night, with the object of indiscriminately attacking any black persons they found in these areas. They participated in a number of such escapades. They had previously received training through the AWB in the use of firearms, unarmed combat and the use of batons, but according to the evidence they had not received any instructions from the AWB to assault any black persons.

[8] All the respondents, together with Theresa de Wet, were on such an escapade on the night of 12 March 1994 when they saw the red Cortina parked off the side of the main road in the Cambridge area. The registration number of the car caused

them to infer that it must belong to one or more black persons. They did not see any occupants inside the car but they proceeded gratuitously to vandalise and damage it. The second and third respondents slashed the tyres and broke the windows of the Cortina.

[9] The group then proceeded to roam through other parts of East London. On their return they noticed that the damaged red Cortina was still there. They now noticed black occupants inside the car. This triggered an attack by the group. The second and third respondents were the first to disembark. They positioned themselves on either side of the Cortina near the back doors and proceeded to smash the windows and dent the car. The terrified occupants scampered out and ran. They were pursued by their attackers. Two of the black victims managed to escape but the deceased could not do so. He had a small physique. He was a pathetically frail hunchback, only 1,5 metres tall with poorly developed lungs. As

his assailants caught up with him he tripped and fell. As he lay defenceless and prostrate on the ground he was brutally beaten to death. The court *a quo* found that the second respondent must have delivered the fatal blows with a truncheon. The skull of the deceased manifested a large depressed fracture of 10cm x 14cm with other fractures radiating from the same area. Very considerable force must have been necessary to inflict these blows. The deceased never recovered. He must have died shortly thereafter. The court *a quo* correctly concluded that all the respondents had acted in concert and were guilty of murder on the basis of *dolus eventualis*. They had appreciated that the acts which they had perpetrated or authorised could have led to the death of the deceased, but had nevertheless proceeded with such conduct, in reckless disregard of the consequences.

[10] Mr Myburgh who appeared for the respondents on appeal submitted that the determination of a proper sentence for an accused person fell primarily within the

discretion of the trial Judge and that this Court should not interfere with the exercise of such a discretion merely because it would have exercised that discretion differently if it had been sitting as the court of first instance. This submission is undoubtedly correct, but it is clear that:

> "[t]he Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence."[1]

An Appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is "disturbingly inappropriate", or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not

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[1] *S v Anderson* 1964 (3) SA 494 (A) at 495 G-H.

exercise its discretion reasonably.[2] It has also been held that:

> "[t]he over-emphasis of the effect of the appellant's crimes, and the underestimation of the person of the appellant, constitutes . . . a misdirection and in the result the sentence should be set aside."[3]

This must be equally true when there is an over-emphasis of the personal circumstances of the accused and an under-estimation of the gravity of the offence.

[11] The sentence imposed by the trial Judge in the present case does not oblige any of the respondents to serve any period of imprisonment whatsoever, if they do not breach any of the conditions for its suspension. There is a striking disparity between this sentence and the sentence which this Court would have imposed had it been sitting as the trial court.

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2 *S v Pillay* 1977 (4) SA 531(A) at 535 D-G; *S v Mothibe* 1977 (3) SA 823 (A) at 830D; *S v Narker and Another* 1975 (1) SA 583 (A) at 588 H.

3 *S v Zinn* 1969 (2) SA 537 (A) at 540 F-G.

[12] My main difficulty with the approach of the trial Judge, is that he over-emphasized the personal circumstances of the respondents without balancing these considerations properly against the very serious nature of the crime committed, the many very aggravating circumstances which accompanied its commission, its actual and potentially serious consequences for others, and the interests and legitimate expectations of the South African community at a very crucial time in its transition from a manifestly and sadly racist past to a constitutional democracy premised on a commitment to a constitutionally protected and expressly articulated culture of human rights. The trial Judge was largely influenced in this approach by the report and the evidence of Dr Irma Labuschagne, a forensic criminologist whose focus on the personal circumstances of the respondents had led her to recommend that they should be kept out of prison. In his judgment, the trial Judge should however have had regard to the remarks of Nienaber JA in *S v Lister*:[4]

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[4] 1993 (2) SACR 228 (A) at 232 h-i (followed in *S v Botha* 1998 (2) SACR 206 (A) at 211 h -i.)

> ". . . the approach of a sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation. To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence."

[13] Dr Labuschagne found that the respondents had all been influenced by a culture of racism within their families. Jones J explained his assessment of this finding as follows:

> "My finding is that the four accused were *influenced* to behave in the way they did, that the forces which influenced them were powerful and in some ways almost irresistible to their young and immature minds, and that this is indeed a mitigating factor."

This approach raises an important principle pertaining to punishment in a country such as South Africa with its tragic history of racial intolerance and fear, which

both the interim Constitution and the present Constitution repudiate with eloquence and vigour.[5]

The relevance of racial conditioning in the sentencing of offenders influenced by its effects in the commission of serious offences was confronted by the Namibian Supreme Court in the case of *S v Van Wyk*.[6] Counsel for the appellant in that case contended that because the appellant had been socialised or conditioned by a racist environment, the fact that the murder of the deceased was racially motivated should, in the circumstances, be treated as a mitigating factor and not an aggravating factor. The Namibian Supreme Court rejected that submission and expressed itself *inter alia* as follows:

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5 The interim Constitution, Act 200 of 1993, expresses this principle *inter alia* in both the preamble and the postscript and in sections 8, 10, 14, 21, 31 and 32. It had been adopted before the date of the offences in the present matter and it came into operation on 27 April 1994. The new ethos which informed its passage, had already emerged and consolidated itself within the country by the end of 1993 (see *Amod v Multilateral Motor Vehicle Accidents Fund* unreported judgment of the Supreme Court of Appeal dated 29 September 1999 at para 20). The present Constitution adopted in 1996 expresses the same ethos *inter alia* in the preamble and in sections 7,8,9,10,15 and 19. It was in operation when the respondents were sentenced by the trial court.

6 1992 (1) SACR 147 (Nm).

> "To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimise discrimination against women, to accept barbaric modes of punishing citizens and exacting brutal retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past[7]. . . I can find no fault with the finding of the Court *a quo* that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor."[8]

Substantially the same temper should inform the response of South Africa to serious crimes motivated by racism, at a time when our country had negotiated a new ethos and a clear repudiation of the racism which had for so long and so pervasively dominated so much of life and living in South Africa. The commission of serious offences perpetrated under the influence of racism subverts the

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7 *S v Van Wyk* above note 6 at 173 c.

8 *S v Van Wyk* above note 6 at 173 f.

fundamental premises of an ethos of human rights which must now "permeate the processes of judicial interpretation and judicial discretion"[9] including sentencing policy in the punishment of criminal offences.

The offences committed by the respondents were committed on the eve of the first democratic elections in terms of the interim Constitution. They could have provoked disastrous consequences for the maintenance of law and order in the country.

[14] Both the trial Judge and Dr Labuschagne were so much influenced by the relative youth of the respondents,[10] and the racial environment to which they were

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9 *S v Acheson* 1991 (2) SA 805 (Nm HC) at 813 B-C, approved in this Court in *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) at para 11.

10 Respondent 1 was 23 years 5 months old at the time of the commission of the offence (26 years 9 months on the date of sentence). Respondent 2 was 17 years and 3 months old at the time of the offence (20 years 7 months when sentenced). Respondent 3 was 17 years 7 months when he committed the offence (20 years 11 months when sentenced). Respondent 4 was 21 years 6 months at the time of the commission of the offence (24 years 10 months when sentenced).

exposed that they failed to accord any significant weight to the aggravating circumstances which accompanied the commission of the offence.

There were many such aggravating circumstances. Jones J took into account the fact that none of the respondents had any previous convictions. But this was not because the respondents had not committed any offences. Indeed the first three respondents were part of a group armed with potentially lethal weapons which had on prior occasions deliberately organised assaults on black persons found at night in traditionally white areas. The justification taken into account for this conduct was their belief that black persons had been responsible for crimes in such areas. But the black persons whom they intimidated, terrorized and assaulted were not identified on the basis that they had committed or were about to commit any crimes. They were assaulted simply because they were black.

Neither the deceased who was killed nor his companions in the red Cortina whom the respondents chased had, to their knowledge, done anything wrong at all. They were simply the victims of vehicular breakdown. The deceased met his death simply because he was black. The attack by the respondents manifested a disgraceful exhibition of an extremely brutal kind of racism. Not the slightest degree of mercy was shown. A pathetically frail hunchback was chased and bludgeoned to death by three powerful blows with a baton. It constituted a menacing combination of pitiless cruelty and force. Even as he lay prostrate and helpless he was terrorized and kicked in a shameless exhibition of brutality and sadism.

[15] The trial Judge held that

> "[t]he accused did not desire the death of their victim. Indeed it was the last thing they wanted."

The last observation is not justified by the objective facts pertaining to the brutality with which the deceased was killed. Moreover it is inconsistent with the finding by the trial Judge that the respondents were guilty of murder on the basis of *dolus eventualis*. Inherent in that finding is the proposition that the respondents appreciated that death might indeed result from their criminal conduct but proceeded nevertheless to persist in such conduct, reckless of the consequences.

[16] The trial Judge held that

> "[t]here are indeed mitigating circumstances attendant upon the commission of this murder. It was not a planned or premeditated murder."

I also have difficulty with this approach. The actual murder of the deceased might not have been planned, but what was planned with great foresight and precision

were a series of escapades to terrorize, intimidate and assault black persons. The respondents armed themselves with lethal weapons such as a firearm, a panga, a heavy metal pipe, a heavy baton, a knife and a handle of a pick axe. They must have realized that they would attract severe punishment if apprehended and for this reason they carefully planned to avoid detection, by masking themselves with balaclavas and dark clothing and by affixing false registration numbers on the vehicle in which they travelled. The death of the deceased arose in consequence of a reckless and dangerous plan. It was not fortuitous.

[17] The trial Judge also accepted in mitigation that the respondents "are today horrified at what they have done". Genuine expressions of remorse might in appropriate circumstances be taken into account in determining an appropriate sentence, but the only expressions of regret from the respondents came towards the end of the trial when they must have appreciated the serious risk of being sentenced

to long terms of imprisonment. No regret was expressed by any of the first three respondents after they had repeatedly assaulted black persons on previous escapades. Indeed, they were emboldened to repeat their conduct. None of the respondents displayed any remorse immediately after the events which led to the death of the deceased. Theresa de Wet testified that when the respondents departed from the scene of the crime they "were basically laughing and chatting about the incident". When they read the newspaper report about the incident there were again no expressions of regret that the deceased had been killed. Their reaction was to "laugh" about inaccuracies in the report pertaining to the colour of the Cortina that they had damaged and thereafter to manufacture false alibis, to account for their movements during the night of the deceased's murder.

[18] Relying on the observations of Dr Labuschagne the trial Judge concluded that direct imprisonment of the respondents "serves no purpose other than retribution"

and went on to consider the effect which imprisonment would have on them.

I also have difficulty with this approach. Imprisonment would undoubtedly be prejudicial to the respondents but regard must be had not only to the interests of the respondents, but the serious nature of the crime in the present case, its effect on others and the interests of the community at large. It cannot properly be said that a substantial term of imprisonment, in the circumstances of this case, "would serve no purpose other than retribution". It would also give expression to the legitimate feelings of outrage which must have been experienced by reasonable men and women in the community, when the circumstances of the offence were disclosed and appreciated. A lengthy term of imprisonment sanctioned by the court would also serve another important purpose. It would be a strong message to the country that the courts will not tolerate the commission of serious crimes in this country perpetrated in consequence of racist and intolerant values inconsistent with the ethos to which our Constitution commits our nation and that courts will deal

severely with offenders guilty of such conduct. As the highest court of the country in such matters, the Supreme Court of Appeal must project this message clearly and vigorously.

[19] Regard being had to all these factors, I am of the view that the sentence imposed by the trial court should be set aside and substituted by a sentence which would oblige the respondents to serve a substantial term of imprisonment. Although the different respondents had different duties to discharge in the events which led to the murder of the deceased, and although only two of the respondents were directly involved in his assault, the trial court was correct in treating them all equally for the purposes of sentence. All the respondents acted together and in concert, and the acts of each, in the circumstances of this case, must be attributed to the others. Nor do I think there is any reason to treat the fourth respondent differently because he did not participate in the previous raids of the group when

they attacked black persons. He took part in the events on the night in question with knowledge and appreciation of what had gone before. Having regard to the serious nature of the offence which was committed, the trial court was also correct in this respect.

[20] In my view a sentence of twelve years imprisonment in respect of each respondent would properly balance the personal circumstances of the respondents against the seriousness of the offence, its actual and potential consequences, and the reasonable interests and legitimate expectations of the community within a constitutionally articulated culture of human rights. Some allowance must, however, be made for the fact that for at least two years the respondents have suffered some punishment already by their house arrest, by community service without any remuneration and by their obligation to pay compensation to the children of the deceased and to Tommy Orie. I will have regard to these factors by

suspending two years of the sentence to be imposed on each of the respondents, subject to appropriate conditions which would constitute an inducement to the respondents to continue to pay into the Guardian's Fund the instalments which Jones J had directed for the benefit of the minor children of the deceased.

[21] We were informed during the appeal that each of the respondents has complied with his obligation to pay R50 per month into the Guardian's Fund for the benefit of the children of the deceased with effect from 7 August 1997. Only R1350 of the total of R3000 must, on this basis, have been paid by each of the respondents. The balance which remains is R1650 in each case. At the rate of R50 per month it will take nearly three years for each of the respondents to discharge this balance. We were informed that since the date of their conviction and sentence each of the respondents has been in gainful employment. It should be within their capacity to pay or cause to be paid what are relatively small instalments even while

they are to be incarcerated with effect from the date of this order.

Order

[22] I would accordingly order that:

1. The sentences of the court *a quo* imposed on the respondents are set aside and substituted with the following:

"(a) Each accused is sentenced to twelve years imprisonment;

(b) Two years of the sentence in respect of each accused in terms of paragraph (a) is suspended on the condition that each accused pays into the

Guardian's Fund the sum of R3000 for the benefit of the minor children of the deceased, in monthly instalments of R50 commencing not later than 7 August 1997. The remaining instalments are to be paid on the seventh day of each and every subsequent month. The obligation to pay such instalments shall continue during any period in which the accused are incarcerated in terms of paragraph (a);

(c) Each of the accused must pay an amount of R150 to Tommy Orie."

I Mahomed

Chief Justice

Concur:

Smalberger JA

Olivier JA

Melunsky AJA

Mpati AJA