THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 342/10

ANDRÉ VAN DE VENTER Appellant

and

THE STATE Respondent

Neutral citation: ***Van de Venter v The State*** **(342/10) [2010] ZASCA 146 (29 November 2010)**

BENCH: **PONNAN, CACHALIA and LEACH JJA**

HEARD: **12 NOVEMBER 2010**

DELIVERED: **29 NOVEMBER 2010**

SUMMARY: Sentence – misdirection by trial court – court on appeal substituting an effective term of imprisonment of 18 years for that of 33 years imposed by the trial court.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Moabi AJ sitting as court of first instance).

The appeal is allowed to the extent set out below:

1 The sentence of 28 years' imprisonment imposed by the court below pursuant to the appellant's conviction on count 1, the murder, is set aside and in its stead is substituted a term of 18 years' imprisonment.

2 The sentence of 5 years' imprisonment imposed by the court below pursuant to the appellant's conviction on count 2, the theft, is ordered to run concurrently with the sentence imposed on count 1.

3 The appellant is thus sentenced to an effective term of imprisonment of 18 years.

JUDGMENT

PONNAN JA (CACHALIA and LEACH JJA concurring):

[1] During February 2000 the appellant, André van de Venter, was convicted in the North Gauteng High Court (Pretoria) (per Moabi AJ) on one charge each of murder and theft and sentenced to an effective term of imprisonment of 33 years - being 28 years for the murder and five years for the theft.

[2] Leave to appeal was granted to this court by the trial judge solely in respect of sentence on 3 March 2000. A petition to this court to expand the scope of the appeal to include the convictions as well, was dismissed on 9 July 2001.

[3] For reasons that do not emerge on the record and in any event are unnecessary to fully traverse no further steps were taken to prosecute the appeal for close on nine

years. When the record was eventually filed with this court on 2 June 2010, it was accompanied by affidavits from the registrar and two clerks of the high court to the effect that the complete record of the proceedings could not be located. The record that now serves before us on appeal has accordingly been reconstructed by those officials. Before us counsel were agreed that the reconstructed record was adequate for a full and proper ventilation of the appeal. I agree.

[4] The facts giving rise to the appellant's conviction were: On 27 March 1998 and in consequence of a report that he had received, Peter Thomas called on the home of his friend Eric Nezar (the deceased). As the door was locked he had to gain forcible entry into the flat. On entering the premises he came upon the body of the deceased on his bed with his face and the upper side of his head bloody. The deceased's hand clutched an electrical cord and there were visible blood spots on one of the walls. He summoned the police. Later that day the deceased's brother, Willem, was contacted by Captain van Aswegen of the Pretoria Murder and Robbery Unit of the SAPS and informed of the deceased's death. Two days later, whilst sifting through the deceased's belongings, Willem chanced upon certain ornamental stones that appeared to have blood on them. Those he handed to the police.

[5] It would seem that whilst the investigating officer, Sergeant van Rensburg, was interviewing people who knew the deceased, the appellant came to be mentioned. Sergeant van Rensburg interviewed the appellant and secured a statement from him. When Captain van Aswegen perused that statement his curiosity was piqued and he resolved to question the appellant. On 6 April 1998 Sergeant van Rensburg and Captain van Aswegen proceeded to the appellant's home. During the course of their questioning of the appellant they enquired about the clothes that he (the appellant) had worn on the night when the deceased had met his death. His shoes in particular appeared to them to link the appellant to certain footprints at the deceased's home. The appellant was arrested.

[6] The next day the appellant intimated his willingness to participate in a pointing out. Arrangements were then made by the investigating officer for an independent commissioned officer, Captain van der Spuy, to oversee the pointing out. That evidence and its import is summarised in the judgment of the court below as follows:

'Van der Spuy . . . produced the photos which showed the accused at the scene and where he was pointed out where different aspects relating to the crime were found in the room. He brought in photos . . . all these show the accused at the premises of the deceased and indicating various points where the deceased was, where he got the stone which he used to hit the deceased, where the blood spots were and where they were removed. In brief, these photographs and voluntarily pointing out squarely put the accused at the scene and he knew what happened on that particular night when the deceased was killed.'

[7] There was as well the evidence of Elmarie Horak linking the appellant to the commission of the offences. Miss Horak testified that the appellant had come to her shop, Cash Converters, to sell 63 CDs and a cell phone. She asked him to go to the Sunnyside Police Station to depose to an affidavit confirming his ownership of those items and his entitlement to dispose of them. The appellant did indeed do so. He returned with a sworn statement. He also signed an in-store declaration that he had lawful title to sell and 'transfer full ownership thereof to Cash Converters'. He was paid R300 in total for those items.

[8] Marno Boshoff, who knew both the deceased and the appellant, testified that at some stage he had asked the appellant why he had killed the deceased. His response is summarised by the trial court as follows:

'And he said the accused said he did not know why he did it. He was asked if he, the accused, was angry, if the deceased did anything wrong to him; but he replied and said no, the deceased did nothing wrong to me. He says he, the accused, did not understand what happened, in essence. He said on that particular morning he, the accused, woke up – maybe I should here indicate that there is evidence to the effect that the night before the accused went to the deceased's room and he slept over there. Now when he woke up in the morning he was in the flat of the deceased. He went to the bathroom and when he came back he saw a stone or a rock lying down. He says he does not know what happened next. He said afterwards he realised what he had done and that there was a problem and he ran away, he left the flat.'

The appellant did not testify in his defence. That was his right. But it is not without its consequences. For, approaching the evidence holistically, as one must, the irresistible

inference to be drawn from the facts that I have briefly outlined, is that the appellant killed the deceased and thereafter stole the deceased's possessions the subject of the theft charge. It follows that the conclusion of the trial court on the convictions cannot be faulted.

[9] As to sentence: The judgment of the court below on sentence is singularly unhelpful. It spans a total of three pages in the record. It alludes to the objective gravity of the offence, the brutality of the deed and the lack of remorse displayed by the appellant as reflected in his failure to take the court into his confidence and his disposing of the deceased's possessions the morning after the murder.

[10] The judgment then proceeds:

'. . . because maybe the most serious issue that must be addressed is that of if the satanism influence, if any, is on you. The state argues that there is no evidence that you were in any way afflicted by this issue of satanism and if you were then you did it knowing what would be the consequences. Where the court would not take that view, it will take a very lenient view, it will give you the benefit of the doubt even if you did not testify that you were to an extent maybe affected by these satanism tendencies. We were told that satanism preaches death, destruction, contempt of religion, of God, and maybe as we do not really have a good motive of why you did what you did, one can maybe say yes, satanism had the better of you because how can a person act so cruelly? When somebody is sleeping on the bed, you bash him with a stone and proceed to kill him; what is the motive? We do not have a clear motive her, that is why I will give you the benefit that you had this influence on you of satanism. But this expert on satanism also turns and says people who get involved in that type of practice do it with their eyes right open and they know what probably will be the consequences of their activities.'

The judgment then concludes:

'The court is conversant with the authorities which have been referred to in address in mitigation. The court is of the opinion that you must get a direct jail sentence and that, if really you are under the influence of satanism or it is still affecting you, which the court does not know, you may get help inside prison, but the court is of the opinion that maybe you were and it gives you the benefit and strongly will direct that facilities be made available for your rehabilitation in prison.'

[11] What the judgment ignored though was the evidence contained in the reports of Prof Roos and Dr Plomp, psychiatrists in the employ of Weskoppies Hospital. Both had concluded that whilst the appellant appreciated what he was doing at the time of the

commission of the offences, his moral responsibility was diminished because he was a schizoid personality, who was emotionally depressed. Both described people who are diagnosed as such as lonely and not able to develop intimate relationships with others.

[12] The report of the social worker, Ms du Preez, paints a picture of a sad, lonely youngster - the product of a broken home. Although he matriculated, the appellant acknowledges that he struggled academically. As the product of a broken home, he appears to have moved between his mother and father. That resulted in his schooling being disrupted. After he failed standard 9 he was moved to his father and stepmother and had to adjust to a new school environment. At that stage he started abusing alcohol and dabbling in satanism. The appellant seems to have formed the impression since the age of about 10 years that life was senseless and that he did not want to continue living. Whilst in standard 10 he attempted on three different occasions to take his own life.

[13] Since leaving school the appellant has been unable to hold down permanent employment and his employment history has been quite sporadic. Although on the cusp of adulthood at 23 years, the appellant has not been involved in any meaningful relationships. Nor for that matter has he had any real friends. According to his mother he spent all of his time at home writing letters to his pen friends and viewing television. His mother informed the social worker that the appellant manifested very low self-esteem and that if he did go out it was usually late at night when he was less likely to be seen by others. In an endeavour to assist him to address those various issues, the appellant's mother suggested that he contact the deceased who was very active in counselling, Bible study groups and a cell leader at his church. That is how the appellant first came to have contact with the deceased. According to the appellant, he was contemplating joining a Buddhist retreat which he was then discussing with the deceased at the time of the latter's death. In his warning statement to the police the appellant stated that despite the fact that he was heterosexual that the deceased had massaged him but as he put it 'Ek nie daarvan hou nie, ek hou nie daarvan dat 'n manspersoon so aan my vat nie'.

[14] The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were recapitulated in *S v Malgas* 2001 (1) SACR 469 (SCA) para 12, where Marais JA held:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. . . . However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[15] In my view the test for intervention on the first leg is satisfied. None of the mitigating factors that I have alluded to merited even a mention in the judgment of the trial court. They ought to have. Nor were they balanced against what were perceived to be the aggravating features in the commission of the offences. In failing to afford any recognition to those factors in the determination of an appropriate sentence, the trial court disregarded the traditional triad of the crime, the offender and the interests of society. Instead the learned judge appears to have emphasised the public interest and general deterrence in arriving at what he considered to be a just sentence, whilst ignoring the other traditional aims of sentencing such as personal deterrence, rehabilitation and reformation. It follows that the sentence imposed by the learned judge falls to be set aside and this court is accordingly free to impose the sentence it considers appropriate.

[16] It remains to consider what sentence should be substituted for that of the trial court. How and why the learned trial judge arrived at a sentence of 28 years for the murder and why the sentence of 5 years imposed for the theft, which was part and parcel of the same criminal transaction was not ordered to run concurrently, is not explained. Despite the fact that the appellant was represented before the learned judge there nonetheless remained a duty on him to call for such evidence as was necessary

to enable him to exercise a proper judicial sentencing discretion. For, as *S v Siebert* 1998 (1) SACR 554 (SCA) at 558i–559a made plain:

'Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

The judgment added: '[A]n accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance'.

[17] The natural indignation that the community must feel at the appellant's conduct warrants appropriate recognition in the sentence. Nevertheless that can hardly invite a sentence that is out of proportion to the nature and gravity of the offence. As it was put in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 35:

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'

The judgment continues '[i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

[18] The conclusion to which I have come bearing in mind all the above factors, as also the fact that the appellant spent a period of approximately one year in custody prior to the finalisation of the matter, is that a proper sentence on the murder conviction would be one of 18 years' imprisonment. I would, moreover, order the sentence of five years' imprisonment imposed on the appellant for the theft conviction to run concurrently with the 18 years.

[19] One final aspect requires comment. It is unclear why the learned judge saw fit to grant leave to the appellant to appeal to this court. In *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 28 this court stated:

'It does not appear from the record that the trial judge considered whether leave to appeal should have been granted to the full court. In terms of s 315(2)(a) of the Criminal Procedure Act 51 of 1977 when an application for leave to appeal in a criminal case heard by a single judge is granted under s 316, the trial

judge shall, if satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court. The present appeal is a case in which the trial judge should have been so satisfied. There were no questions of law involved; the case raised no question of principle; and there were no considerations which called for the attention of this court (*S v Myaka* 1993 (2) SACR 660 (A) at 661i-662b). It frequently happens that simple appeals have to be heard by this court. In order to avoid the unnecessary clogging of the roll of this court with matter that does not require its attention, it is important that trial judges should not overlook the provisions of s 315(2)(a) (*S v Sinama* 1998 (1) SACR 225 (SCA)). The inappropriate granting of leave to appeal to this court results in cases of greater complexity and which are truly deserving of the attention of this court having to compete for a place on the court roll with a case which is not (*Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) para 23).'

[20] In the result the appeal is allowed to the extent set out below.

1 The sentence of 28 years' imprisonment imposed by the court below pursuant to the appellant's conviction on count 1, the murder, is set aside and in its stead is substituted a term of 18 years' imprisonment.

2 The sentence of 5 years' imprisonment imposed by the court below pursuant to the appellant's conviction on count 2, the theft, is ordered to run concurrently with the sentence imposed on count 1.

3 The appellant is thus sentenced to an effective term of imprisonment of 18 years.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	L A van Wyk (Ms) Instructed by: Pretoria Justice Centre Pretoria Bloemfontein Justice Centre Bloemfontein
For Respondent:	P W Coetzer Instructed by: Director of Public Prosecutions Pretoria Director of Public Prosecutions Bloemfontein