THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable/Not Reportable

CASE NO. 321/2001

In the matter between

SELVAN NAIDOO **First Appellant**

VINCENT PILLAY **Second Appellant**

And

THE STATE **Respondent**

CORAM: MPATI DP ZULMAN JA and SOUTHWOOD AJA

HEARD: 15 SEPTEMBER 2003

DELIVERED: 15 SEPTEMBER 2003

JUDGMENT

ZULMAN JA

[1] On the afternoon of 24 March 2000 a teargas canister was activated in the Throb Club in Chatsworth while it was packed with school children. A stampede ensued in which thirteen young people died and many more were injured. Charges of murder, assault, and unlawful possession of teargas were preferred against three persons alleged to have been responsible for the activation of the canister.

[2] The murder charges failed because the trial Court (Hugo J and assessors) concluded that it had not been proved that the deaths either had been desired or actually foreseen. The Court found that the deaths should have been foreseen and convicted all three accused on thirteen counts of culpable homicide. They were also convicted on fifty-seven counts of common assault and one count of unlawful possession of a teargas canister.

[3] The three accused were the two appellants (accused one and two) and one Sivanathan Chetty (accused three) (Chetty).

[4] The three accused were each sentenced to 18 months imprisonment

on each of the thirteen counts of culpable homicide. In the case of appellants one and two, the sentences imposed in respect of three of the counts were ordered to run concurrently with one another and with the sentences imposed in respect of the remaining counts of culpable homicide. No such order was made in respect of Chetty. All of the accused were sentenced to six months imprisonment in respect of their unlawful possession of the teargas canister, and 5 years imprisonment in respect of the fifty-seven counts of common assault which were taken together for the purpose of sentencing. These sentences were also ordered to run concurrently with one another and with the sentences imposed in respect of the convictions of culpable homicide. The nett effect of it all was that the first and second appellants were sentenced effectively to 15 years imprisonment and Chetty to nineteen and a half years imprisonment.

[5] Appellants one and two together with Chetty were granted limited leave to appeal by the court *a quo*. They were restricted to contending that their conviction upon multiple counts of culpable homicide and assault was impermissible in law and that they should have been convicted on one count of culpable homicide in which the death of thirteen people was involved and one count of common assault in which 57 people were assaulted. They were granted unrestricted leave to appeal against their sentences. Appellants one and two did not prosecute their appeals while

Chetty did. No heads of argument were filed on behalf of appellants one and two although their appeals were set down for hearing together with Chetty's appeal. They were also not present nor represented when the appeal was heard. In the result only the appeal of Chetty was heard by this court. After receiving certain further submissions from counsel in Chetty's appeal, the appeals of the two appellants were struck off the roll. However it was left open to the appellants, if so advised, to apply for condonation of their non-prosecution of their appeal and for its restatement.

[6] The appeal of Chetty against his conviction failed. However the appeal against the sentence imposed upon him in respect of the thirteen counts of culpable homicide succeeded. Those sentences were set aside and the following sentences substituted for them and, if Chetty had been serving the sentences since the date that they were imposed, antedated to the date upon which Chetty commenced to serve the sentences:

> "On each of the thirteen counts of culpable homicide nine months imprisonment".

For the rest, the sentences imposed by the court *a quo* remained unaltered. This meant that Chetty's sentence now amounted effectively to nine years and nine months imprisonment. In imposing those sentences the court took into account that the appellant was in custody for eight months prior to

the conviction. The judgment of the court in Chetty's appeal is reported in 2003 (1) SACR 347 (SCA).

[7] On 24 February 2003 the first appellant who was in custody addressed a letter to the Registrar of this court. In the letter he indicated, inter alia, that he had been represented at his trial by an advocate appointed by the Legal Aid Board. He understood that that advocate would represent him before this court in his appeal. This did not happen. He requested the court to place the matter of his appeal on the roll in that "substantial injustice would result should its matter not be heard". The Registrar, after consulting the senior judge who presided in Chetty's appeal, (Marais JA) replied to this letter and advised the first appellant that his appeal would be re-instated on the Court roll in the Court term running from 15 August to 30 September 2003. He was also advised should the second appellant wish to have his appeal re-instated, since nothing had been heard from him to date, it too would be re-instated at the same time. The second appellant was advised to contact the Registrar's office. The Registrar subsequently communicated with second appellant who also indicated that he wished to pursue his appeal.

[8] Subsequently attorney Pretorius of the University of the Free State Legal Aid Clinic filed heads of argument on behalf of the two appellants.

In the heads Mr Pretorius indicated, wisely, that after a careful consideration of the judgment of this Court in Chetty's appeal any appeal on the merits of the convictions would not be persisted in. The Court is indebted to Mr Pretorius for his assistance in this matter.

[9] In a letter dated 18 August 2003 to the Registrar the respondent indicated that it had considered the appeals of the two appellants carefully and that it had been decided that the respondent would not be opposing the matter but would abide the decision of the court.

[10] With that introduction I now proceed to consider the merits of the appellants' appeal against the sentences imposed. In essence the appellants contend that the sentences are startlingly inappropriate in relation to the sentence which should have been imposed and more particularly compared to the sentence which was substituted by this Court in regard to Chetty.

[11] The Court *a quo* considered the question whether all three of the accused before it should receive the same sentence and stated the following:-

> "The question arises as to whether all three accused should get the same sentence. There are various factors that play a role here. Accused nos 1 and 2

> showed remorse in the sense that they gave themselves up on the day following this incident. They did not contest their roles in the incident and they did not occupy the Court's time by a fruitless exercise in falsely exculpating themselves. That is not the case with accused number 3 who to the bitter end denied his culpability and his responsibility in these offences.
>
> As against that, accused no 2 has previous convictions which the other two do not have. Accused no 2's previous convictions are, save for one, irrelevant to the present case but he was convicted of malicious injury to property for which he received a fairly nominal sentence and one can only conclude that that offence was not a particularly serious one. I do not believe that it should play a material role in the sentence save as I shall indicate below.
>
> Of course there is also the factor that had it not been for accused no 3 and had it not been for the instructions he gave, accused no 1 and 2 would not have been in the position they are today. He was the instigating factor in connection with this offence and that too is a ground for differentiating his sentence from the sentence imposed upon the others."

[12] The court *a quo* also drew attention to the fact that the first appellant and Chetty had been in custody for some eight months and the second appellant for a lesser period at the time that sentence was passed. However, the Court found that this was "compensated for" by the fact that the second appellant has previous convictions and that this did not in the Court's view form a reason for distinguishing between the sentences in itself.

[13] As pointed out by this Court in Chetty's appeal Chetty was a first offender. This is also the case of the first appellant and for all practical purposes of the second appellant. However there are certain aggravating circumstances which cannot be lost sight of. Thirteen young lives were lost causing anguish to their family and friends of immense magnitude. As

further pointed out in the judgment “The palpable anger of the community from which the victims came is entirely justified and fully understandable.” However it is a strong mitigating factor that the two appellants who were economically vulnerable were exploited by Chetty who requisitioned them to place and activate the teargas canister.

[14] I have taken all these factors into account in considering what would be an appropriate sentence in the case of the two appellants. If such a sentence is measured against the sentence imposed by the Court *a quo* and the reduced sentence imposed by this Court on Chetty I believe that it is fair to say that the sentence imposed on the appellants is startlingly inappropriate.

[15] Accordingly:

(1) The appeal against the sentences imposed on the two appellants succeeds. The sentences are set aside and the following sentences are substituted for them, and if the appellants have been serving these sentences since they were imposed, antedated to the date upon which they commenced serving their sentences:

“On each of the thirteen counts of culpable homicide six months

imprisonment."

(2) For the rest, the sentences imposed by the court *a quo* remain unaltered.

(This means that the sentences of the appellants now amount effectively to six years and six months imprisonment).

R H ZULMAN
JUDGE OF APPEAL

MPATI DP)
SOUTHWOOD AJA)CONCUR