THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 347/2003

In the matter between:

JAN DANIëL VERMEULEN **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **ZULMAN, MTHIYANE en BRAND JJA**

HEARD: **13 MAY 2004**
DELIVERED: **24 MAY 2004**

Summary: Whether s 51 (3) of the Criminal Law Amendment Act 105 of 1997 applies, and whether there are substantial and compelling circumstances in terms of that section

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JUDGMENT

MTHIYANE JA:

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[1] This appeal is against a sentence of life imprisonment imposed on the appellant by the Pretoria High Court (Monaledi AJ). The appeal is before us with the leave of this Court, the trial judge having refused leave to appeal.

[2] The appellant, a 23 year old farmer from Leeufontein in Bronkhorstspruit, and his half-brother, Mr Albertus Taljaard, were arraigned in the court *a quo* on charges of murder and attempted murder. The appellant pleaded guilty to the charge of murder and to assault, the latter being a competent verdict on the charge of attempted murder. He was convicted in accordance with his plea and was sentenced to life imprisonment. The court *a quo* found that s 51 of the Criminal Law Amendment Act 105 of 1997 was applicable and that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence as is envisaged in s 51 (3)(a) of the Criminal Law Amendment Act.

[3] The appellant's brother, who was accused No 2 in the court *a quo*, pleaded not guilty to the charges and consequently a separation of trials was ordered in terms of s 81 (2) of the Criminal Procedure Act 51 f 1977.

[4] The appellant's plea of guilty on the two charges was based on the facts set out in his statement in terms of s 112 of the Act, which the State accepted as correct. In what follows I briefly set out the relevant facts.

[5] On 27 February 2001 at about 10:00 the appellant was busy attending to his daily farming routine which involved, *inter alia*, driving of cattle from one camp to another, when he came upon Mr Mzayifani Nelson Makhabitshane (the deceased) and Mr Joseph Nkosi, near a gate on the farm. He confronted them and

asked what they were doing there. They told him that they were collecting firewood. He ordered them to leave and threatened that, if he found them there upon his return, there would be trouble.

[6] He then went back to the house where he met up with his brother. He invited his brother to accompany him back to the spot where he had earlier found the deceased and Nkosi. His intention was to see if the were still there. The appellant and his brother resolved that if they found the deceased and Nkosi there they would assault them and drive them off the farm. Although both brothers were armed with firearms, they had not, at that stage, decided that they would shoot any one but had merely intended to assault the deceased and Nkosi with fists.

[7] When the appellant returned to the scene 5 minutes later with his brother, they found that the deceased and Nkosi were still in the camp. The appellant and his brother alighted from the bakkie and began to charge at them. The deceased and Nkosi tried to defend themselves with bits and pieces of firewood they had in their hands. At this point the appellant conceded that what they were about to carry out was an unwarranted attack upon two innocent persons.

[8] The appellant's brother began to assault the deceased while the appellant turned to Nkosi. The appellant snatched the piece of firewood that Nkosi had with him and began hitting him. When he tried to retaliate the appellant drew his firearm and Nkosi ran away. The appellant gave chase for only a short distance and returned to join his brother. They then both assaulted the deceased by hitting

him and kicking him. At a certain stage they tried to throttle him but he broke free and ran into a thick wattle bush. The appellant's brother gave chase for only a short distance on foot but the deceased disappeared in the bush. The appellant got into his bakkie and drove up to an elevated spot near a railway line in order to get a better view of the area. As he alighted from the vehicle he at once saw the deceased emerge from the bush and flee. He drew his firearm and fired a shot at the deceased and then a second one. The deceased was hit and fell to the ground. The appellant went up to him and noticed that he was still alive though he appeared to be very seriously injured. His face was covered in blood from the assault, and the gun shot wounds had ripped through his upper body. He was in a very serious condition. The appellant says he did not intend to shoot him (whatever that means).

[9] The appellant and his brother were shocked and frightened and realised that they were now in big trouble. They then discussed the matter and decided that the deceased should be killed and his body hidden, so that they would not get into trouble. The appellant says that the intention to kill the deceased was formed at this stage. They then removed lifted the deceased (who was then still alive) and placed him in the bakkie and drove further into the wattle-bush looking for Nkosi because they wanted to establish whether he had witnessed the shooting. When they failed find him they gave up the search and decided to drive home. At home they decided that the deceased should be buried under the carcass of a cow that

had recently been killed. They selected that spot because the ground was softer there.

[10] They later on decided against burying him in that area as they considered it to be too open and bare and that they were bound to be noticed. They ultimately decided to bury him in the cornfields. The deceased was still alive. They then drove home to collect a pick axe and a shovel. These implements were collected by the appellant himself. His parents and his brother's wife were in the house but did not see the appellant and his brother.

[11] From there they drove to the cornfields. They removed the deceased from the bakkie and carried him further into the cornfields where they began to dig a grave in which the deceased was to be buried. After the digging was completed it was clear to them that the deceased was still alive. The appellant's brother wanted to finish off the deceased by shooting him. The appellant dissuaded him because of the attention a gunshot would attract. The appellant's brother then struck the deceased with a pick axe, killing him instantly.

[12] They then lifted the deceased's body and tried to deposit it into the grave, squatting on its haunches. But the body did not fit into the grave as the legs or feet were catching the lip or sides of the grave. The appellant's brother then took a pick axe and broke the legs or feet and in that way cut the body to size. The body was then deposited into the grave. The appellant's brother began to cover the grave while the appellant took the bakkie home as he feared that it might attract

attention if it remained near the scene. After leaving the bakkie at home the appellant returned to the scene to help his brother cover the grave.

[13] Later that day Nkosi arrived on the farm with a police inspector and a member of the commando. The appellant was confronted about the incident but he denied any involvement. They left only to return the following day. On this occasion Nkosi was with detectives. They found the appellant at his father's butchery where Nkosi pointed him out to them. The appellant was duly arrested and charged with attempted murder, assault and kidnapping (as the body of the deceased had not then been found).

[14] During the afternoon on the day of his arrest the appellant informed the investigating officer, Detective Sergeant Mawelele, that he wished to make certain pointings out. He then took the police to where they had buried the deceased and made further pointings out.

[15] The appellant did not give evidence but a clinical psychologist, Mr Kobus F Truter, was called by the defence in mitigation of sentence. His evidence which was based largely on the report he compiled subsequent to the interview which he had with the appellant and his parents. In the report, compiled on 3 November 2002, Truter dealt in some detail with what he regarded as the mitigating and aggravating circumstances in the case and refrained from suggesting what he considered to be an appropriate sentence. I will return to his evidence later in the judgment, when I consider whether there are substantial and

compelling circumstances in the present case, as is envisaged in s 51 (3) of the Criminal Law Amendment Act 105 of 1997.

[16] At the conclusion of all the evidence led in mitigation of sentence the court *a quo* found that the minimum sentence provisions provided for in s 51 (1) of the Criminal Law Amendment Act were applicable, and that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence as is envisaged in s 51 (3) of the Criminal Law Amendment Act. The appeal is against this finding.

[17] Sections 51 (1) and (3) of the Criminal Law Amendment Act provide:

'51 minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to ss (3) and (6), a High Court shall, - (a) if it has convicted a person of an offence referred to in Part 1 of Schedule 2; or (b) sentence the person to imprisonment for life.

. . .

(3)(a) If any court referred to in ss (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence presented in those sub-sections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[18] The relevant portion of schedule 2 referred to in paragraph [24] above reads:

'Part 1

Murder, when –

(a) it was planned or premeditated;

. . .

(d) the offence was committed by a person, group of persons or syndicate acting in the execution of a common purpose or conspiracy.'

[19] In the appeal before us, counsel for the appellant conceded that the killing of the deceased was planned and that it was carried out in the execution of a common purpose as contemplated in sub-paragraphs (a) and (d) of the schedule to the Criminal Law Amendment Act. In my view, this concession was correctly made. Although the agreement between the appellant and his brother, that the deceased be killed was reached shortly before the actual killing, there can be no question that planning was clearly established. In *S v Malgas*[1] it was said that the fact that the planning and premeditation occurred not long before the deed was accomplished, cannot alter the fact that life sentence was an appropriate sentence.

[20] The thrust of counsel's attack on the judgment *a quo* was that the trial judge erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence. In her judgment it is not clear what factors Monaledi AJ gave consideration to in reaching the conclusion that there were no substantial and compelling circumstances. Be that as it may it does not however seem that we, as the appellate court, are in any way impeded in dealing with the matter. We have the assurance of both counsel, and this is borne out by the record, that all the relevant facts and all the evidence which fall to be considered for purposes of sentence are before us, and that it would serve no purpose to refer the matter back to the trial judge for

[1] 2001 (2) SA 1222 (SCA) at 1238 para 34.

reconsideration.[2] In terms of s 51 a sentencing court is not required to record the factors which led it to conclude that there are no substantial or compelling circumstances. It is otherwise, however, where there is the finding is to the contrary. In such event s 51 (3) (a) imposes a specific obligation upon the sentencing court (where it finds substantial and compelling circumstances to exist, which justify the imposition of a lesser sentence) to enter them on the record and to impose such lesser sentence which it considers appropriate.

[21] Counsel for the appellant very fairly conceded that this was a gruesome killing of an innocent man who was merely collecting firewood. Truter set out the following factors as aggravating circumstances:

'(a) the gruesomeness with which the deeds were carried out;

(b) after the appellant had realised in shock that he had shot the victim, he could well have taken other steps to possibly save his life;

(c) the deceased did not die immediately after being shot and was struck with a pick axe so as to kill him. The appellant went along with this;

(d) the tragedy in which the deceased's family was left;

(e) the deceased had basically no defence, and was helpless after the victims were confronted with two firearms.'

[22] When deciding whether there are substantial and compelling circumstances the court is enjoined to consider all of the above factors, including the personal circumstances of the accused, the interests of society and the gravity of the offence and to give due recognition to the fact that when 'considering

[2]Cf *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.'[3]

[23] Apart from the contention that the judge *a quo* should have found that there are substantial and compelling circumstances no material misdirections have been drawn to our attention. As to how misdirections are to be dealt with the following trite approach was reiterated in *Malgas*:

'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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large'.[4]

[24] The thrust of counsel's submission is that the sentence imposed on the appellant is shockingly inappropriate. It was submitted further that insufficient weight was given to the appellant's personal circumstances and the other factors already referred to above such as the fact that the appellant's brother, who pleaded not guilty and had played a major role, (according to counsel), received a sentence of 21 years imprisonment, in another court.

[25] The above criticism is, in my view, is unjustified, as the appellant's case was disposed of before that of his brother. In fact the appellant was called by the State as a witness against his brother, who was tried subsequently by Els J in

[3]See *Malgas* at 1230G; paras 8 and 9.
[4]See *Malgas* at 1232 A-C.

another court. In any event the difficulty with the judgment of the learned judge, which was placed before us during argument, is the finding that the minimum sentence provisions were not applicable. This, despite the presence of planning and common purpose. Of course, the learned judge ultimately concluded that, even if the Act applied, there were substantial and compelling circumstances. It is not necessary to make any further comment on the matter as the decision of the learned judge is not on appeal before us. The State did not appeal against that court's judgment, nor the sentence imposed by it. In the appeal before us the Sate, while conceding that there were substantial and compelling circumstances (a concession which is not binding on us) severely criticised the sentence imposed by Els J as being too lenient. The State contends that 25 to 30 years would have been a more appropriate sentence. When asked during argument as to why leave to appeal was not sought, counsel replied that perhaps with hindsight an appeal should have been launched. While conceding that there were substantial and compelling circumstances in the present matter, counsel for the State submitted that the appellant should not receive less than 25 to 30 years imprisonment.

[26] It is true that even in the absence of a material misdirection this court would be justified in interfering with the sentence imposed by the trial court, but it may do so only when there is a disparity between the sentence of the trial court and that which the appellate court would have imposed had it been the trial court,

which disparity is so marked that it can properly be described as ‘shocking’, or ‘startling’ or ‘disturbingly inappr0priate’. In *Malgas* it was said:

‘[I]n the latter situation the appellate Court is not at large in the sense in which it is at large in the former:

‘In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.’[5]

[27] The factors advanced on behalf of the appellant as ‘substantial and compelling circumstances’ are that the appellant was 22 years of age at the time; he was a first offender; he pleaded guilty; he co-operated with the police; he was remorseful; thefts (33 in number) that had taken place on his farm over the past year; he had become neurotic about people trespassing on his farm. In amplification of this point Truter recorded the following in his report:

‘(a) the suspicion, distrust, and constant condition of vigilance in which he protected his farm and his parents. He was driven, investigative, and this mindset was to him an ‘axe in the frozen cream of crime and threats’ in which he is as a farmer found himself;

(b) in the case of the transgression in point, the appellant initially regarded the trespassers on his farm with suspicion, and believed that they had other initiatives. He wanted to frighten them away at all costs, so that they would not trespass on this farm again;

(c) In spite of his efforts of locking gates and making the farm difficult to access, there were always paths through the farm which were constantly being used by the local population at their leisure. He typified them as obstinate and believed that, under the course of

[5]See *Malgas* at 1232 D-E.

collecting firewood and cutting thatching they would reconnoitre/spy out, perpetrating thefts afterwards;

(d) the measure of *esprit de corps* and cohesion and sub conscious mutual encouragement existing between the two brothers.'

[28] I turn to consider the question whether the above factors amount to substantial and compelling circumstances which justify the imposition of a lesser sentence as contemplated in s 51 (3)(a) of the Criminal Law Amendment Act. In my view the above factors cannot be considered in *vacuo*, but due weight must be given to them in the context of the given case and together with all of the other factors before the court, such as the aggravating features of the case and the interests of the community. I deal first with the appellant's age. It is true that the appellant was 22 years old at the time and his brother was 27 years old. While this factor has to be taken into consideration, account must also be taken of the dominant role the appellant played in the killing of the deceased. It was he who shot the deceased twice, and then suggested that he be killed and buried under the carcass of a cow. It was he who stopped that initial plan and suggested that the deceased be buried in the cornfield. When his brother wanted to fire a shot it was he who said the shot should not be fired as it would attract attention. It was he who collected the pick axe and the shovel from home. It was he who drove the bakkie that carried the deceased. There is nothing to suggest that the brother issued any instructions. On the contrary, the appellant's brother was going along with whatever he was being told to do by the appellant. In the trial before Els J the appellant's brother said he participated in the killing because he feared the

appellant. I am not holding this against the appellant, but mention it simply to indicate that it is not so that the elder brother played a dominant role. The appellant did not have an opportunity to challenge this statement during the trial of his brother because he was a witness and similarly the appellant's brother was in no position to challenge the averments made against him at the hearing of the appellant's case, that it was he (the appellant's brother) who played a major role. Even if one leaves out of account what the appellant's brother said at his trial about the appellant (which I proposed doing in this case) it seems to me that, despite his age, the appellant was clearly the leader rather than the follower in this whole sordid operation.

[29] The fact that the appellant is a first offender certainly has to be taken into account. So is the fact that he pleaded guilty and co-operated with the police. But account should not be lost of the fact that when the appellant was first confronted by Nkosi, the police inspector and the member of the commando about the incident, he denied any involvement. The change of stance by the appellant later on may well have been influenced by the realisation that the game was up. Nkosi, mercifully, lived, and he witnessed the attack on himself and the deceased. He also saw the general area where the incident took place. He would, to the appellant's knowledge, have been able to provide information which might ultimately have led to the finding of the body of the deceased and would have implicated the appellant in the killing.

[30] Turning to the issue of remorse, Truter testified that the appellant showed remorse. He referred to letters which the appellant wrote to his parents and to the family of the deceased apologising for what he had done and asked for forgiveness. When his parents visited him in custody he apparently asked for the Bible and begged for forgiveness. All of this, however, happened some 18 months after the incident. By then, in my view, the appellant must have realised that his situation was desperate. The above acts, it would appear, were, in my view, actuated by concern for himself rather than for the victims of the deed. While this is a factor not to be ignored it has to be put in perspective in the light of all the facts in this case.

[31] Truter also referred to 33 farm attacks, all of which happened in one year and to thefts from the appellant's farm. He suggested that the appellant had become neurotic. I fail to see what this had to do with the people who were merely in the camp to collect firewood. The deceased and Nkosi were not stealing cattle or launching an attack on the farm. They were not even armed. Although they were doing absolutely nothing, the two innocent men were chased by the appellant and his brother (both of whom were armed with firearms) and hunted down like wild animals. Fleeing into a thick wattle bush did not help the deceased. Thinking that the appellant and his brother had given up, the deceased emerged from the bush only to be shot twice by the appellant. Why the appellant treated the deceased and Nkosi this way is not easy to fathom because it emerged in the evidence at the trial that when he caught some white men

stealing corn on the neighbouring farm the appellant reported them to the police and had them arrested. On another occasion he caught some white persons making a fire on the farm. He ordered them to put out the fire. But this time when he caught the deceased and Nkosi, who were just collecting firewood, he elected first to beat them up and then to shoot the deceased. The defence, however, did not contend that this killing was racially motivated. Only the appellant knows what went on in his mind at the time.

[32] Nkosi escaped. While the deceased lay injured, at the suggestion of the appellant a search was mounted for him, because they wanted to find out whether he had witnessed the shooting. Why was that? Only the appellant knows why.

[33] In his opening address at the trial counsel for the defence aptly described this killing as a 'gruesome event'. I share that sentiment. I cannot imagine a more revolting way of putting a human being to death. Before the deceased died he was not only physically assaulted but also emotionally traumatised. While he lay injured the appellant and his brother carried on a discussion about first killing him and then burying him under the carcass of a cow. He was then moved to the cornfield. Once there, some discussion took place to the effect that he should not be shot because that would attract attention. A grave was dug for him while he was still alive. Ultimately, he was struck with a pick axe and buried in the most undignified way possible – for doing no more than collecting firewood. In my view the aggravating circumstances of this case far outweigh all the other factors,

when balanced against one another. The killing was cruel, inhuman and degrading and no self respecting society can tolerate deeds of this nature.

[34] It was also submitted that the shock and the realisation that the appellant and his brother had fatally injured the deceased led them to a point of no return. This submission loses sight of the fact that this situation was of their own making. One cannot create a perceptibly irreversible situation and then seek to rely on it. I cannot accept that the appellant and his brother did not have an opportunity to reflect on the situation or even to save the deceased's life. He lay injured and nothing was done to assist him, a factor which demonstrates the callousness of the whole sordid affair. In stead they indulge in a discussion as to how and where he was to be buried.

[35] Finally, I turn to the submission that it is unfair that the brother of the appellant who played a more prominent role should receive a lesser sentence than the appellant. First, despite the fact that the appellant's brother struck what was probably a fatal blow, I do not think that the appellant played a less prominent role. As I have indicated above, in my view, he was the dominant player in all of this. Secondly, it is true that 'justice is best seen to be done in the matter of sentence if participants in an offence (even if tried separately) who have equal degrees of complicity are punished equally, if there are no personal factors warranting disparity.[6] The statement in *Giannoulis* must now be qualified by reference to the present legislation to which due weight must be given by the

[6] *S v Giannoulis* 1975 (4) SA 867 AD at 870H.

courts. One can imagine the odd results that might ensue were the trial court to find that the Act does not apply, when in fact it applies, and a co-accused is given a lighter sentence on that account. In those circumstances the sentencing court would certainly not be obliged to impose the same sentence on appeal, notwithstanding the disparity.

[36] For the above reasons I cannot find fault with the trial judge's conclusion that there are no substantial and compelling circumstances present in this case.

[37] The appeal is accordingly dismissed.

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:
ZULMAN JA
BRAND JA