THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not Reportable
Case No.148/06

In the matter between:

RASHID SHAIK **First Appellant**
RENESH SINGH **Second Appellant**
GERALD GOVENDER **Third Appellant**
SUMUGAN MUTHUSAMY GOVENDER **Fourth Appellant**

and

DIRECTOR FOR PUBLIC PROSECUTIONS, KZN **Respondent**

CORAM: ZULMAN, BRAND, MAYA JJA et MALAN THERON AJJA

HEARD: 3 NOVEMBER 2006
DELIVERED: 30 NOVEMBER 2006

Summary: Sentence – Uniformity of sentences desirable for co-accused with equal complicity in the commission of the same offences and relatively comparable personal circumstances – appellants not all playing an equal role in the commission of the offences - differing sentences warranted - no material misdirection on the part of court below – no marked disparity between the sentences imposed by the court below and those which would have been imposed by this court – no basis for interference.

Neutral Citation: Shaik & others v Director for Public Prosecutions, KwaZulu Natal [2006] SCA 154 (RSA).

JUDGMENT

MAYA JA

[1] The appellants were four of eleven accused arraigned before Magid J, sitting with assessors in the Durban High Court, on an indictment containing seven counts – four of kidnapping, one of murder, one of attempted murder and one of robbery with aggravating circumstances.

[2] Three of the accused were acquitted at the conclusion of the trial. The first and second appellants were convicted of two counts of kidnapping, murder and attempted murder. They were both sentenced to five years imprisonment in respect of each count of kidnapping, life imprisonment for the murder and ten years imprisonment for the attempted murder. The third and fourth appellants were convicted of murder and attempted murder. They were each sentenced to life imprisonment for the murder and ten years for the attempted murder. The shorter terms of imprisonment were ordered to run concurrently with the life sentence imposed in respect of the murder.

[3] The court of first instance refused the first and second appellants' applications for leave to appeal against their convictions and sentences. The third and fourth appellants brought similar applications and were granted leave to appeal only against their convictions. An application to this court, brought only by the first, second and third appellants, was successful. Leave was granted to the full court of the Natal Provincial Division – in respect of the first and second appellants against both convictions and sentences and in respect of the third appellant, against his sentences. On appeal, the court *a quo* interfered only with the sentences

of life imprisonment on a finding that there were substantial and compelling circumstances justifying the imposition of lesser sentences. The sentence was replaced with twenty years imprisonment in respect of the first and second appellants and 12 years imprisonment in the case of the third appellant. This appeal, with special leave by this court, is against these sentences.

[4] The facts which gave rise to the appellants' convictions are the following. On 13 June 1998, the second appellant and a friend, Mr Leeshaul Dewnand, were involved in an altercation with the deceased in the count of murder and his friends at a certain shopping centre in Phoenix near Durban. During the incident the deceased pointed a firearm at the second appellant. One of the deceased's friends insulted and assaulted Dewnand and kicked the vehicle driven by the second appellant. On the following day, the second appellant reported the incident to Mr Nithia Chinnasamy (accused 6) who was the leader of a group alleged to be a gang to which the appellants and their co-accused belonged. Chinnasamy wanted the deceased to be 'taught a lesson' and instructed the first and second appellants, accused 4, Dewnand and Mr Matthew George, to find and bring him to Rinkgreen Walk, a spot popularly called Nithia's section, at which the group habitually congregated.

[5] The first and second appellants, accused 3 armed with a firearm, accused 4 and George set off in the second appellant's vehicle. They could not find the deceased but met a friend of his, Mr Gabriel David (the complainant in count 1), whom they forced into their vehicle and took to Chinnasamy. There he was manhandled and ordered to take his abductors to the deceased. The deceased was ultimately located in the company of

two friends, Mr Hansraj Deepchund (the complainant in the count of attempted murder) and Mr Deon Naidoo, the complainant in count 4. He was standing next to Deepchund's vehicle parked in the street. The second appellant parked his vehicle in a manner that prevented the deceased and his companions from escaping. The deceased discharged the firearm that he took from Deepchund in the direction of the first and second appellants but it was not loaded and merely made a clicking sound. Accused 3 disarmed the deceased at gunpoint. The deceased and his two companions were then assaulted and forcibly taken to Chinnasamy. The deceased was conveyed in the second appellant's vehicle and his two companions, in Deepchund's which was driven by accused 3. David was allowed to leave.

[6] On the group's arrival at Rinkgreen Walk, Chinnasamy ordered the first, second and fourth appellants and accused 3, 4, 5 and 7 to assault the deceased and Deepchund whereupon the two men were viciously assaulted. Naidoo was allowed to leave in Deepchund's vehicle, on Chinnasamy's instructions. The deceased and Deepchund were kicked and punched and assaulted with an assortment of objects. During the assault Chinnasamy instructed the fourth appellant to summon the third appellant and accused 10 who were his employees and were on duty at one of his building sites. On their arrival at the scene the three men joined in the assault which was still in progress.

[7] All four appellants actively participated in the assault of the deceased and Deepchund. The first appellant hit the deceased with a mop handle and burning logs. He took a hose from a nearby fire hydrant, put it in the deceased's mouth and turned on the water. He hit Deepchund with a baseball bat and a pipe. After the arrival of accused 10 and the third and

fourth appellants, he pulled down the deceased's pants and the third appellant then pushed a stick into the deceased's rectum. The third appellant also punched the deceased. He kicked Deepchund and threw a burning log at him. The second appellant assaulted the deceased with a mop handle and burning logs. He trampled Deepchund. The fourth appellant hit the deceased on the head, legs and other parts of the body with a baseball bat. He lifted Deepchund and threw him on the ground.

[8] It is only when the victims were motionless that Chinnasamy stopped the assault and ordered some of the assailants to remove them from the scene. The deceased and Deepchund were then dragged and thrown down an embankment at nearby school grounds, some 200m away. This is where the deceased's body was subsequently discovered. The second and fourth appellants were some of the men who dragged the bodies away. The deceased had groaned as he was being dragged away. Deepchund somehow survived the brutal attack and managed to crawl to a nearby house for help on regaining consciousness. On Chinnasamy's orders, the scene was hosed down to remove traces of the victim's bloodstains. Pieces of their clothing, torn during the assault, were thrown into nearby bushes. According to the medical evidence, the deceased sustained and died from multiple injuries, some 225 bruises and four lacerations, covering his entire body. This excludes the internal injuries to his brain, lungs and rectum.

[9] The appellants' relevant personal circumstances which Magid J took into account were the following. All but the fourth appellant were first offenders. They resided in Phoenix, an area severely disadvantaged socially and economically and afflicted by attendant social ills. The first appellant was 30 years old at the time of sentence. He had a matric

certificate and was employed as a technician. His wife had died shortly before the day on which offences were committed. He lived with his parents and supported his ailing, 65 year-old mother and a 12 year-old niece. The second appellant held three postmatric diplomas in bookkeeping, accountancy and computers. He was in stable employment and maintained an ailing elderly mother. The third appellant was 19 years old at the time of the offences. The highest standard he passed at school was Std 5. He was self-supporting and worked for accused 6 in the building construction industry. He has no dependants. The fourth appellant was 34 years old at the time when sentence was imposed. The highest standard he passed at school was Std 4. He was employed as a driver. He has a wife and two young children. He was convicted of housebreaking at the age of 14.

[10] The court *a quo* found that Magid J's conclusion relating to the count of murder that there were no substantial and compelling circumstances justifying the imposition of sentences lesser than life imprisonment in respect of the appellants was wrong. It held at pages 45-46 of its judgment:

'[D]espite the gruesomeness of the murder, the sentences of life imprisonment would be out of all proportion to the moral blameworthiness of accused [appellants] Nos 1 and 2. They were not leaders, but followers, and in this instance their assault on the deceased had been the result of carrying out accused No 6's orders. Their personal contributions had not been great, and it must be accepted that they had not acted with *dolus directus*, but only with *dolus eventualis.* On top of that the evidence suggested that all of them had been drinking or smoking some or other drug. These features in my view constituted substantial and compelling circumstances, for the purposes of section 51(3)(a) [of the Criminal Law Amendment Act 105 of 1997], which therefore warrant the passing of a sentence other than the life imprisonment which section 51(1) otherwise prescribed. In my view sentences of 20 years imprisonment on count 5 … would have sufficed…As far as the sentence on count 5 is concerned, however, for exactly the same reasons as in the cases of accused Nos 1 and 2, accused No 8's [third appellant] sentence on count 5 must be reduced. In this regard it is difficult to follow, since they both arrived at the scene at a late stage, why accused No 8 was sentenced to life imprisonment where accused No 10 was given only seven years. Because the role accused No 8 played in the assault on the deceased was more serious than that of

accused No 10, his sentence should be reduced to 12 years.'

[11] The court *a quo* further held that the considerations which were relevant to the reduction of the life sentences in respect of the first, second and third appellants were equally applicable to the fourth appellant's case but because he had not appealed, it could not come to his aid. I respectfully agree with these views. Counsel for the State properly conceded that his sentence of life imprisonment should be reduced. He submitted that a twenty-year term of imprisonment similarly imposed on the first and second appellant would be appropriate. He, however, argued that the sentences imposed upon the other appellants were proper and should be confirmed.

[12] The appellants' counsel contended that as the appellants had acted with common purpose, they should have received similar sentences for the murder. An appropriate sentence for each of them, he argued, would be a seven-year term of imprisonment similar to that imposed upon accused 4 and 10, ordered to run concurrently with the other sentences. I do not agree. Uniformity of sentences is of course desirable and our courts generally strive to achieve it in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances.[1] This is hardly the case in the instant matter. Firstly, the court *a quo* correctly distinguished the respective roles played by each of the accused in the commission of the offences and found that neither accused 4, who is the only one who admitted taking part in the commission of the offences, or accused 10, who arrived late at the scene, inflicted serious injuries on the victims. That was the basis for their lesser sentences which have properly not been challenged.

[1] *S v Goldman* 1990 (1) SACR 1 (A) at 3e; *S v Vermeulen* 2004 (2) SACR 174 (SCA) at 185e.

[13] I agree with the court *a quo*'s reason for imposing a sterner sentence on the third appellant despite the fact that he arrived simultaneously with accused 10 at the scene. He, of all the assailants, perpetrated the cruellest, most barbaric and degrading act on the helpless deceased by ramming a stick into his rectum. Such conduct is by no means comparable to that of either accused 10 or accused 4 and clearly warrants the sentence imposed on him. However, his youthfulness and immaturity at the time of the offences and his late arrival at the scene obviously distinguishes his case from those of the more mature first and second appellants.

[14] The second appellant is clearly the one who brought about the whole tragic incident because, as Magid J correctly found, he sought revenge against the deceased and reported his encounter with him to Chinnasamy precisely for that reason. He and the first appellant were involved in the incident from the onset, starting with their persistent efforts to locate the deceased. They both inflicted a prolonged and brutal attack on the deceased. It can hardly be said that the twenty year terms of imprisonment imposed on them are unreasonable or inappropriate regard being had to all the relevant circumstances. There is, in my opinion, no reason to interfere with the sentences.

[15] As far as the fourth appellant is concerned, I am not persuaded that he played a significantly lesser role than the first and second appellants. His participation in the deceased's assault was no less aggressive or reprehensible than that inflicted by those two men. It is he who struck the deceased on the head and back with a heavy baseball bat and carried out Chinnasamy's instructions to break the deceased's legs by striking him on

'his legs' with the same instrument. It is difficult to imagine more vicious acts. Some of the injuries sustained by the deceased tallying with this assault were brain haemorrhage and congestion, haemorrhages and bruising in the thighs and knee joints, a swollen right kneecap and a fractured left kneecap. Even on his return from fetching accused 10 and the third appellant he resumed the assault. He opened the deceased's eyes, clearly indicating that he realised the extent and probable consequence of the assault on the deceased before callously dragging him away. I am satisfied that his degree of participation in the assault and his moral blameworthiness were relatively equal to that of the first and second appellants. Having regard to this fact and their comparable personal circumstances, there is in my view no warrant for differentiation between their sentences. A reasonable and appropriate sentence in his case would be one similar to those imposed upon the first and second appellants.

[16] Other than to argue half-heartedly that the court *a quo* did not consider the cumulative effect of the first, second and third appellants' sentences, a submission which clearly had no merit, their counsel could point to no material misdirections which would vitiate the sentences and entitle this court to interfere. I have not found any. Neither does it seem to me that the disparity, if any, between the sentences of the court *a quo* and the sentences which this court would itself have imposed is so marked that the sentences can be described as 'shocking' or 'startling' or 'disturbingly inappropriate'.[2] There is therefore no basis for this court to interfere. Their appeals must accordingly fail. For the reasons stated above, the fourth appellant's appeal however must succeed.

[17] In the result, the following order is made:

[2] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

1. The appeals by the first, second and third appellants are dismissed.
2. The appeal by the fourth respondent succeeds. The sentence of life imprisonment imposed upon him is set aside and there is substituted for it a sentence of twenty years imprisonment, antedated to the date the sentence of life imprisonment was imposed.

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MML MAYA

JUDGE OF APPEAL

CONCUR:

ZULMAN JA
BRAND JA
MALAN AJA
THERON AJA