THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case no: 296/05

In the matter between:

THE STATE
Appellant

and

GERT JOHANNES ROSLEE
Respondent

Coram: *Navsa, Cloete JJA et Cachalia AJA*

Date of hearing: **6 March 2006**

Date of delivery: **17 March 2006**

Summary: Appeal against sentence by State – misdirections – sentence shockingly light – minimum sentence provisions – approach to be followed – sentence set aside and substituted.

Neutral citation: This judgment may be referred to as *S v Roslee* [2006] SCA 15 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] The respondent, Mr Gert Johannes Roslee, premeditated the murder of his former girlfriend, Elizabeth Magdaleen Minny (Liz-Marie). On Wednesday 29 October 2003, he waited for her in the parental home of her new boyfriend, Jaco Greyling (Jaco). Whilst he was waiting he was confronted by Jaco's brother, Abraham Greyling (Abraham), whom he stabbed to death. A young woman, Heloise van der Westhuisen (Heloise), accompanied by her three-year-old son Donovan (Donovan), arrived at the house to deliver biscuits. He stabbed and killed them both. When Liz-Marie arrived from work he stabbed and killed her. He stole two cellular telephones which belonged to Abraham and Heloise as well as Liz-Marie's cellular telephone, her diary, bank card and money she had in her possession. He also stole Heloise's motor vehicle, which he later abandoned. He was convicted in the Pretoria High Court (Mabuse AJ) on four counts of murder and two counts of theft. In respect of the murders of Abraham, Heloise and Donovan (counts 2, 3 and 4), he was sentenced to 15 years' imprisonment on each count. In respect of the murder of Liz-Marie (count 5), he received a sentence of 18 years' imprisonment. On the two counts of theft, he received a sentence of 6 and 7 years' imprisonment respectively. The sentences were ordered to run concurrently. This amounted to an effective sentence of 18 years imprisonment.

[2] The State appeals, with the leave of the court below, against the sentences imposed on counts 2, 3, 4 and 5, on the basis that they are shockingly and inappropriately light and that they are based on a number of misdirections. The question to be addressed in this appeal is whether these contentions are

correct.

[3] I will, in due course, refer to material parts of the respondent's statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) on the strength of which he was convicted. At this stage it is useful to consider the facts that emerged from evidence presented by the State in aggravation of sentence. The accused chose not to testify and led only the evidence of a psychologist in mitigation of sentence.

[4] For reasons that will become apparent it is necessary to set out the factual background in some detail.

[5] Liz-Marie was 19 years old at the time of her death. She and the respondent became romantically involved during 2001 when she was in grade 11. He had left school and was in employment. In February 2003, after she had matriculated, the relationship was terminated. It was rekindled in April 2003. In May 2003 they became engaged to be married. The relationship was tempestuous and, in August 2003, the engagement was called off and Liz-Marie finally terminated the relationship.

[6] During August 2003 Liz-Marie developed a new love interest, Jaco. He and Abraham lived with their parents. As Liz-Marie's relationship with Jaco developed she went to live with the Greylings after her mother had agreed to it. Liz-Marie had intended to live on her own in a flat which her mother had hired for her, but decided against it because of death threats she had received from the respondent.

[7] Liz-Marie worked as a receptionist for a dentist. According to her mother, Mrs Helena Pieterse, she was a loving person who served as a role model for her younger sisters. Mrs Pieterse accepted that the respondent loved her daughter but did not believe he was obsessed with her. On 8 October 2003 the

respondent visited Mrs Pieterse, to enquire of her whether she thought there was any hope of Liz-Marie reconsidering her decision to terminate their relationship. She told him that it was up to Liz-Marie to decide. Her evidence that Liz-Marie had received several telephonic death threats from the respondent was not challenged.

[8] According to Mrs Maria Greyling, Jaco and Abraham's mother, Liz-Marie and her son were very much in love.

[9] Abraham was 21 years old when he was killed. He was at home at the fateful time because it was his day off from work. Mrs Greyling was not at home because she and her husband had errands to run. Upon their return they found Liz-Marie's room in a chaotic state. Liz-Marie was on the bed. She had been gagged and her arms and legs were tied. A ball had been inserted in her mouth. A meat knife was lying on the ground. Liz-Marie's body was still warm but she was dead. She had cuts on her legs and a hole in her chest.

[10] Heloise, a family friend, had come to deliver biscuits (ordered by Mrs Greyling) when she and Donovan were killed.

[11] Mrs Greyling described Abraham as a son who was a gift from God. He was very close to her and was sorely missed by the family. As a result of the murders they could no longer continue to live in the house and were in the process of selling it. Her husband had been asked to testify but could not face the trauma that would accompany that exercise.

[12] Mrs Johanna Grobler, Heloise's adoptive mother, testified. Mrs Grobler and her husband had adopted Heloise in 1997 and she had been an 'angel' to them. Heloise was 23 years old at the time that she was killed. Donovan was her only child. Mrs Grobler and her husband could not have children of their own. According to Mrs Grobler, the impact of Heloise's death was such that it was as if she and her husband had been robbed of their own lives. Heloise and Donovan had been loved by everyone in their family.

[13] The investigating officer, Inspector Doubell, testified. When he first confronted the respondent concerning the murders, the respondent denied any involvement. He stated that he loved Liz-Marie too much to have caused her harm. On 30 October 2003 Doubell was summoned to a hospital in Heidelberg where he found the respondent threatening to commit suicide. The respondent was dressed only in a pair of short pants and had cuts on his thigh, both wrists and his throat. He was wielding a meat knife. After a standoff lasting hours the police were forced to shoot him in the shoulder to get him to drop the knife.

[14] DNA tests linked a cigarette butt and fragments of nails found at the murder scene to the respondent and consequently linked him to the offences in question. Furthermore, blood found on a T-shirt seized by the police from the respondent was positively identified as Liz-Marie's blood by way of forensic testing. Doubell found two knives at the crime scene that appeared to have been used to commit the murders. One was bloody.

[15] The last witness to testify was Ms Gayle Anne Schmidt, a psychologist. She first saw the respondent on 13 October 2003 as a patient at Heidelberg Hospital. He had been referred to her after he had attempted to commit suicide because he felt he could not live without Liz-Marie. Schmidt consulted with the respondent on only two occasions, the last being on the day of the murders before they were committed.

[16] Schmidt recalled the day which Doubell had described, when the respondent had threatened to kill himself with a knife. She was present when the respondent stated that he wished to apologise to Liz-Marie's parents but did not admit to killing her. He admitted only to killing Abraham. He wanted to tell her parents that he was sorry about what had happened to her. He also appeared to be upset because he had read in her diary that she loved a horse more than she had loved him.

[17] Schmidt testified that, at the time that he was threatening to commit suicide at Heidelberg Hospital, the respondent did not say what had motivated him to commit the offences. At that stage he was under stress and was overwhelmed by thoughts that he described as ‘demons or devils’ in his head.

[18] On the morning of the day on which he committed the murders, when Schmidt consulted with the respondent, he told her that he had come to terms with the termination of his relationship with Liz-Marie and was intent on making a new beginning. He appeared to be wrestling with inner frustration and aggression. However, when he left, Schmidt was under the impression that he had indeed come to terms with the termination of his relationship with Liz-Marie. The respondent told Schmidt that he had spoken to Liz-Marie recently and they had agreed to be friends.

[19] The day after Liz-Marie’s death Schmidt spoke to the respondent telephonically. He was tearful and made an appointment to see her later that day. The appointment was not kept because he was arrested.

[20] The correctness of the post-mortem reports were admitted by the respondent. In respect of Abraham, the relevant report shows that three stab wounds were inflicted to the chest, two of which penetrated the lungs. He sustained a third stab wound to the right shoulder, one wound on the left forearm and a superficial wound close to the left wrist.

[21] In respect of Heloise, the post-mortem reveals that she sustained multiple stab wounds. She had been stabbed four times in her chest area and twice in the left side of her back. From the size of one of the wounds in the left side of her back it appears to have been a double stab wound. Heloise was also stabbed in the middle and right side of her back. One of the stab wounds penetrated her heart. The left lung was pierced twice.

[22] Three-year-old Donovan was stabbed four times. He was stabbed three times in the chest and once in the back. His heart and left lung were pierced.

[23] Liz-Marie sustained eight stab wounds to the chest. Six wounds penetrated her right lung. Her heart was pierced. She was stabbed in her right leg and in her right thigh. All in all, she sustained 14 wounds, four of which were described as superficial.

[24] In the respondent's statement in terms of s 112(2) of the CPA, the following is revealed. He planned to kill Liz-Marie. He had established telephonically that she had already left work and he intended to get to her home before she did. The respondent's encounter with Abraham was unexpected. First they exchanged harsh words. Then, according to the respondent, Abraham pushed him from behind as he made his way towards the kitchen door. The respondent saw a knife which he grabbed and used to stab Abraham in the chest. Abraham grappled with him and the respondent thereupon stabbed him several times until he collapsed. At that time Heloise, who had arrived with her son, started screaming. The respondent attempted to quieten them down. Heloise and Donovan were both hysterical. He did not hesitate to kill them both. He did so to prevent them from identifying him. He used black plastic cable to bind Heloise's arms and legs to make it look like a robbery. Liz-Marie arrived as he was cleaning up blood and she started screaming. The respondent forced her into the bedroom and onto the bed where he stabbed her repeatedly until she was dead. He removed all her clothing and tied her up with the plastic cables and an electrical cord. He wanted to create the impression that she had been robbed and raped.

[25] At the beginning of his statement in terms of s 112(2) of the CPA, the respondent stated that the termination of his relationship with Liz-Marie 'het my verpletter en ek het dag in en dag uit daaroor getob en gebroei'. Immediately after this he stated that he had decided to kill her but *did not* provide any motivation.

[26] Against that background the court below considered the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) which prescribes minimum sentences for certain offences. Section 51(1)(a) provides that, if a person is convicted of a murder that was planned or premeditated, that person *shall* be sentenced to imprisonment for life. Section 51(3)(a) provides that, if any court which convicts someone who planned or premeditated a murder is satisfied that substantial and compelling circumstances exist which justify a lesser sentence than that prescribed, it shall enter those circumstances on the record of proceedings and may thereupon impose such lesser sentence.

[27] The court below correctly concluded that the murder of Liz-Marie was premeditated. Mabuse AJ, however, found that the respondent had murdered her because of the broken love-relationship and went on to conclude, after referring to case law, that the emotional trauma brought on by the termination of that relationship constituted an 'extenuating circumstance'. In particular, he relied on *S v Rammutla* 1992 (1) SACR 564 (BA). The court below did not hold it against the respondent that he did not testify in mitigation of sentence and held, after reference to authorities, that extenuating circumstances could be deduced from the evidence led by the State.

[28] The court below said the following:

'The court is accordingly satisfied that the evidence by both Liz-Marie's mother and Gayle Schmidt proved that the accused killed Liz-Marie because of the broken love-relationship. The court finds guidance again in the case of *S v Rammutla* on page 567, where it was stated that "it has been accepted by our courts that where there has been a love-relationship which has been broken, the 'injured' party may well be so emotionally affected and disturbed that he will resort to violence resulting in the death of the erstwhile lover. Such an emotional state has been regarded as an extenuating circumstance." '

[29] In respect of the murder of Abraham, Donovan and Heloise, the court below found that, since the respondent was unaware that they would be on the scene, those murders could not be said to have been premeditated. The court below reasoned as follows:

'[T]he cumulative impact of the accused's personal circumstances and the conditions that led to this tragedy can be regarded as substantial and compelling . . . .'

This comprises the court below's entire reasoning for the sentences imposed in respect of these three murders.

[30] In my view, the court's reasoning in respect of the murder of Liz-Marie is flawed. Her mother stated clearly that she did not regard the respondent as being obsessed with Liz-Marie. Schmidt testified that, on the morning of the murders, although wrestling with feelings of frustration, the respondent appeared to have made peace with the termination of his relationship with Liz-Marie. He told Schmidt that they were now friends. The respondent himself provided no motivation for the murder. He *chose* not to testify in mitigation of sentence. His statement in terms of s 112(2) of the CPA reflects methodical, rational and calculating behaviour, not only in respect of the murder of Liz-Marie, but in regard to the other three murders as well. The relationship with Liz-Marie had been terminated many weeks before the murders were committed. The court below's reliance on the *Rammutla case* is misplaced. In that matter the murder was not planned and was committed after violence had been perpetrated against the accused and occurred in the heat of the moment. The termination of a love-relationship does not per se constitute a mitigating, extenuating, or substantial and compelling circumstance. Every case must be carefully considered and decided on its own facts.

[31] In *S v Malgas* 2001 (2) SA 1222 (SCA), this court, in considering 'substantial and compelling circumstances', stated the following (at 1231A-D):

'Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'

[32] Earlier in the *Malgas* judgment (at 1230E-G), Marais JA said the following

concerning the Act:

'In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering the sentence the emphasis were to shifted to the objective gravity of the type of crime and the public's need for sanctions against it. But that does not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.'
(Emphasis in the original.)

[33] Although there is no onus on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration.[1] In a given case it may not be enough for an accused to argue that such circumstances should be inferred from or found in the evidence adduced by the State. See in this regard Du Toit *et al Commentary on the Criminal Procedure Act* at 28-16DD.

[34] The court below did not approach the matter in the manner set out in the *Malgas* judgment. It engaged in speculation in favour of the appellant. It did not consider whether there were *truly* convincing reasons for departing from the prescribed minimum sentence. It did not consider all of the many factors traditionally and rightly taken into account in the process of sentencing. These are material misdirections entitling this court to intervene.

[35] To fully appreciate the degree of savagery of the murders, an unpleasant but necessary exercise is an examination of the post-mortem photographs. Terrible injuries were inflicted by the respondent. The photograph of three-year-old Donovan is particularly heart-rending. The total number of stab wounds bear testimony to the degree of violence and callousness. The murders have had a

[1] This is an aspect that trial courts and legal representatives should take into account.

devastating effect on relatives of the victims, not least because of the manner in which they were carried out. The public requires effective sanctions against the perpetrators of such savagery.

[36] The court below's scant treatment of the circumstances surrounding the murders of Abraham, Heloise and Donovan is regrettable. Heloise and Donovan were murdered to prevent them from identifying the respondent. It is true that their murders were not planned. However, the post-mortem photographs and reports show the savage nature of the attack on a young woman and her three-year-old child who were defenceless. The respondent was an intruder in Abraham's home. He was entitled to resist the intrusion. In his statement in terms of s 112(2) of the CPA the respondent describes how he murdered Abraham:

'. . . Ek het 'n mes, een van 'n stel wat op 'n kas gelê het, gegryp, omgedraai en die gesegde Abraham Greyling in die bors gesteek. Dit het hom nie gestuit nie en hy het gepoog om my vas te gryp. Ek het hom verskeie steekwonde toegedien totdat hy skielik inmekaar gesak het. Deurentyd het ek geweet en besef dat ek hom kan dood deur hom aldus so met die mes te steek, maar ek het nie omgegee nie.'

Abraham's murder was wanton. In respect of these three murders, the court below did not properly consider the seriousness of the offence and did not pay sufficient attention to the community interest. Maintaining the sentences imposed by the court below in respect of any one of the murders committed by the respondent, would, in my view, bring the administration of justice into disrepute. The State's contentions as set out in para [2] above are fully justified.

[37] In respect of the murders of Abraham, Heloise and Donovan, and considering the seriousness of the offence, the personal circumstances of the respondent, including his relative youthfulness (he was approximately 24 years old at the time of trial) and the community interest, as well as the factors referred to earlier in this judgment, it appears to me that in respect of each of these murders a sentence of 20 years' imprisonment is justified.

[38] For all the reasons stated above, the appeal is upheld. In respect of counts 2, 3, 4 and 5, the sentence of the court below is set aside and substituted as follows:

'1 On counts 2, 3 and 4, the accused is sentenced to 20 years' imprisonment in respect of each count.

2. In respect of count 5, the accused is sentenced to life imprisonment.'

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

CLOETE JA
CACHALIA AJA