REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 008/04

Reportable

In the matter between:

HANGWANI GARDINER RASENGANI
APPELLANT

and

THE STATE
RESPONDENT

CORAM: FARLAM, MTHIYANE JJA et MAYA AJA

HEARD: 5 MAY 2006

DELIVERED: 29 MAY 2006

SUMMARY: Criminal Procedure – prescribed minimum sentence – duty of trial judge to call evidence on sentence where necessary.

Neutral citation: This judgment may be referred to as *Rasengani v The State* [2006] SCA 66 (RSA).

JUDGMENT

FARLAM JA

INTRODUCTION

[1] The appellant in this case was arraigned before Hetisani J, sitting in the Thohoyandou High Court on an indictment containing six counts, namely one of murder, two of attempted murder, one of pointing a firearm in contravention of s 39(1)(i) of the Arms and Ammunition Act Act 75 of 1969, one of possessing an unlicensed firearm in contravention of s 2, read with s 39(1)(h), of the Act and one of possessing ammunition while not in lawful possession of a firearm capable of firing that ammunition in contravention of s 36, read with s 39(1)(b), of the Act.

[2] He was convicted on all the counts, save that relating to the possession of ammunition, and was sentenced on 14 December 2000 to life imprisonment for the murder, 22 years imprisonment for the first attempted murder, 18 years imprisonment for the second, 8 years imprisonment for pointing a firearm and six years imprisonment for possessing an unlicensed firearm. It was ordered that all the determinate terms of imprisonment were to run concurrently with the life sentence imposed in respect of the murder.

[3] The appellant's application for leave to appeal against the convictions and sentences was refused by the trial court. On application to this Court the appellant's application for leave to appeal against the convictions was refused but his application for leave to appeal against the sentences imposed upon him was granted.

FACTS

[4] It was common cause at the trial that the accused had been involved in a romantic relationship with the complainant on the first attempted murder charge, Dr Engedzani Paulina Khwanda. (In what follows I shall refer to her as 'the complainant'.) According to the complainant the relationship terminated at

the end of February 1999. The appellant averred, however, that the relationship continued until the date on which the incidents which gave rise to the various charges occurred, namely 13 July 1999.

[5] The complainant testified that after her relationship with the appellant terminated she became involved in a relationship with the deceased, which commenced in March 1999. According to the complainant the appellant was not prepared to accept that their relationship had come to an end. He refused to move out of the complainant's house (which she herself appears only to have stayed in when not on duty at the hospital where she worked). He threatened on several occasions to commit suicide unless their relationship resumed. He was depressed to such an extent that she prescribed Prozac for him on 21 June 1999 and thereafter Valium on 1 July 1999. (She could not remember doing so but when the prescriptions she wrote out were put to her she admitted that they were in her handwriting.)

[6] The appellant telephoned her on 12 July 1999, and told her that if she continued with her relationship with the deceased that his body was not bullet proof and that he, the appellant, would shoot both of them at close range. That evening she went to the deceased's house, where she was staying for the week. The next morning, at 5 am she received a telephone call on her mobile telephone from the appellant but did not respond to it.

[7] At 6 am the deceased's domestic worker, Ms Tinyiko Annah Makamu, let the appellant into the deceased's house, after he had requested entry so that he could discuss a court case with the deceased, who was an attorney. Once they were in the house the appellant pointed a firearm at Ms Makamu's forehead and demanded to be shown the room where the deceased was sleeping. (This incident led to the charge of pointing a firearm.) She took him to the room whereupon he opened the door and entered the room. Immediately thereafter he started shooting at the deceased, who was still in bed. The complainant, who was lying on the side of the bed furtherest away from the appellant, went to the appellant and pulled his hand back so that he could not continue firing at the deceased. The deceased fell down and then

got up and walked outside. The appellant escaped from the grip of the complainant and followed the deceased into the passage outside the room where he fired again at the deceased. The complainant then went up to the appellant and said to him, ‘now that you have killed Khathu [the deceased], why can you not kill me too?’ The appellant replied that before he could kill her he wanted first to aim at her stomach, because she might be carrying the deceased’s baby and he wanted to destroy the foetus before he killed her. He then loaded bullets into the firearm and shot her at close range in her stomach. She fell down. The appellant then went over to where the deceased was lying and shot him again. She got up and walked to the gate where she fell down again. The appellant came to her, took some bullets out of his jacket, put them next to her head and said that he wanted to shoot her head so that her parents would not be able to recognise her. He knelt down, produced a knife and screwdriver and stabbed her in her back. He then stood up and kicked her all over her body. He told her that he was going back to the house in order to cut off the deceased’s genitals to teach him a lesson and that he would then come back to her again. When he entered the house she managed to stand up and run away. She collapsed at the nearby house of the witness, Mr Musia.

[8] Musia came out and covered her with a blanket and then, because he could not get through to the police on his house telephone, he decided to go to the police base in his motor vehicle so as to call them to the scene. As he was walking towards his vehicle the appellant arrived, with a firearm in his hand, and said that he was looking, as he put it, for his naked wife. Musia told him that his wife had gone out of his yard through the gate, whereupon the appellant left. Musia drove to the police base, told them briefly what had happened and then drove back to his house followed by the police. When he got back to his house and had parked his vehicle he saw the appellant walking in front of his house. Musia told the policeman in the police vehicle which had followed his car that the man walking in front of his house was the man who had been looking for the complainant.

[9] The policeman, who was Inspector Mabasa, asked Musia to follow him

in the police vehicle. Mabasa went after the appellant. Musia did not see what happened but heard a shot and when he arrived at the spot where Mabasa and the appellant were he found the appellant lying on the ground. He helped Mabasa to carry the appellant to the police vehicle and Mabasa then drove away taking the appellant with him. After this Musia took the complainant to the deceased's house, from where she was taken to hospital.

[10] According to Mabasa, the complainant on the second attempted murder charge, he accompanied Musia from the police base to his house. When they arrived there he saw the appellant passing by in the street with a firearm in his hand. On being told that the appellant was the person who had been involved in the earlier shooting incident, he told him to stop. The appellant turned towards him and pointed his firearm at him. Mabasa hid behind a rock in the vicinity. The appellant fired a shot towards him, which missed. The appellant then said that he could not surrender himself to a police officer and that he would rather shoot himself. He then pointed his firearm towards his armpit and shot himself. He fell to the ground. Mabasa saw blood oozing from his armpit. He took possession of the firearm and on searching the appellant found a screwdriver and a knife. The appellant was then taken to hospital. In addition to the screwdriver which Inspector Mabasa found on the appellant another screwdriver was found in the passage of the deceased's house near the deceased's body.

[11] It appears from the report of the post-mortem examination performed on the body of the deceased that in addition to a gunshot wound through his left eye into the left hemicranium which caused his death there were also superficial lacerations (puncture marks) on the deceased's right neck and left shoulder and on both buttocks as well as in the left pubic area. Dr Tshivhase, who performed the post-mortem examination said that these marks could have been caused by either the screwdriver found near the deceased's body or the one found on the appellant by Inspector Mabasa.

[12] Dr Tshivhase also testified regarding the injuries received by the complainant. According to her the complainant had a gunshot wound in the

abdomen which caused, amongst other things, extensive damage to the bowel, liver and spleen. The spleen was ruptured and had to be removed. There was also a laceration, caused by some sharp object, on the right side of her neck. There was also what the witness described as minor tissue injury on the left side of the complainant's face and some superficial puncture marks on her back.

[13] After the appellant was convicted the complainant testified as to the effect the attack on her had had on her life. She said that before the incident she had wanted to specialise in paediatrics but that this field of specialisation was no longer open to her because as a result of the removal of her spleen her chances of getting infections of various kinds have been substantially increased. She said further that because of this she was restricted from seeing most patients. She also described how, when she sees patients in out-patients' department with injuries similar to hers, she has flashbacks to her own experiences which prevent her from functioning as swiftly and efficiently as she should in the circumstances. She also stated that because of the traumatic experiences she underwent she had been seeing a psychiatrist.

JUDGMENT OF THE COURT *A QUO*

[14] In his judgment on sentence the learned trial judge referred to s 51 of the Criminal Law Amendment Act 105 of 1997 which provides in subsections (1) and (3), read with Part I of Schedule 2, that a person convicted of a murder which was planned or premeditated must be sentenced to life imprisonment unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. He found that the murder of the deceased was premeditated and stated that this was the reason that he was obliged to impose a sentence of life imprisonment on the appellant in respect of count 1, the count of murder. He had earlier stated that the appellant had committed the offences in respect of which he had been convicted 'seemingly under very emotional provocation'. He said, however, that 'this vital point was not fully canvassed by the defence' nor was it contradicted by the State. Later the judge mentioned that he had already alluded to the fact that the appellant had 'perhaps [been] under extreme emotional provocation' at the time of the commission of these crimes and said that 'this factor would count very strongly in his favour but there is no evidence before the court to support it.' In this regard reference was made to the fact that the appellant had been seen by four psychiatrists.

[15] The learned judge also said that if the case had come before him before 1997, by which he clearly meant prior to the coming into operation of

Act 105 of 1997, 'the sentence to be imposed here today would be far different from what it is'.

SUBMISSIONS BY COUNSEL

[16] Counsel for the appellant submitted that the trial judge court had misdirected himself in imposing the sentence he did on count 1 because, having found that the murder was premeditated, he failed to consider whether there were substantial and compelling circumstances present. It was accordingly necessary, so counsel submitted, for this court on appeal to address itself to the question which the trial judge had failed to consider.

[17] Mr *Ntlakaza*, for the State did not dispute this contention: he conceded the misdirection contended for but submitted that this court should conclude that no substantial and compelling circumstances were present. He also conceded that the sentences on the two counts of attempted murder (counts 2 and 3) and the count of pointing a firearm in contravention of section 39(1)(i) of Act 75 of 1969 (count 4) were excessive and should be replaced by sentences which this court considered appropriate. As regards the sentence imposed on count 4, namely eight years imprisonment, he pointed out that the maximum sentence provided for by s 39(1)(i) is only six months imprisonment so that the sentence imposed by the trial court was 16 times more severe than the maximum provided by the statute.

DISCUSSION

[18] The difficulty I have in regard to the question as to whether substantial and compelling circumstances were present is created by the fact that, although it appears that the appellant may well have behaved as he did because of severe emotional stress (I do not agree that it is appropriate to call it emotional provocation) this matter was not fully canvassed in evidence. We know from the evidence that the appellant was unable to accept that his relationship with the complainant had come to an end, that he was being treated for 'depression and stress', that he had threatened to commit suicide and indeed tried to do so on the day the crimes were committed and that the complainant had prescribed anti-depressants for him, one of which he was taking at the time when the crimes were committed. Although three of the four

psychiatrists who saw him did so pursuant to the provisions of s 79 of the Criminal Procedure Act 51 of 1977 in order to ascertain whether he was fit to stand trial and had criminal capacity when the alleged offences were committed, it is likely in my view that as a result of their interviews with him they would be able to express opinions as to the emotional stress to which the appellant was subject when the crimes were committed, how serious his depression was and whether, and, if so, to what extent it provided, at least in part, an explanation for his behaviour, which, as appears from the summary given above was in some respects what I think may appropriately be described as bizarre.

[19] In my view the judge should, in order to see to it that justice was done in this case, have called one or more of the psychiatrists who interviewed the appellant so as to obtain information on the matters I have set out above.

That he had the power to do so appears clearly from s 274(1) of Act 51 of 1977 which provides as follows:

'(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.'

[20] In this regard it is also helpful to call to mind what Curlewis JA said in *R v Hepworth* 1928 AD 265 at 277, viz:

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

[21] In the present case to close one's eyes to the fact that evidence on these matters was not led might well lead to the imposition of a sentence which is not in accordance with justice. I say that because the factors I have listed in para 18 above indicate, as the trial judge himself was aware, that emotional factors may have been present, which combined with the appellant's state of mental health at the time, may have caused him to behave in the way he did.

Even if such factors were present, the crimes which he committed were very serious and called for severe sentences but this does not mean that the sentence prescribed for premeditated murder should have been imposed if substantial and compelling circumstances were present. Whether they were

or not can only be decided once the further evidence to which I have referred has been led. Similar considerations apply as regards the other crimes in respect of which the appellant was convicted.

[22] In the circumstances I think that in order for justice to be done in this matter it is necessary for this court to set aside the sentence imposed by the trial court, to send the matter back for one or more of the psychiatrists who examined the appellant to testify on the matters mentioned above, for the court in addition to hear such evidence on these matters as the State and the defence may wish to lead and for sentence to be passed afresh on all the counts on which the appellant was convicted.

ORDER

[23] The following order is made:

The sentences imposed on the appellant are set aside and the matter is remitted to the trial court to deal with the matter as set out in para 22 of the judgment of this Court.

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IG FARLAM

JUDGE OF APPEAL

CONCURRING

MTHIYANE JA

MAYA AJA