THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

NOT REPORTABLE
CASE NO 598/2006

In the matter between

OSWALD DISSEL **Appellant**

And

THE STATE **Respondent**

Coram: **Farlam, Van Heerden JJA and Kgomo AJA**

Date of Hearing: **17 AUGUST 2007**

Date of Delivery: **28 September 2007**

Summary: ***Criminal law – Conviction and sentence – murder – 15 years' imprisonment – whether appellant acted in self-defence – substantial and compelling circumstances justifying imposition of lesser sentence than prescribed minimum – sentence imposed by High Court set aside and appeal and sentence imposed by regional magistrate reinstated.***

Neutral citation: This Judgment may be referred to as *Dissel v The State* [2007] SCA 125 (RSA)

JUDGMENT

KGOMO AJA:

[1] In May 2004 the appellant, then aged 39 years, was charged in the Graaff-Reinett Regional Court on a charge of murder, read in conjunction with the provisions of ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (the Act). He pleaded not guilty, but was ultimately convicted as charged on 22 July 2005. He was sentenced to 15 years' imprisonment, five of which were conditionally suspended. He appealed against the conviction only to the Eastern Cape High Court.

[2] Before the High Court the State sought, by way of a point in limine, to have the sentence declared a nullity and set aside and to have the appellant committed to the High Court for sentencing as contemplated in s 52(1)(b)(i) of the Act. The State contended that the regional magistrate should have found the appellant guilty of planned or premeditated murder. Thus, according to the State, the matter fell within the ambit of s 51(1), read with part 1 of schedule 2, of the Act and was beyond the Regional Court's sentencing jurisdiction.

[3] The High Court refused the State's request mainly on the ground that it was impermissible for the State to seek, by way of a point in limine, to appeal on a question of law or against sentence without complying with the requirements of ss 310 and 310A of the Criminal Procedure Act 51 of 1977. The High Court dismissed the appeal against conviction. However, exercising its inherent powers, and after giving due notice to the parties, the High Court increased the appellant's sentence to 15 years' direct imprisonment (see eg, *S v Kirsten* 1988 (1) SA 415 (A) at 421F). In effect, the 5 years' suspended portion of the sentence imposed by the regional magistrate was deleted. With the leave of the High Court, the appellant now appeals against the conviction and sentence.

[4] In argument before us regarding the conviction, counsel for the appellant argued that he was guilty only of assault with the intent to do grievous bodily harm

because he had exceeded the bounds of self-defence. However, counsel was constrained to concede that the appellant was guilty of murder on his own version. He urged upon us to accept the appellant's version, and interfere with the sentence imposed by the High Court. Counsel for the State submitted that the appellant's version was contrived and fell to be rejected as false. It is therefore necessary to deal in some detail with the merits of the case because the version which the court accepts will have a bearing on the appropriate sentence.

[5] The deceased, Dick Swartz, a teacher, had been married to his former wife, Phyllis Swartz (born Koeberg), for about nine years when they divorced in August 2002. During about April 2003 the appellant became involved in a relationship with the deceased's ex-wife. It was common cause that the appellant played no part in the breakdown of the deceased's marriage to Mrs Swartz.

[6] On the fateful day, Monday 23 June 2003, the deceased was walking along Breë Street, Graaff-Reinet, in the company of his cousin Anthony Swartz, on the way to 'Aunt Mollie's' house at 11 Breë Street. The house situated at 25 Breë Street used to be the matrimonial home of the deceased and Mrs Swartz. Anthony Swartz testified that he and the deceased were outside house No 25 when they encountered the appellant in his vehicle. The appellant stopped the vehicle of his own accord when he reached them. There was a conversation between the appellant, who remained seated in his vehicle, and the deceased. Nothing untoward happened at that stage; the deceased was not armed with a knife and no fight or stabbing incident occurred between the appellant and the deceased. After the appellant had driven off, he (Anthony Swartz) and the deceased went to Aunt Mollie's house where they sat on the steps leading up to the verandah or on the verandah and drank beer.

[7] On the other hand the appellant testified that the first encounter between himself and the deceased that day took place in Breë Street about 100 metres from the gate of house No 25. The deceased, who was with Anthony Swartz, stopped him. There was a brief but non-confrontational conversation which terminated with the deceased telling him that he had an axe to grind with him. ('Hy het `n appeltjie met my te skil'.) They parted on that note. The appellant was on his way to Mrs

Swartz's house at that time because she had asked him to collect her and the deceased's eleven year old daughter for some extra-mural school activity.

[8] According to the appellant, as he was reversing his vehicle out of the yard of house No 25, the deceased approached the car and, without saying anything, began stabbing at the appellant through the driver's window. Mrs Swartz had apparently warned him of the deceased's approach. The appellant later pointed to a hole low down in the back-rest of the seat of his vehicle as having been caused by the deceased. The magistrate found it highly improbable that the appellant could have leaned out of the way of the knife, as he demonstrated. Mabel Japhta, a State witness, denied that this initial stabbing incident had ever occurred. The magistrate and the High Court found that the stabbing incident described never happened and was a fabrication by the appellant to somehow try to justify the next encounter which proved fatal. I cannot fault this conclusion.

[9] According to another State witness, the deceased's brother Johnny Swartz, he had co-incidentally met Mrs Swartz at Clicks on the afternoon in question (after the appellant had dropped her off in the town) and she had warned him, that 'ek moet my broer Dick keer want Ossie [the appellant] gaan hom seermaak'. Mrs Swartz, who testified in the appellant's defence, admitted the encounter at Clicks and her cordial relationship with Johnny Swartz, but denied that she uttered the words ascribed to her by him. The latter's evidence was simple, brief and straight to the point. He was not discredited under cross-examination.

[10] As regards the encounter between the appellant and the deceased which led to the latter's death, the state witnesses Anthony Swartz, Johnny Tromp, Bertus Marlow and Grace Somana between them testified that the appellant was armed with a long knife. Having entered Aunt Mollie's yard, he ran towards the deceased who, on seeing him, fled with the appellant in pursuit. The deceased slipped and fell on the flight of steps leading up to Aunt Mollie's house. The appellant then stabbed him repeatedly. The deceased remained sprawled on the steps and later bled to death. The post–mortem examination report, compiled by Dr Willem Pieterse, revealed nine stab wounds.

[11] Three of the witnesses mentioned in para 10 denied, as suggested to them by the defence, that the deceased exited Aunt Mollie's premises to accost the appellant. They all testified that the appellant returned to Breë Street, stopped his vehicle at Aunt Mollie's gate (on the wrong side of the road), alighted from the vehicle, entered the yard through the gate and ran up to the deceased. Grace Somana and Johnny Tromp also testified that, after getting out of his car, the appellant swore at the deceased and shouted that he should repeat what he had said earlier on, or words to that effect. Each one of them observed the events from a different vantage point.

[12] The appellant's version on how and why he arrived on the scene of the fatal stabbing is that, when he dropped Mrs Swartz in town that afternoon, she had asked him to drive past her house (No 25 Breë Street) to check whether the deceased had not damaged it in some way. On his way back to Breë Street, he picked up his friend, Mr Koeberg. They drove back to Mrs Swartz's house. As they were passing Aunt Mollie's gate, the deceased unexpectedly emerged from the gate and darted in front of the appellant's car with a knife in hand. The appellant slammed on his brakes to avoid running the deceased over. In the process the car's engine stalled. The deceased then wordlessly started stabbing at him again, but did not succeed in stabbing him.

[13] According to the appellant, after stopping his vehicle he opened the driver's door and rammed it into the deceased. He grabbed a pocket knife which he used to cut biltong and which was in his vehicle, and got out of the vehicle. The deceased again ran at the vehicle and stabbed at him repeatedly, but managed to miss him altogether. The deceased then turned and ran back through the gate, with the appellant in pursuit. He stumbled and fell on the stairs leading to the verandah. The appellant then stabbed the deceased repeatedly, including while the latter was lying on his back. He then walked off the property and threw his pocket knife away when he saw it had blood on it. He drove to the local police station to lay a charge of attempted murder against the deceased. It was while doing so that he heard of the deceased's death.

[14] It should be noted that the appellant changed the details of his version several times. Both the magistrate and the High Court rejected the appellant's version on

the aforegoing aspects as not being reasonably possibly true, pointing out that it was not supported either by the objective evidence or by the evidence of the other eye-witnesses. Thus, for example, no knife was found on the deceased or anywhere near him. Moreover, the appellant's knife was also not found, although the police searched for it. The deceased suffered grievous knife wounds, losing more than 50% of his blood, while the appellant was totally unharmed. The deceased was also heavily under the influence of alcohol, as revealed by his blood alcohol count, and as a result in all probability not in a physical state to fend off a knife attack.

[15] Both courts dealt with some discrepancies in the state witnesses' evidence but regarded them as immaterial or even understandable. Because of the overwhelming weight of evidence against the appellant and his fabricated evidence, I find it unnecessary to deal with these inconsistencies. In any event the magistrate accepted the eye witnesses' evidence that the deceased was unarmed; was accosted and attacked by the appellant on Aunt Mollie's premises; that the appellant was the aggressor and at no stage acted or was called upon to act in self-defence.

[16] From what had gone before the regional magistrate and the High Court concluded that the appellant had not gone to check on the state of Mrs Swartz's house, but that he was in fact looking for the deceased to harm him. This conclusion is, in my view, correct.

[17] The High Court found that the magistrate had misdirected himself by finding that there were substantial and compelling circumstances warranting a sentence of less than the prescribed minimum of 15 years. According to the High Court the magistrate, having rejected the appellant's version as not reasonably possibly true at the conviction stage, erred in finding that provocation by the deceased was a substantial and compelling circumstance. It was for this reason that the High Court interfered with the Regional Court's sentence and imposed a sentence of 15 years' direct imprisonment. I am satisfied that the appeal against the appellant's conviction has no merit and must accordingly fail. The appeal against sentence is, however, a different matter.

[18] Counsel for the State submitted that no substantial and compelling circumstances existed and that the regional magistrate was not justified in imposing a lesser sentence than the prescribed minimum period of 15 years. On the other hand, counsel for the appellant contended that the High Court was not justified in interfering with the trial court's sentence because no misdirection on the part of the latter court was shown to have been committed.

[19] In *State v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j this Court stated:

'Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (See *S v Fazzie and others* 1964 (4) SA 673 (A) at 684A-B, *S v Pillay* 1977 (4) SA 531 (A) at 535A-B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and others* (supra) at 684B-C; *S v Pillay* (supra) at 535E).

Furthermore, a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in *S v Pillay* (*supra*) at 535E G)'.

[20] The evidence reveals that there had been longstanding rivalry and animosity between the appellant and the Swartz family. First, some members of the Swartz family had attempted to acquire the tavern now owned by the appellant from its previous owner but appellant had apparently outsmarted them. This did not go down well. Secondly, the Swartz family disapproved very strongly of a relationship between the appellant and one of the younger women in the Swartz family. Thirdly, the appellant commenced a relationship with the deceased's wife after they had gone through what appears to have been a fairly acrimonious divorce following a stormy marriage. This did not help the already strained relationship. Fourthly, there was an altercation between the deceased and the appellant (testified to by Mabel Japhta) when the appellant collected Mrs Swartz and the deceased's daughter from their home in Breë Street that afternoon.

[21] The regional magistrate further found that something offensive must have been said or done by the deceased to the appellant on the fateful day to have put the latter into a rage. This must be so having regard to: (a) Mabel Japhta's aforesaid evidence of a heated exchange between the two of them earlier that afternoon; (b) the evidence of the appellant that the deceased had said to him that he had an axe to grind with him; (c) Mrs Swartz's warning to Johnny Swartz that very afternoon to control the deceased because otherwise the appellant would harm him; and, (d) the evidence of Johnny Tromp and Grace Somana that the appellant challenged the deceased to repeat what he had said earlier. The appellant was certainly not an angel. He had assaulted and molested Mrs Swartz on several occasions during their marriage as a result of which she obtained several interdicts against him. This could not have helped to allay an already tense situation and would have merely served to worsen tensions and emotions.

[22] Whilst the appellant has several previous convictions, none of them involved violence. In addition his last previous conviction was already some seven years old when the murder was committed.

[23] I am not persuaded that the magistrate misdirected himself in any way in imposing sentence. To my mind, the High Court erred in so finding. There is no evidence that the murder weapon, irrespective of its size, was specifically fetched elsewhere by the appellant to commit the crime and had not been in the vehicle all along. The possibility cannot be excluded that the appellant merely wanted to harm ('seermaak') the deceased. As the magistrate puts it: 'dat die gebeure die dag die laaste strooi was, dat iets uitgehaak het, dat beskuldigde totaal beheer verloor het'.

[24] A careful reading of the magistrate's reasons for imposing sentence reveals that he took all relevant factors alluded to and others not pertinently mentioned here properly into account. I am not convinced that there were no substantial and compelling circumstances, nor am I persuaded that the sentence imposed by the magistrate was so lenient as to call for its increment.

[25] The following order is made:

1. The appeal against conviction is dismissed.

2. The appeal against sentence succeeds. The sentence imposed by the High Court is set aside and substituted with the following:

> 'The accused is sentenced to 15 (fifteen) years' imprisonment, of which 5 (five) years is suspended for a period of 5 (five) years on condition that he is not convicted of murder, attempted murder or culpable homicide (involving violence) committed during the period of suspension.'

3. In terms of s 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to 23 August 2005.

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F D KGOMO
ACTING JUDGE OF APPEAL

CONCUR:) FARLAM JA
) VAN HEERDEN JA