THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE

CASE NO: 261/2006

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS: TRANSVAAL **APPELLANT**

and

DAVID SWANEPOEL **1ST RESPONDENT**

SALMON IGNATIUS BASSON **2ND RESPONDENT**

CORAM: **FARLAM, MTHIYANE and MLAMBO JJA**

HEARD: **3 NOVEMBER 2006**
DELIVERED: **1 DECEMBER 2006**

Summary: **Appeal against sentence – Imposition of direct imprisonment on first respondent imposed – Coupled with special order providing for psychological and psychiatric therapy in the absence of any power to do so or relevant expert evidence – Such amounting to misdirection – Sentence replaced by sentence of 20 years imprisonment – Sentence of house arrest for one year subject to conditions imposed on second respondent who had been in custody for 17 months awaiting trial – No basis for interference.**

Neutral Citation: **This judgment may be referred to as Director of Public Prosecutions: Transvaal v SI Basson [2006] SCA 173 (RSA).**

JUDGMENT

MTHIYANE JA:
MTHIYANE JA:

[1] This is an appeal by the State, with leave of this Court, against the sentence imposed on the respondents by Van Rooyen AJ sitting in the Pretoria High Court. The first respondent, Mr David Swanepoel, a 32 year old man was convicted of murder and robbery with aggravating circumstances and was sentenced to 14 years' imprisonment, the Court having found substantial and compelling circumstances to be present in terms of s 51 of Act 105 of 1997. In addition the following 'order' was made:

'The Prison Authority is ordered, in the public interest, to provide him with weekly personal sessions of at least one hour with a psychologist or a trained social worker and ensure that he has at least one personal monthly session of at least one hour with a psychiatrist paid by the State. The Legal Aid Board's Ms Augustyn has conveyed to me that the Board will keep regular contact with accused 1 so as to monitor the state of his mental health. I will suggest to the head of Weskoppies Hospital that they consider taking accused 1 in for a month as soon as possible so as to stabilize his personality problems and prepare him for future treatment. Of course, such a service will depend on availability of a room and personnel and the agreement of the head of Weskoppies Hospital.'

[2] The second respondent was convicted of theft and of being an accessory after the fact of murder and was sentenced to house arrest for 12 months in terms of s 276(1)(h) of Act 51 of 1977. It was ordered further that in the event of a breach of certain conditions the second

respondent was to be brought before the trial judge or some other judge for the imposition of a further two years' imprisonment.

[3] The case comprises a peculiar set of facts. I set them out briefly. On the night of 4 March 2004 the first respondent, a male prostitute, informed the second respondent that one Allen Sim (the deceased) owed him money for services rendered. The deceased was a client of his and the services included sexual activity. The first and second respondents duly went to the deceased's flat who received them well, made them coffee and all three then sat talking in the lounge. After a while the deceased complained of back pain and the first respondent offered to give him a massage. The first respondent undressed and left leaving his trousers in the lounge. He then went into the deceased's bedroom, leaving the second respondent in the lounge. After a while the first respondent returned to the lounge looking for his knife, which he always carried with him. In the meantime, the second respondent had seen the knife lying on the floor and had hidden it in his pocket. The first respondent demanded the knife but the second respondent refused to give it to him. A struggle ensued between them for possession of the knife but ultimately the first respondent managed to dispossess second respondent, whereafter he returned to the deceased's bedroom. The second respondent then heard heated argument in the bedroom and when he went to investigate, he found that the first respondent had stabbed the deceased. The first respondent then went to take a bath. The second respondent thereafter assisted the first respondent to place the body of the deceased in the bath and filled it with water. The respondents thereafter removed several items from the deceased's flat, which included a video recorder and a DVD player, and took away his motor car.

[4] On appeal the sentences imposed on the respondents were attacked by the State on the basis that they were too lenient, given the seriousness of the offences committed by the respondents. Mr Roberts, for the State, submitted that the trial judge failed to exercise his discretion properly and had misdirected himself, especially in his finding that the murder was not planned. The State contends that even if it were not found that the Judge had not misdirected himself, the sentences imposed were disturbingly inappropriate and that this court is entitled to interfere and impose what it considers to be an appropriate sentence.

[5] The approach to be adopted by the appellate court in an appeal against sentence is that the court on appeal should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court' (See *S v Sadler* 2000 (1) SA 331 (SCA) at para 6). It has been said that interference with the trial judge's discretion is only justified where there has been failure to exercise the discretion properly, either because of a misdirection or where the sentence imposed is disturbingly inappropriate.

[6] Against the backdrop of the above principle it remains to consider whether there is a justifiable basis for this Court to interfere with the sentences imposed by the trial judge in this case. Mr Roberts for the State submitted, as I have said, that the trial judge misdirected himself in concluding that the murder was not planned. He referred us to a passage in the record in which the first respondent in his plea explanation said:

'Me and accused 2 (meaning the second respondent) and William Daniel Roux sat together and planned to rob the deceased.'

In respect of the first respondent the verdict reads:

'Accused No 1 is convicted of murder and robbery with aggravating circumstances. *The murder was not planned*.' [Emphasis added]

[7] It is not clear that in an appeal against *sentence* the State can attack factual findings which are contained in the judgment on *conviction* (cf *S v Fourie* 2001 (2) SACR 118 (SCA) at para 14). Be that as it may, there is no substance in the submission because what the first respondent admitted in his plea explanation was that the *robbery* was planned. He did not admit that the *murder* was planned.

[8] I am satisfied, however, that there are reasons for interfering with the sentence imposed on the first respondent. The crimes of which he was convicted were serious, calling for a sentence of imprisonment for at least twenty years. The trial judge gave a lesser sentence, coupled with an ‘order’ calling upon the correctional services authorities to see to it that the first respondent received therapy from a psychiatrist and a psychologist or social worker. The judge appears to have been of the opinion that if the first respondent received the therapy he ordered it would be safe to release him after 14 years. The judge had earlier expressed his concern about the first respondent’s ‘obvious potential for loss of control’, which he said had ‘a psychological or even possible psychiatric history’ and stated his view that it is in the public interest that persons such as the first respondent ‘should be subjected to special treatment in a psychiatric or similar institution’.

[9] The first respondent clearly poses a risk to the community. It appears essential that he should receive therapy to address his personality problems. What therapy he should receive and when is a matter for the correctional service authorities to consider when exercising their functions in terms of Chapter IV of the Correctional Services Act 111 of 1998. Although the sentencing court had the power to make comments on the manner in which it thought the sentence it was imposing on the first

respondent should be served (see s 38(2) of Act 111 of 1998), it had no power to make orders in that regard. The ‘order’ it made must be set aside. Even if the ‘order’ were to be regarded as comments to be considered under s 38(2), I do not agree with them. The sentencing court did not have expert evidence before it from a psychiatrist or psychologist. The assumption the court appears to have made about the first respondent’s probable response to the therapy he ordered should be given was not supported by the evidence led. The witness who testified was a probation officer who had had a discussion with a psychiatrist on the staff of Weskoppies Psychiatric Hospital. She told the court what the psychiatrist had told her.

[10] In my view the sentence imposed on the first respondent should be set aside, together with the ‘order’ addressed to the correctional authorities which accompanied it, and replaced by a sentence of imprisonment for 20 years.

[11] As to the second respondent I am not persuaded that the trial judge misdirected himself. The second respondent played a very minor role in both the theft and the crime of being an accessory after the fact. In fact from the outset he was not prepared to be a party to the murder. He tried to prevent the first respondent from committing the murder and struggled with him for possession of the knife. His role in the crime of being an accessory was negligible. It is true that he was involved to a greater extent on the theft charge. On the other hand he appears to have acted under the influence of the first respondent. It must also be borne in mind that he spent some 17 months in prison awaiting trial and has served the 12 months sentence imposed upon him in terms of s 276(1)(h) of Act 51 of 1977. Besides this there was a further sentence of two years’

imprisonment hanging over his head in the event of a breach of any of the conditions imposed by the judge in respect of house arrest. It is not suggested that he failed to adhere to the conditions imposed as part of that sentence. I am unable to find that an adequate basis exists for interfering with the judge's discretion in regard to the second respondent. I am accordingly of the view that the appeal against the sentence imposed on the second respondent should be dismissed.

[12] The following order is made:

(a) The appeal in respect of the sentence passed on the first respondent is allowed. The sentence imposed on the first respondent is set aside and replaced by the following:
'20 years imprisonment'.

(b) The appeal in respect of the sentence imposed on the second respondent is dismissed.

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KK MTHIYANE

JUDGE OF APPEAL

CONCUR:

FARLAM JA
MLAMBO JA