

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A557/2003

In the appeal between:-

J M C SMITH First Appellant

A C VILJOEN Second Appellant

W J BOTES Third Appellant

E M KRUGER Fourth Appellant

and

THE STATE Respondent

CORAM: HATTINGH J *et* CILLIé J *et* RAMPAL J

HEARD ON: 20 FEBRUARY 2006

JUDGMENT BY: RAMPAL J

DELIVERED ON: 2 MARCH 2006

[1] Initially four appellants were supposed to be involved in these proceedings. Today, however, the fourth appellant was not ready to proceed. His appeal had to be removed from the roll. Therefore, I shall say no more about him. The appeal before us concerns the remaining three appellants.

- [2] The three appellants were tried and convicted in the Parys Circuit Court on 12 December 2001 on two counts of murder. The next day on 13 December 2001 each of them was sentenced to 15 (fifteen) years imprisonment in respect of each count. The court directed that 10 (ten) years of the sentence meted out in respect of the second charge should run concurrently with the sentence imposed in respect of the first charge. The effective sentence which each of the appellant has to serve, is therefore 20 (twenty) years imprisonment. They now come to this court on appeal against both the conviction and the sentence.
- [3] As far as the merits are concerned, it was contended on behalf of the appellants that even if the versions of the appellants were correctly rejected as false, the court *a quo* had misdirected itself in evaluating the real impact of the excessive alcohol they had consumed, the addictive cannabis they had smoked and their relative immature youth.
- [4] The State relied primarily on the testimonies of Brazao, Kobben, Van Tonder and Mofokeng in support of the first charge against the appellants. In the course of his judgment Hancke J said the following on p. 1309: 24 to p. 1310: 11:-
- “Soos reeds gemeld het mnr. Mofokeng ‘n goeie indruk op die Hof gemaak. Wat die weergawes van Brazao, Kobben en Van Tonder betref, is dit seer sekerlik so dat hulle vertoning in die

getuiebank nie vry is van kritiek nie en dat daar weesprekings en verskille is in hulle getuienis, asook hulle weergawe wat hulle aan die polisieverklarings vermeld het. Dit blyk egter duidelik, as die getuienis in totaliteit geneem word, dat beskuldigdes 1, 2 en 3 daarop uit was om moeilikheid te gaan soek met swart mense wat gelei het tot hierdie aanrandings. Mnr. Mofokeng staaf die here Brazao, Kobben en Van Tonder tot 'n mate en is daar onderlinge staving te vinde in hulle weergawes ondanks die geregverdigde kritiek wat geopper kan word ten opsigte van hulle weergawe. Die Hof is tevrede dat mnre. Brazao, Kobben en Van Tonder se weergawe in breë trekke korrek is dat dit die beskuldigdes was wat by die taxi staanplek afgeklim het, waarna die oorledenes (in aanklag 1) aangerand is.”

The one critique against the three was that they were intoxicated. However, the critique does not apply to Mofokeng.

- [5] The version of all the appellants in respect of the first charge was substantially the same. Their common version was that the State witnesses, particularly Kobben and Van Tonder, were to blame for the first victim's murder. The court *a quo* found that their version was fraught with improbabilities, blatant lies and serious contradictions and that it could on account of those defects be safely rejected as false. Although they too were under the influence of alcohol, they were not so intoxicated that they did not know what they were doing. They easily ran away from the scene and easily jumped onto the bakkie after assaulting the first victim.

- [6] The court *a quo* thoroughly dealt with the form of criminal intent. Among other decisions the case of **S v SALZWEDEL AND OTHERS** 2000 (1) ALL SA 229 (AD) was cited at par. 9 b where Mahomed CJ said the following:

“They had appreciated that the acts which they had perpetrated or authorised could have led to the death of the deceased, but had nevertheless proceeded with such conduct, in reckless disregard of the consequences.”

- [7] The court *a quo* came to the following conclusion after analysing and evaluating the facts:

“In ag genome die totaliteit van die getuienis is hierdie Hof tevrede bo redelike twyfel dat die drie beskuldigdes wel voorsien het dat die oorledene kan sterf as gevolg van die aanranding, maar dat hulle roekeloos daaromtrent gestaan het en steeds voortgegaan het om die oorledene te skop, onder andere op sy kop. Die Hof is dus tevrede dat die Staat sy saak bewys het ten opsigte van beskuldigdes 1, 2 en 3 wat aanklag 1 betref.”

- [8] On the facts and in law the judgment stood squarely on a solid foundation. I would therefore confirm the conviction of each of the three appellants. The combined effect of their relative youth, the influence of intoxicating alcohol, coupled with the influence of cannabis smoking, was not so serious that it can be said that the appellants did not know what they were doing. The argument that because of these three factors the appellants lacked criminal intent to commit murder can therefore not succeed. In reaching this conclusion I am fortified by the serious injuries they inflicted

on the victim. He was bleeding so profusely that Mofokeng found it difficult to recognise him. When they repeatedly kicked the victim on the head, they must have realised that they could kill him. The bleeding on the brain underlined the extent of the violent force applied.

[9] I turn now to the second charge. Here the State relied chiefly on the testimonies of Lorinda Ras, Willem Oosthuizen and Edward Nyoni. Although the court *a quo* found that there were certain unsatisfactory aspects about the testimony of Ras and Nyoni, their evidence was significantly fortified by that of Oosthuizen. Moreover, a defence witness for the first appellant J.J. Breedts, also known as Jakes, corroborated the prosecution version in many material respects. Here as in the first assault, the appellants were admittedly on the scene.

[10] The attack and assault of the second victim was clearly a continuation of a wicked, racial and criminal scheme of the appellants to victimise blacks at random merely because they were black. In accepting the version of the State and rejecting the version of the appellants that they did not realise the possibility that they might kill the second victim by kicking him many times on the head as they did, the court *a quo* commented as follows:

“Hierdie Hof is tevrede dat daar duidelik ‘n vooraf sameswering of ‘n besluit was tussen beskuldigdes 1, 2 en 3 om swart mense

te gaan slaan en dat hulle klaarblyklik die aggressors was deurdat hulle op 'n stadium besluit het om die oorledene 'n les te leer toe hulle hom agtervolg het. Die weergawe van beskuldigdes 1, 2 en 3 dat hulle hom saggies sou geskop het, strook ook nie met die objektiewe feite nie, allermens met die getuienis van mnr. Oosthuizen wat op 'n stadium getuig het die oorledene is hard geskop en later het hy gesê die oorledene is met mening geskop. Die feit dat van die beskuldigdes later teruggekeer het, is ook aanduidend van die feit dat hulle voorsien het dat die oorledene as gevolg van die voorval kon sterf.”

The victim sustained severe head injuries. The trauma applied to the one side of his head caused him even worse injury to the other side. In medical terms such injury is called “a contra coup” injury.

- [11] The conclusion reached by the trial court that the first appellant, second appellant and the third appellant indeed foresaw that the injuries they were inflicting on the second victim, could result in his death but notwithstanding such realisation of death persisted with such criminal conduct in reckless disregard of such foreseeable consequences, cannot be faulted. The argument of Mr. van Wyk that the appellants did not, on account of their juvenile immaturity, the influence of intoxicating alcohol, coupled with the influence of cannabis, foresee the fatal consequences of their actions, falls to be rejected outright.

[12] Indeed they set out to assault and not to kill. However, from the excessive brutal force they, in concert with their companions, employed, I can readily infer their intent to murder. That intent took the form of *dolus eventualis* as the court *a quo* found. The evidence of Oosthuizen was that the victim was pursued by the appellants as he was fleeing from them; that the second and the third appellant stoned him; that their co-accused no. 5 tackled him and that the victim fell to the ground on his belly. He was then repeatedly kicked over and over again on the head by the appellants and their co-perpetrators. At one stage one of them jumped on the head of the helpless victim. The court *a quo* was, in my view, correct in dismissing their claim that the victim hit the kerb as he was falling down. Also false was their claim that they had already withdrawn from the assault at the time the victim was injured on the head.

[13] I am therefore also inclined to confirm the conviction of all the three appellants in connection with the second charge as well.

[14] As regard sentence, it seems to me that the court *a quo* took into account all the relevant factors and that it considered them in an appropriate and a balanced manner. I am satisfied that it did not exercise its discretion pertaining to sentence improperly or unreasonably.

[15] I deem it unnecessary to repeat the personal circumstances of the appellants. Among others, the following mitigating

factors were taken into account. The first appellant, the second appellant, the third appellant were sixteen, seventeen and eighteen years of age respectively. All were first offenders. All were intoxicated and all had been in custody for 2 years before they were sentenced.

- [16] The brutal killings were prompted by virtually nothing but sheer racial hatred of the blacks by the white appellants. In **S v SALZWEDEL AND OTHERS** *supra* at 234 d - f Mahomed CJ had this to say about this sort of behaviour:

“Substantially the same temper should inform the response of South Africa to serious crimes motivated by racism, at a time when our country had negotiated a new ethos and a clear repudiation of the racism which had for so long and so pervasively dominated so much of life and living in South Africa. The commission of serious offences perpetrated under the influence of racism subverts the fundamental premises of an ethos of human rights which must now ‘permeate the processes of judicial interpretation and judicial discretion’ including sentencing policy in the punishment of criminal offences.”

- [17] The appellants formed a criminal gang whose existence was based on a culture of violence. To this gang the random victimisation of blacks appears to have been an exciting hobby. The victims were elderly and frail persons who stood no chance whatsoever against the youthful might of the appellants. They were killed in an absolutely brutal and merciless manner without any provocation. So much about

aggravating factors.

[18] As I see it nothing was over-emphasized and nothing was under-emphasized at the expense of the appellants. Although the court *a quo* found that there were substantial and compelling circumstances in respect of each appellant it nonetheless imposed the prescribed minimum sentences on each of them. Counsel for the State contended that it was the brutality of the two murders which moved the court *a quo* to impose 15 (fifteen) years imprisonment on each of the appellant and that it would probably still had done so even if no minimum sentence was prescribed. It has to be pointed out that the finding by the trial court that there were substantial and compelling circumstances in this case, did not in itself bind the court *a quo* to impose a lesser sentence than the prescribed minimum sentence. Section 51 Act No. 105/97 provides that the court can and not must deviate.

[19] Indeed the effective sentence of 20 (twenty) years imprisonment on the appellants so young, with clean criminal records, who were in custody for two years before they were sentenced and who had abused intoxicating alcohol on the night in question, is rather a stiff sentence. But that alone is not a valid reason to justify our interference. The fact that we consider it a stiff sentence which we would not have imposed had we being seized with the trial does not mean that the sentence invokes a sense of shock and therefore

inappropriate. It must be borne in mind that two completely innocent lives were lost as a result of senseless acts and society expects the court to punish retributively and deterrently those responsible. The court was also mindful of the impact of the two sentences if they were to run separately and therefore tempered with such cumulative hardship accordingly. There being no misdirection on the part of the trial court, this court sitting in an appellate mode is not at liberty to interfere with the sentences imposed on the appellants. We cannot interfere with the exercise of a sentencing discretion merely because we would have exercised that discretion differently. Determining a proper sentence falls primarily in the discretion of a trial judge. In my view, the appeal against the sentences should also fail. The sentences were not shockingly severe or disturbingly inappropriate.

[20] Accordingly I make the following order:

20.1 The appeal fails *in toto*.

20.2 The convictions and the sentences are confirmed.

M.H. RAMPAL, J

I concur.

G.A. HATTINGH, J

I also concur.

C.B. CILLIÉ, J

On behalf of the first, second and third appellant:

Attorney R. van Wyk

Instructed by:

Andries Spangenberg Inc.

BLOEMFONTEIN

On behalf of the respondent:

Adv. S. Giorgi

Instructed by:

Director Public Prosecutions

BLOEMFONTEIN

/sp