

**IN THE HIGH COURT OF SOUTH AFRICA**

**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO: A628/2001**

In the matter between:

**RUSSEL PAUL SEVENSTER**

Appellant

and

**THE STATE**

**Respondent**

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**JUDGMENT**

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**VAN REENEN, J:**

The appellant stood trial before Hlophe DJP (as he then was) and two assessors on the following charges:

- a) that he on 3 January 1998 and at No 1E Port Du Gard, Beach Road, Sea Point unlawfully and intentionally killed Alison Gregg (Gregg) by hitting her with a blunt object and slitting her throat with a knife (Count 1);
- b) that he on the said date and place unlawfully and intentionally killed Mark Von Gerhardt-Weber (Von

Gerhardt-Weber) by hitting him with a blunt object and stabbing/cutting him with a knife (Count 2);

- c) that he on the same date and place assaulted Gregg and Von Gerhardt-Weber and by force removed from their possession a Honda Ballade motor vehicle CA 774256, a sewing machine, a washing machine, a music system, a television set, a video cassette recorder, a tool box containing power- and other tools, a mini stove, a carpet, a billiard cue, a pair of binoculars, a car radio face-plate, an electric kettle, an urn, jewellery, carpet saddle bags and two bar stools, the property of or in the lawful possession of Gregg and/or Von Gerhardt-Weber (Count 3);
- d) that he on 5 January 1998 and at 7 Ferni Flats, Pinelands unlawfully and intentionally stole R150 in cash from Wendy Sprules (Sprules), and R760 in cash and an identity book, the property of Darren Waugh (Waugh) (Count 4); and

- e) that he on 20 December 1997 and at Cape Town unlawfully and intentionally stole a Ford Bantam bakkie CA 271819, R300 in cash and a number of power- and other tools, the property of or in the lawful possession of Richard Smith (Smith) (Count 5).

The appellant was found guilty on counts 1 and 2 as charged; on count 3 of theft of the Honda motor vehicle, tool boxes, a carpet, a gold chain, bar stools, a coffee table and a silver jug; on count 4 of the theft of R150 in cash from Sprules, and an identity document as well as an undetermined amount of money from Waugh; and on count 5 of the theft of R300 in cash from Smith.

The trial court on 5 April 2000, sentenced the appellant to 18 years' imprisonment on count 1, 18 years imprisonment on count 2, 5 years imprisonment on count 3, 2 years imprisonment on count 4 and 12 months

imprisonment on count 5 and ordered the sentences imposed in respect of counts 3, 4 and 5 to run concurrently with the sentences imposed in respect of counts 1 and 2.

The appellant, with the leave of the court **a quo**, appeals against the sentences imposed on him to a full bench of this division.

A court of appeal does not have an overriding benevolent discretion to ameliorate a sentence imposed by a trial court (See: **R v Lindley** 1957(2) SA 253 (N) at 235 F). The approach that should be followed by a court exercising appellate jurisdiction in respect of a sentence imposed by a trial court was aptly summarised as follows by Marais JA in **S v Malgas** 2001(1) SACR 469 (SCA) at 478 d – h:

“A court exercising appellate jurisdiction cannot, in the

absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it

may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

Advocate Nortier, who represented the appellant, in his heads of argument assailed the sentences imposed by the trial court on the grounds that the learned trial judge -

- a) found that the appellant acted with reduced criminal responsibility, but failed to have sufficient regard to the measure and scope thereof;
- b) repeatedly referred to the presence of aggravating features but, save for three less than apposite instances, failed to identify such features;
- c) committed a misdirection by having found, contrary to the evidence adduced, that the appellant failed to

exhibit any contrition;

- d) erred, by having taken account of the occurrences that form the subject-matter of count 3 in assessing the appellant's moral blameworthiness in respect of counts 1 and 2 and, as a result, over-accentuated the seriousness of the latter two counts;
- e) failed to have regard to the cumulative effect of the sentences imposed, and accordingly, the sentences that were imposed are strikingly or disturbingly inappropriate;
- f) having articulated the view that, had it not been for the fact that he had found that the appellant acted with diminished criminal responsibility, he would have sentenced him to at least 25 years imprisonment in respect of each of counts 1 and 2, or probably life imprisonment, nevertheless imposed sentences which, if regard is had to the appellant's age and life expectancy, equate to imprisonment for the rest of

the appellant's natural life-span; and

- g) erred in having found that the appellant constituted a danger to society.

In view of the conclusion at which I have arrived in this appeal it is not necessary to consider whether the learned trial judge committed any of the misdirections attributed to him by the appellant's counsel.

Whether there is such a disparity between the duration and/or nature of the sentence imposed by a trial court and that which a court exercising appellate jurisdiction would have imposed as a court of first instance, that it attracts the epithets "shocking"; "startling" or "disturbingly inappropriate", is determined with reference to the record of the proceedings in the court **a quo** and the latter's factual findings, mindful that there are no universally applicable and exact criteria according to which the

appropriateness of a sentence can be assessed, so that views of what in a particular case constitutes an appropriate sentence may legitimately differ (See: **S v Pieters** 1987(3) SA 717 (A) at 734 F; 734 G – H).

The learned trial judge, on the basis of the evidence of a state witness, Dr Sean Kaliski, a specialist psychiatrist who made a favourable impression, found that the accused acted with reduced criminal responsibility. That finding has not been assailed.

It is clear from the evidence adduced at the trial that the accused on or about 28 December 1997 and after a relatively lengthy period of abstention embarked upon an uncontrolled spree of substance abuse, predominantly in the form of crack cocaine. It is common cause that the spree continued until 5 January 1998, the date on which the last of the offences that form the subject-matter of the

charges against the accused, was committed. The accused's substance abuse was so intense that, according to the investigating officer Johannes de Vries Vermeulen, he was extremely unkempt, emaciated and covered with sores when he was arrested.

Although the versions of the events preceeding and during the killing of Gregg and Von Gerhardt-Weber provided by the accused to Vermeulen, magistrate P.P. Kriel, Dr Kaliski and the court, contain certain discrepancies, they have the following common features: that the accused and his two victims had used crack cocaine in the latters' flat; that there had been a violent argument during which the accused was accused of having been the cause of his father's and brother's deaths; and that this accusation triggered the attack with a stone (used by them in the preparation of drugs) which culminated in the death of Gregg and Von Gerhardt-Weber.

Dr Kaliski accentuated the addictive properties of crack cocaine and testified that, whilst under its short-lived influence, the control and judgment of the user thereof is impaired and his or her inhibitions profoundly reduced, making him or her more susceptible to any taunting or provocation. He also testified that, in the case of long-term abuse of crack cocaine, the short-lived plateau of enjoyment is followed by a craving manifesting itself in depression, extreme irritability, hostility and aggressiveness. Dr Kaliski conceded that the accused could have been more easily provoked as a result thereof and expressed the views that he did not find it strange that the accused “exploded”. He also testified that the degree to which the accused had lost his self-control should be determined with reference to the facts found to have been proved.

During cross-examination, Dr Kaliski conceded that the number of horrendous injuries suffered by the deceased were consistent with a frenzied attack and were indicative of a diminution on the part of the accused of the ability to care about the consequences of such an attack. Having regard to the fact that the accused hit the two deceased with a stone with such force that their skulls and facial bones were cracked, as well as the number, the nature and the situation of the wounds inflicted with one or more of the four blood-stained knives found at the scene, that concession, in my view, was fairly made. That conduct on the part of the accused must be contrasted with the evidence that he, normally, was of a non-violent disposition.

In my view, the facts of the instant case warrant the conclusion that the accused acted under substantially reduced criminal responsibility. It is axiomatic that substantially reduced criminal responsibility has an

extensive mitigating effect on sentencing as it reduces an accused's moral blameworthiness (See: **S.S. Terblanche: A Guide to Sentencing in South Africa** 222).

It cannot be gainsaid that Gregg and Von Gerhard-Weber were murdered in a gruesome manner which, even if the extent of the accused's reduced criminal responsibility is taken into account, would justify imprisonment of 18 years per count if unrelated. However, if an accused is sentenced in respect of two or more related offences, the accepted practice is that the sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which he or she has to be sentenced (See: **S v Coales** 1995(1) SACR 33

(A) at 36 e – f; **S v Mhlakaza** 1997(1) SACR 575 (SCA) at 523 g – h). That approach appears to be particularly apposite where the offences are as closely interrelated in time and place as counts 1 and 2 are.

The learned trial judge did not specifically state that he had given consideration to the cumulative effect of the sentences imposed in respect of the said two counts.

It is impermissible for a court, when determining what an appropriate sentence is, to have regard to the possibility that the person sentenced to a period of imprisonment, may be released on parole (See: **S v S** 1987(2) SA 707 (A) at 313 J). It accordingly has to be assumed that the effective period of 36 years imprisonment imposed by the learned trial judge on the accused, may potentially be served in full (See: **S v Mhlakaza and Another** 1997(1) SACR 515 (SCA) at 192 c – e).

Having regard to the triad consisting of the offender, the offences and the interests of society and, in particular, to the accused's substantial reduced criminal responsibility, an appropriate sentence in respect of counts 1 and 2, viewed cumulatively, would in my view be 25 years imprisonment. Accordingly, there is, in my view, a striking disparity between the sentence that the learned trial judge imposed and the sentence which I would have imposed had I sat as a court of first instance. In the circumstances this court is at large to interfere with the sentences imposed by the learned trial judge in respect of counts 1 and 2.

In the premises the appeal against the sentences imposed in respect of counts 1 and 2 succeeds and the sentences imposed in respect of counts 1 and 2 are deleted and substituted with the following:

“Counts 1 and 2 are taken together for sentencing purposes. The accused is sentenced to 25 years imprisonment.”

Advocate Nortier has not attributed any misdirections to the learned trial judge as regards the sentences imposed in respect of counts 3, 4 and 5. What remains to be considered is whether any of those sentences are shocking, startling or disturbingly inappropriate. When that assessment is made sight must not be lost of the fact that the factors that warranted the finding that the accused was acting under reduced criminal responsibility when he murdered Gregg and Von Gerhard-Weber would appear to have been absent when the acts that form the subject-matter of counts 3, 4 and 5 were committed. Although the sentences imposed in respect of those counts are severe, they do not deviate from the sentences which I would have imposed, had I sat as a court of first instance, to such a degree that they could be described as shocking,

startling or disturbingly inappropriate. In any event their severity has, to a degree, been mitigated by the fact that the learned trial judge ordered them to run concurrently with the periods of imprisonment imposed in respect of counts 1 and 2.

Accordingly the appeal in respect of the sentences imposed on counts 3, 4 and 5 fails but the order directing that such sentences are to run concurrently with those imposed in respect of counts 1 and 2 is amended to read as follows:

“It is directed that the periods of imprisonment imposed in respect of counts 3, 4 and 5 are to run concurrently with the 25 year period of imprisonment imposed in respect of counts 1 and 2.”

The sentence now imposed in respect of counts 1 and 2 is to be deemed to have been imposed on 5 April 2000 i.e.

the date on which the accused was originally sentenced  
(See: Section 282 of the Criminal Procedure Act, No 51 of  
1977).

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**D. VAN REENEN**

**VAN HEERDEN J:**

I agree.

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**B.J. VAN HEERDEN**

**ERASMUS J:**

I agree.

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## **N.C. ERASMUS**

**VAN REENEN, J: [VAN HEERDEN J et ERASMUS J concur] - 22/02/2002**

In the premises the appeal against the sentences imposed in respect of counts 1 and 2 succeeds and the sentences imposed in respect of counts 1 and 2 are deleted and substituted with the following:

“Counts 1 and 2 are taken together for sentencing purposes. The accused is sentenced to 25 years imprisonment.”

Accordingly the appeal in respect of the sentences imposed on counts 3, 4 and 5 fails but the order directing that such sentences are to run concurrently with those imposed in respect of counts 1 and 2 is amended to read as follows:

“It is directed that the periods of imprisonment imposed in respect of counts 3, 4 and 5 are to run concurrently with the 25 year period of imprisonment imposed in respect of counts 1 and 2.”

The sentence now imposed in respect of counts 1 and 2 is to be deemed to have been imposed on 5 April 2000 i.e. the date on which the accused was originally sentenced (See: Section 282 of the Criminal Procedure Act, No 51 of 1977).