Case No 635/98 **REPORTABLE**

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

STEPHAN MUDUPE KGOSIMORE **Appellant**

and

THE STATE **Respondent**

Coram : SCOTT, STREICHER JJA *et* MELUNSKY AJA
Heard : 13 SEPTEMBER 1999
Delivered : 16 SEPTEMBER 1999

Sentence - appeal by state - power of court of appeal to interfere the same as in the case of an appeal by the accused.

J U D G M E N T

SCOTT JA/...

SCOTT JA:

[1] The appellant, a 34 year-old school teacher, was charged in the Free State High Court with one count of murder and one count of attempted murder. He pleaded guilty on both counts and on the strength of his written statement made in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 ("the Act") was duly convicted. He was sentenced to 5 years imprisonment for the murder and 12 months for the attempted murder. Both periods of imprisonment were wholly suspended. Prior to his conviction he had spent 7 months in prison as an awaiting trial prisoner. The attorney general's application for leave to appeal in terms of s 316 B of the Act was dismissed by the trial court (Gihwala AJ) but on petition to the Chief Justice leave was granted to appeal to the full court. That court (Lichtenburg JP, Beckley and Hancke JJ) set aside the sentence imposed by the trial court on the count of murder and imposed instead a sentence of 9 years imprisonment. The sentence of

12 months suspended imprisonment in respect of the count of attempted murder was confirmed. The appellant's petition to the Chief Justice for leave to appeal against the sentence of 9 years imprisonment was successful; hence the present appeal. The state takes the view, however, that the substituted sentence is still too lenient and, after giving notice of its intention to do so, seeks an increase in the sentence.

[2] The events leading up to the commission of the offences on 19 December 1996 appear largely from the appellant's written statement made in terms of s 112 (2) of the Act. The appellant did not testify. Only two witnesses were called; Mrs Ronel Fourie, a social worker who testified on behalf of the state with regard to the question of sentence, and Mr Sephiri Leteane, the principal of the Rearabetswe Senior Secondary School where the appellant taught mathematics and physical science, who gave evidence in mitigation.

[3] The appellant was married in January 1991. The marriage appears to have been reasonably happy at first, save that it transpired that the appellant was

infertile and this gave rise to some tension between the spouses. Early in 1996 the appellant began to suspect that his wife, Mavis, was having an affair with the deceased. The latter was a close friend of the appellant and had been for many years. On 2 August 1996 the appellant discovered his wife and the deceased in compromising circumstances. When confronted they both confessed to having committed adultery. The appellant was prepared to continue with the marriage but the relationship between himself and his wife deteriorated rapidly. At the end of August 1996 she left the appellant and moved to Johannesburg. The deceased, who was married, did not follow her. Shortly thereafter she instituted divorce proceedings against the appellant. He discovered that the deceased had provided her with the funds to do so. Subsequent to her leaving the common home the appellant applied for a firearm license. It was granted on 18 December 1996. He immediately acquired a firearm. At 3 am on 19 December 1996, ie that very night, the appellant went to the deceased's house armed with his newly acquired firearm. According to

his written statement the purpose of his visit was to ask the deceased where Mavis was. He explained in his statement that he proposed to threaten the deceased with the firearm and to kill him if he refused to disclose his wife's whereabouts or refused to speak to him at all. According to the appellant the deceased attempted to disarm him and in the course of the struggle that followed the deceased was fatally wounded. The post mortem report revealed that the deceased had been shot 5 times in the region of the chest and a sixth shot had grazed his head. The deceased's brother attempted to intervene. He sustained gun shot wounds in the hand and leg. The gunfire directed at the deceased's brother was the subject of the charge of attempted murder.

[4] During the trial it was admitted on behalf of the appellant that on an earlier occasion the appellant had threatened to kill both the deceased and the latter's wife, as well as his own wife, Mavis.

[5] Prior to the hearing the appellant was interviewed on more than one

occasion by Mrs Fourie, the social worker, for the purposes of preparing a report on sentence. Several relevant facts emerge from her evidence. She testified that the appellant gave as the reason for acquiring a firearm not only the desirability of being able to protect himself - someone had previously broken into his house - but also to enable him to threaten the deceased and so ascertain the whereabouts of his wife. It appears furthermore that although the appellant blamed the deceased for the break-up of his marriage there were probably other causes as well, including a history of assaults by the appellant on his wife which preceded the adultery. Finally, as far as the question of remorse is concerned, the impression gained by Mrs Fourie as to the appellant's attitude was that the deceased had received his just deserts and that his only real concern was his own position, although he did express sympathy for the deceased's daughter who was left without a father. Mrs Fourie's conclusion was that notwithstanding the appellant's absence of previous convictions and favourable personal circumstances, the offences committed by him were such that

the only appropriate sentence was one of direct imprisonment.

[6] The appellant had achieved much in his life. Notwithstanding a humble and disadvantaged beginning he had managed to qualify as a teacher. Prior to the shooting he had been a teacher for some 11 years at the Rearabetswe Senior Secondary School, Odendaalsrus, where he taught mathematics and physical science. He was described by his principal, Mr Leteane, as a positive person, always kindly and much admired both at school and in the community generally. He played an active roll in extra mural activities at school including the debating society, sport and indoor-games. At night he taught at the Mokotsho Centre which is a centre for the teaching of adult people. In addition, he attempted to further his own education by enrolling as a part-time student for a Bachelor of Arts degree. According to Mrs Fourie he had to abandon his studies for financial reasons. The evidence disclosed that his net monthly income was a meagre R1 599,74. Mr Leteane testified that teachers of the appellant's calibre were scarce, so much so that he was

confident that if the appellant were not to be sent to prison he would be accepted back in his former teaching post at the school.

[7] In his written statement the appellant emphasized that his wife's adultery and desertion had upset him greatly. This was confirmed by both Mrs Fourie and Mr Leteane. The latter explained that from about the beginning of August 1996 the appellant virtually underwent a personality change. Instead of his former friendly and gregarious self he became isolated and withdrawn. He was clearly under considerable stress and even consulted a doctor. His work at school also changed. Reports were not submitted timeously and he began absenting himself from school. In response to Mr Leteane's inquiries, the appellant revealed that he was having domestic problems. According to Mrs Fourie it was apparent to her that the appellant was deeply attached to his wife and was unable to cope in a meaningful way with the break-up of his marriage. He wanted her back but did not know where to find her. He attributed the break-up to her adultery with a man whom

he had regarded as his best friend. He felt hurt and betrayed. It is clear that the deep emotional turmoil which he undoubtedly experienced had got the better of him.

[8] A most unusual feature of the present appeal is that counsel on both sides submitted that the sentence imposed by the court *a quo* was disturbingly inappropriate; but, of course, for diametrically opposed reasons. Counsel for the appellant says it is too severe; counsel for the state says it is too lenient.

[9] Before attempting to resolve this conflict it is necessary to consider a preliminary point raised by counsel for the appellant. He submitted that considerations of policy and fairness dictated that when the state appealed against sentence the power of a court of appeal to interfere should be more limited than in the case of an appeal by an accused. (*Cf Hiemstra*: Suid-Afrikaanse Strafproses 5 ed at 820.) He argued that if a stricter test were applied any criticism that could be levelled at the nature of the sentence imposed by the trial court would be insufficient to justify interference and that the court *a quo* erred in doing so. Accordingly, so

the argument went, the sentence imposed by the trial court should be reinstated.

[10] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; *viz* whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Cf *S v Pieters* 1987 (3) SA 717 (A) at 727 G - I.)

Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so. I can accordingly see no juridical basis for the stricter test suggested by counsel; nor is

there anything in s 316 B of the Act, or for that matter s 310 A, to suggest otherwise. (See also *R v Anderson* 1964(3) SA 494(A).) It follows that, in my view, whether it is the attorney-general (now the director of public prosecutions) or an accused who appeals against a sentence, the power of a court of appeal to interfere is the same.

[11] In the light of the seriousness of the offence and the circumstances in which it was committed the court *a quo* came to the conclusion that a sentence of 5 years suspended imprisonment was wholly inappropriate and was indicative of the trial court having failed to give proper weight to the various aggravating features which the court *a quo* listed and which are apparent from what has been said above. I agree. It follows that the court *a quo* was entitled to set aside the sentence of the trial court and in the exercise of its discretion impose sentence afresh.

[12] What has to be decided is whether there is any basis for this court interfering with the substituted sentence of 9 years imprisonment. Apart from the

point raised by the appellant's counsel to which I have previously referred and which in my view is without substance, neither counsel was able to refer to any misdirection on the part of the court *a quo* save for the severity or leniency of the sentence. It is clear from the judgment of Beckley J that the court *a quo* was fully aware of the appellant's favourable personal circumstances as well as the various mitigating factors which were undoubtedly present. It stressed, however, that these were not to be viewed in isolation but had to weighed up against the seriousness of the crime, the circumstances in which it was committed and the interests of society.

[13] Is the sentence disturbingly lenient? The appellant is not the kind of person one would normally expect to find in prison. He appears to have been a conscientious and dedicated schoolteacher and a valuable member of his community. His crimes were committed at a time of emotional upset following the break-up of his marriage and his perceived betrayal by a close friend. These were factors which the court *a quo* was entitled and indeed obliged to take into account.

While the sentence imposed is not one which I necessarily would have imposed if sitting as a court of first instance, I am unpersuaded that it is so lenient as to justify interference by this court.

[14] Is the sentence disturbingly severe? Apart from the obvious seriousness of the crime, it is apparent that the appellant did not shoot and kill the deceased in a moment of anguish or on the spur of the moment. Some four months prior to the shooting he took the first step to acquire a firearm in order to threaten the deceased with it. It is common cause that either before or after taking this step he did indeed threaten to kill the deceased. Once he acquired the firearm he wasted no time in arming himself and going to the deceased's house. On his own admission he proposed to use it on the deceased if the latter failed to disclose the whereabouts of his wife. In the event, he shot the deceased no fewer than 5 times in the region of the chest. As observed by the court *a quo*, all this is indicative of a considerable degree of premeditation. I agree. I am unpersuaded that the sentence is too severe.

[15] In the circumstances there is, in my view, no basis on which this court can interfere with the sentence imposed by the court *a quo*. The appeal is accordingly dismissed.

D G SCOTT JA

STREICHER JA
- Concur
MELUNSKY AJA