IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable
Case No.: A484/09

In the matter between:

VERN DE KOKER Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 4 DECEMBER 2009

BREITENBACH AJ:

1. The appellant, Mr Vern de Koker, was arraigned in the George Regional Court on three charges. The presiding officer was Mr M P Fourie. The prosecutor was Adv J C Gerber SC. The appellant was represented by Mr A Marx of the Legal Aid Board.

2. All of the offences with which the appellant was charged were committed on 11 July 2008 in George and its environs.

3. The 1st charge was robbery, with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977 ("the CPA"). It was alleged that at or near George the appellant unlawfully and intentionally robbed Marissa Coetzee of a cell-phone and R100 cash by threatening to stab her with a knife, which is a dangerous weapon, alternatively by stabbing her repeatedly with a knife, thereby threatening to cause her, alternatively causing her, grievous bodily harm. The charge sheet stated that, if convicted, the accused faced a minimum sentence of 15 years' imprisonment.

4. The 2nd charge was rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("Act 32 of 2007"). It was alleged that at or near the Outeniqua Pass, George, the appellant unlawfully and intentionally committed an act of sexual penetration with a female, namely Ms Coetzee, by having sexual intercourse with her by pushing his penis into her vagina without her permission, and by causing her grievous bodily harm. The charge sheet referred to the provisions of ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (as amended) ("the minimum sentence law" or "Act 105 of 1997") and Schedule 2 thereto and stated that, if convicted, the accused faced a minimum sentence of life imprisonment.

5. In this regard I should mention that the relevant provision of Schedule 2 to the minimum sentence law, is in Part I thereof. It reads: "*Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007- ... (c) involving the infliction of grievous bodily harm.*" After its substitution on 31 December 2007 by s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 ("Act 38 of 2007"), s 51(1) of the minimum sentence law has empowered a regional court to sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to life imprisonment.

6. The 3rd charge was murder. It was alleged that at or near George the appellant unlawfully and intentionally assaulted Ms Coetzee by stabbing her repeatedly with a knife with the previously-planned intention of murdering her, and thereby inflicting on her certain deadly injuries which led to her death. The charge sheet referred to the provisions of ss 51(2), 52(2), 52A and 52B of the minimum sentence law and stated that, if convicted, the accused faced a minimum sentence of life imprisonment.

7. In this regard I should mention that the references to ss 51(2), 52(2), 52A and 52B of the minimum sentence law are clearly incorrect. Section 51(2) of the minimum sentence law governs the sentencing of persons who have been convicted of an offence referred to in Parts II, III and IV of Schedule 2 thereto, and it provides for the imposition of minimum sentences of imprisonment ranging from 5 to 25 years. By contrast, s 51(1) of the minimum sentence law makes provision for the imposition of minimum sentences of life imprisonment for offences referred to in Part I of Schedule 2 thereto. The whole of ss 52, 52A and 52B were repealed on 31 December 2007 by s 2 of Act 38 of 2007. In this case the relevant provision of Schedule 2 to the minimum sentence law is also in Part I thereof. It reads: "*Murder, when- (a) it was planned or premeditated...* [or] *(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences: (i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977)*".

8. In my view nothing turns on the incorrect references to ss 51(2), 52(2), 52A and 52B of the minimum sentence law. The charge was properly and fully described. The purpose of the reference in the charge sheet to the minimum

sentence law and the statement therein that, if convicted, the accused faced a minimum sentence of life imprisonment, was to ensure that the appellant was "*placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences*" (*S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12). In the present case, that purpose was undoubtedly achieved. As explained more fully in what follows, the appellant, who was legally represented, when faced with these charges, decided to negotiate and conclude with the state a plea and sentence agreement in terms of s 105A of the CPA in which he pleaded guilty to all three charges and agreed to the imposition of the prescribed minimum sentence for each of the three charges.

9. The charge sheet reflects that the appellant was arrested on the same day as the offences were committed, i.e. 11 July 2008.

10. On 14 April 2009 the charges were put to the appellant and he pleaded guilty. Before he did so, the prosecutor referred to the fact that the state and the appellant had concluded the plea and sentence agreement and the regional magistrate thereupon informed him that, as appeared from the document embodying the agreement, "*daar sekere minimum strawwe voorgeskryf word vir elk van die drie aanklagte waarop u teregstaan en die minimum strawwe wat die hof verplig sal wees om op te lê sal wees ten opsigte van die klagte van roof, 15 jaar gevangenisstraf, die klagte van verkragting lewenslange gevangenisstraf en ook die klagte van moord lewenslange gevangenisstraf. Die hof is slegs geregtig om af te wyk van hierdie minimum strawwe indien die hof oortuig is dat daar baie belangrike omstandighede, wesenlike en dwingende omstandighede teenwoordig is*" (record p. 9 line 24 to p. 10 line 8). The regional magistrate then asked the appellant whether he understood, to which the appellant answered that he did.

11. Section 105A(1)(a)(i) and (ii)(aa) of the CPA provide: "*A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and (ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty- (aa) a just sentence to be imposed by the court*".

12. The rest of s 105A of the CPA sets out, in some detail, the steps the prosecutor must normally take before entering into a plea and sentence agreement (which must be in writing), the contents of the agreement and the steps to be taken by the court before it may convict and sentence an accused in terms of a plea and sentence agreement.

13. The prescribed contents of the agreement include the following: It must be signed by the prosecutor, the accused and his or her legal representative. It must state that the accused, before entering into the agreement, was informed that he or she has the right to be presumed innocent until proved guilty beyond reasonable doubt, to remain silent and not to testify during the proceedings and not to be compelled to give self-incriminating evidence. It must also state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the agreement and any admissions made by the accused.

14. The plea and sentence agreement in the present case complies with all of these requirements.

15. In the section of the plea and sentence agreement headed "*Wesenlike feite en ander tersaaklike feite*" the commission of the offences by the appellant is described as follows:

"*Op Vrydag oggend, 11 Julie 2008 was die beskuldigde op pad werk toe. Hy het naby Fancourt gewerk, maar toe hy daar opdaag, toe was die werkers nie daar nie. Hy het toe geloop. Terwyl hy in Blanco loop, het 'n dame, nou bekend as die oorledene, hom geroep. Sy was so 50 meter van hom af. Hy stap toe nader en sy vra toe dat hy haar moet help want haar bakkie sit vas. Sy het eers die hond in die huis gaan toe maak. Toe klim sy in die bakkie in en skakel die bakkie aan. Die beskuldigde het toe gestoot aan die bakkie en sy het toe uitgery. Hy het toe die hek toegemaak. Sy het toe weer in die huis ingegaan en die hond laat uitkom. Sy vra toe waarheen hy oppad was. Hy sê toe aan die oorledene dat hy oppad is huis toe. Sy het hom toe 'n rygeleentheid aangebied. Hy het toe saam met haar gery en gevra of sy nie miskien dorp toe gaan nie. Sy het toe gesê sy is oppad werk toe en dat sy hom sal gaan aflaai in die dorp. Hulle het toe gery en toe hulle naby die Virgin Atlantic gimnasium kom het hy toe 'n mes uit sy sak gehaal en dit oopgemaak. Hy sê toe vir die oorledene as sy nie doen wat hy vir haar sê nie gaan hy haar seer maak. Hy sê toe daar by die garage by die aansluiting van die Oudtshoorn pad sy moet links draai na die berg toe. Hy het gesê sy moet normaal ry. Hulle het toe teen die berg opgery. By 'n plek waar 'n mens kan stop, het hy gesê sy moet aftrek. Sy het toe afgetrek en gevra wat wil hy hê. Sy het hom 'n R100.00 gegee en haar selfoon. Hy besef toe dat die enigste rede waarom sy hierdie items aan hom oorhandig het, was as gevolg van die feit dat hy haar met 'n mes gedreig het. Sy het aanmekaar gevra wat wil hy hê en dat hy haar nie moet seer maak nie. Dit was sy bedoeling om haar te beroof en het ook geweet dat die neem van haar geld en selfoon neerkom op roof waar daar verswarende omstandighede teenwoordig is aangesien hy haar met 'n gevaarlike wapen, te wete, 'n mes gedrieg het.*

Hulle klim toe uit die bakkie en stap na sitplekke by die aftrekplek. Hulle het toe seksuele gemeenskap gehad deurdat hy sy penis in haar vagina ingedruk het. Toe hy klaar was, het hy weer sy broek opgetrek. Hy het besef dat sy nie

vrywillig tot seksuele gemeenskap ingestem het nie omdat sy hom gevrees het aangeisen hy haar met 'n mes gedreig het. Hy het ook besef dat hierdie optrede neerkom op verkragting. Hy het toe besef dat hy toe in die moeilikheid was en het nie geweet wat om rêgig te maak nie. Hy vat toe sy mes en steek die oorledene verskeie kere in die nek gedeelte tot sy op die grond geval het. Hy wou haar doodsteek en het haar verskeie kere in die nekgedeelte gesteek. Hy het toe nader gegaan en gesien sy is dood. Hy het toe na die bakkie gehardloop en weggery."

16. In the part of the section of the plea and sentence agreement headed "*Pleit van skuldig en erkennings*" dealing with the charge of murder, the appellant makes the following admissions regarding the post-mortem examination and report, and the injuries he inflicted:

"*Hy erken verder dat die oorledene deur 'n pataloog, ene Dr. M Hurst, op die 14de Julie 2008 gedurende 'n lykskouing ondersoek is en dat gemelde praktisyn sekere aantekeninge tesame met drie fotos soos vervat in die lykskouings verslag geneem het, dat die lykskouings verslag korrek is en dat die oorledene dood is as gevolg van steekwonde soos deur hom toegedien welke die oorledene se regter long, "jugular vein", "subclavian artery", "trachea" en "oesophagus" deurdring het.*

Hy is verder bereid om te erken dat die beserings soos aangedui op die lykskouings verslag die enigste beserings is wat tydens die betrokke voorval opgedoen is.

Hy is tevrede dat die oorledene geen verdere beserings opgedoen het vandat sy vervoer is vanaf die misdaadstoneel tot met die lykskouing nie."

17. The post-mortem report estimates the age of the deceased as 20 years, and records its chief findings on the body of the deceased as being "[s]*even stab*

wounds of the neck, two pass into the Jugular vein, one the Subclavian artery and right lung and one into the trachea and oesophagus" and "*1900ml of blood in the right chest cavity*". The cause of death is said to be "[p]*enetrating incised wounds of the right Jugular vein, right Subclavian artery, right lung and trachea and oesophagus*" (record p. 55).

18. The plea and sentence agreement contains the following further information relevant to the sentences upon which the state and the appellant had agreed:

"*ERNS VAN DIE MISDAAD, ENSOVOORTS*

Die erns van die misdaad, die belange van die gemeenskap en die persoonlike omstandighede van die beskuldigde is behoorlik oorweeg en in ag geneem deur beide partye.

VERSWARENDE OMSTANDIGHEDE

Die verswarende omstandighede is soos volg:

a. Die voorkoms van die misdade van die huidige aard is besig om te vermeerder;

b. Die beskuldigde het die lewe van 'n ander persoon geneem; en

c. Die aard van die misdaad maak dit moeilik om te bespeur.

PERSOONLIKE OMSTANDIGHEDE VAN DIE BESKULDIGDE EN STRAFVERSAGTENDE FAKTORE

a. Die Beskuldigde is tans 24 jaar oud.

b. Die Beskuldigde het tot standard 8 op skool gevorder.

c. Die Beskuldigde het geen kinders nie.

d. Die Beskuldigde het werklike berou en wil in sy skuld val.

WESENLIKE EN DWINGENDE OMSTANDIGHEDE

Die Partye is dit eens dat hier geen wesenlike en dwingende omstandighede in terme van Artikel 51(3)(a) van Wet 105 van 1997 is nie."

19. Section 105A of the CPA requires the court to take certain steps before it may convict and sentence an accused in terms of a plea and sentence agreement which include the following:

19.1. The court must require the accused to confirm that such an agreement has been entered into. In the present case this was done (record p. 9 lines 18 to 21).

19.2. The court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court. As stated, in the present case the accused pleaded guilty to all of the charges (record p. 10 line 10 to p. 11 line 4). The regional magistrate then required the prosecutor to read the agreement into the record, which he did (record p. 11 line 17 to p. 21 line 24).

19.3. After the contents of the agreement have been disclosed, the court must question the accused to ascertain whether: he or she confirms the terms of the agreement and the admissions made by him or her in the agreement, with reference to the alleged facts of the case; he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced. In the present case the regional magistrate complied substantially with these requirements (record p. 24 lines 2 to 11 and 14 to 21) and, after having read the agreement, he said the following: "*Ten opsigte van die ooreenkoms self is die hof tevrede dat die terme van die ooreenkoms volledig blyk en dat alle wesenlike feite van die saak voor*

die hof geplaas is en dat alle ander faktore relevant tot die vonnisooreenkoms in erkennings deur die beskuldigde vermeld word. Die hof is dan tevrede dat die beskuldigde die bewerings in die klagstaat erken en dat die beskuldigde skuldig is aan elke van die drie misdrywe ten opsigte waarvan die ooreenkoms aangegaan is" (p. 24 line 23 to p. 24 line 4).

19.4. If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement. For purposes of doing so the court may direct to the prosecutor and the accused relevant questions, including questions about the previous convictions of the accused, and if the offence concerned is an offence referred to in the minimum sentence law (i.e. Act 105 of 1997) the court must have due regard to the provisions of that Act. In the present case the regional magistrate asked the appellant to confirm the correctness of the list of his previous convictions which was attached to the agreement (record p. 22 line 15 to p. 24 line 1). After stating that he was satisfied that the appellant had admitted the allegations in the charge sheets and that he was guilty of each of the three offences, and after taking time to consider the sentences specified in the agreement, the regional magistrate then asked the prosecutor and the defence whether "*enige van die partye iets verder* [wil] *meld oor vonnis as sulks en oor persoonlike omstandighede wat dalk nie in die verslag blyk nie*", to which both the prosecutor and the defence said no (record p. 25 lines 6 to 12).

19.5. Finally, if the court is satisfied that the sentence agreement is just, the court must inform the prosecutor and the accused that the court is so satisfied, whereupon the court must convict the accused of the offence

charged and sentence the accused in accordance with the sentence agreement. In the present case, after making the enquiry whether the state or the accused wished to state anything further regarding the sentence and about personal circumstances that did not appear from the agreement, the regional magistrate said: "*Goed die hof is dan ook oortuig dat die betrokke vonnisooreenkoms reg en billik is. Ek is van oordeel dat daar genoegsame klem geplaas word op die strafoormerke van veral voorkoming. Ook vergelding wat hier by 'n ernstige en hartseer misdaad soos hierdie na vore moet kom en ook die nodigheid om 'n vonnis op te lê wat ter afskrikking van uself en ook ander potensiële oortreders sal geld*" (record p. 25 lines 13 to 19).

20. The regional magistrate thereupon convicted the accused as charged (record p. 25 lines 22 to 25). Before imposing the sentences the regional magistrate said: "*Die hof is ook van oordeel soos die partye ooreengekom het dat daar nie wesenlike en dwingende omstandighede ten opsigte van enige van die voorvalle blyk nie en dat die hof inderdaad dan verplig is om die minimum strawwe op te lê*" (record p. 26 lines 2 to 5). The regional magistrate then sentenced the appellant to 15 years' imprisonment on the 1st charge, life imprisonment on the 2nd charge and life imprisonment on the 3rd charge. The regional magistrate then adverted to the fact, also recorded in the plea and sentence agreement, that because of the provision in s 39(2)(a)(i) of the Correctional Services Act 111 of 1998 that any determinate sentence to be served by any person (*in casu*, that of 15 years' imprisonment) runs concurrently with a life sentence to be served by that person, the sentences he imposed would be served concurrently. In effect, therefore, the appellant was sentenced to life imprisonment for the three crimes he committed. Finally, the regional magistrate declined to make an order in terms of s 103(1) of Act 60 of 2000, with the result that the appellant also became unfit to possess a firearm.

21. The appeal is now before this court under paragraph (ii) of the proviso to s 309(1)(a) of the CPA, which provides if that a person is convicted of any offence and sentenced to imprisonment for life by a regional court under s 51(1) of Act 105 of 1997, he or she may note an appeal against such conviction and sentence to the High Court having jurisdiction without having to apply for leave in terms of section 309B of the CPA.

22. The appellant's notice of appeal makes it clear that the appeal is confined to the sentences imposed by the regional magistrate only. The grounds of appeal are stated as follows:

"*1. Die appellant het met nawete tot die insig gekom dat die vonnisse ten opsigte van aanklagtes een (1) tot drie (3) soos voorheen ooreengekom nou blyk skokkend onvanpas te wees en 'n ander hof heel waarskynlik tot 'n ander gevolgtrekking sal kom met betrekking tot die oplegging van gepaste vonnis vir die gemelde aanklagtes.*

2. Die agbare hof gefouteer het deur die persoonlike omstandighede van die appellant te onder beklemtoon.

3. Die agbare hof gefouteer het deur die belange van die gemeenskap oor te beklemtoon.

4. *Die agbare hof gefouteer het deur die strafverswarende faktore oor te beklemtoon en die strafversagtende faktore te onder beklemtoon.*"

5. While it is clear that paragraph (ii) of the proviso to s 309(1)(a) of the CPA confers on a person convicted and sentenced to life imprisonment by a regional court the right to appeal to the relevant High Court against that sentence, it does not follow that the appeal cannot become perempted. As explained by Cameron JA in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at paragraph 11, "[p]*eremption of the right to challenge a judicial decision occurs*

when the losing litigant acquiesces in an adverse judgment. But before this can happen, the Court must be satisfied that the loser has acquiesced unequivocally in the judgment. The losing party's conduct must 'point indubitably and necessarily to the conclusion that he does not intend to attack the judgment': so the conduct relied on must be 'unequivocal and must be inconsistent with any intention to appeal' (Dabner v South African Railways and Harbours 1920 AD 583 at 594, per Innes CJ)". I cannot think of a clearer case of peremption than one where an accused duly concludes a plea and sentence agreement with the state in terms of s 105A of the CPA, confirms the agreement to the court before which he is arraigned, asks the court to convict and sentence him in accordance with the agreement and is thereupon duly convicted and sentenced in accordance with the agreement. By following the process created by section 105A, the appellant settled the *lis* between the state and him once and for all. (As this is not a case in which the agreed facts to not constitute the offences, I express no opinion on the correctness or otherwise of the decision in *S v Armugga and Others* 2005 (2) SACR 259 (N), in which it was held (at 263*b* to *h*) that those convicted and sentenced pursuant to plea bargaining agreements retained the right of appeal because the South African Law Reform Commission, in a report in relation to the proposed draft of the Bill which eventually inserted s 105A into the CPA, had decided to retain the right of appeal because it would be justified in cases of that sort.)

6. Even if the right to appeal was not perempted, there is no reason whatsoever for this court to interfere with the decision of the regional magistrate to sentence the appellant in accordance with the plea and sentence agreement. The test for interference by an appeal court in a sentence imposed by a trial court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or, even in the absence of misdirection, is disturbingly inappropriate in the sense that the appeal court is satisfied that the trial court did not exercise its discretion reasonably and imposed a sentence

which was not appropriate (*Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) para 10, citing *S v Rabie* 1975 (4) SA 855 (A) at 857D to F and referring to *S v Pillay* 1977 (4) SA 531 (A); *S v Pieters* 1987 (3) SA 717 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); and *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA)).

7. As appears from the discussion earlier, the regional magistrate followed the procedure prescribed by s 105A of the CPA and, in particular, before sentencing the accused he asked the defence whether they had anything to add to what was stated in the agreement regarding the sentences or the appellant's personal circumstances (to which the answer was no). It will further be recalled that when the proceedings commenced the regional magistrate explained to the appellant the implications of the minimum sentence provisions of Act 105 of 1997, and the agreement itself recorded that the parties were agreed that in the appellant's case there were no substantial and compelling circumstances which justified imposing a lesser sentence than the prescribed minima. There can be no doubt that the regional magistrate had due regard to the provisions of that Act. The sentences he imposed were the minima prescribed by Parliament for offences of this kind where no such substantial and compelling circumstances are found to exist.

8. The effective sentence of life imprisonment the regional magistrate imposed was the only appropriate one in the circumstances, having regard to the appellant's brutal and callous actions and his criminal record. A striking feature of this case is that, after raping Ms Coetzee at knifepoint, he stabbed and killed her in order to silence her. Although relatively young at the time of the offences in question – he was 24 years of age – by then he already had four relevant previous convictions, namely assault with intent to do grievous bodily harm committed on 29 November 2001, possession of an unlicensed firearm on

9 September 2002, assault committed on 14 November 2002 and assault committed on 30 May 2007.

27. In the result, and for the reasons set out in this judgment, the sentences imposed by the regional magistrate should stand.

28. I accordingly propose that the appeal be dismissed.

BREITENBACH, A J

I agree that the appeal be dismissed, and it is so ordered:

YEKISO, J

For the appellant: Adv. J E Losch
Cape Bar

For the state: Adv. N Ajam
Office of the Director of Public Prosecutions, Western Cape