IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A470/2011

DATE: 23 NOVEMBER 2012

In the matter between:

KELVIN POOVINTHREEN PILLAY 1st Appellant

TYRON STEWARD 2nd Appellant

and

THE STATE Respondent

J U D G M E N T

DAVIS, J:

This is an appeal against sentence, the context of which can be summarised as follows. Both appellants were convicted on 22 March 2011 as accessories after the fact to murder. Second appellant was also convicted on a charge of assault. Both appellants were sentenced on 8 April 2011 to eight years imprisonment and second appellant to a further 12 months imprisonment on the assault charge. Both appellants have appealed to this court against sentence only.

The facts of the case are well summarised in the judgment of the court *a quo* and, therefore, require only a brief exposition. It appears that on 22 February 2008, five Metro police constables conducted patrols in the areas of Grassy Park and Lavender Hill. They included the two appellants, together with one Jason February. According to the evidence, February and the appellants were in the van. At some point, according to the witnesses, they saw the deceased being chased by two Metro police officers, followed by a third officer. Shots were heard and the deceased was then seen being dragged off to the police van. At some point during the course of the patrol, the policemen came across another person, Cheslyn Jacobs, and arrested him for being in possession of a Tik lolly.

The thrust of the evidence was in effect that February and 2nd appellant had pursued the deceased, that shots were fired by February and the deceased was then dragged and placed in the van. During the course of these events, it became common cause, particularly as a result of the evidence which was given in court by second appellant, that he had assaulted Jacobs in the police van before latter was freed. Appellant 1 denied assaulting Jacobs and there was insufficient evidence insofar as this particular charge was concerned.

It then appears that at some point these police officers, in effect disposed of the body of the deceased by throwing it on a dump where other bodies apparently had been found in the past. Thereafter, the events which became relevant to the main charge unfolded. The evidence appears to be that it was February who had caused the fatal shots to be fired which killed the deceased. It appears further that the two appellants assisted February in carrying the deceased's body, placing him in the van and later disposing of the body, as I have indicated.

Furthermore, once this had been done, and Jacobs had been freed, the appellants had assisted February insofar as obfuscating the evidence which would otherwise have led to the discovery of the dastardly deed which had been committed. Appellant 1 helped February clean the van by shining a torch on the bloodspots and, therefore, assisted him to remove the incriminating evidence. Furthermore, the appellant 2 assisted in ensuring that their clothes were cleaned and that bloodstains were removed. In short, both appellants contrived to ensure that the crime that had been committed, namely the murder of the deceased, would not go discovered as a result of their efforts to remove incriminating evidence.

When the matter came before the Court *a quo*, it convicted the appellants as I have indicated. Jakuja, J, insofar as sentence

is concerned, made a number of points which are of particular import:

> "It is unsettling to learn that police officers could actually take the body of a person and dump it at a place that is known as a dumping round for dead bodies. Evidence before this court is that the place where they went to dump the body, is a knowing dumping place for dead bodies (sic). They are not very clear if they thought they could get away with this. They broke the very law that they took an oath to uphold."

The court *a quo* then considered the other relevant factors which go into the determination of the sentence. In the first place the court took into account that appellant 1 at the time was 35 years old and a first offender. He had not been married. He had no children but resident with his ill father. Although he had been dismissed from the Metro Police Force, he had begun a business running a driving school.

Appellant 2 was not married and was 29 years old at the time of the proceedings which gave rise to the sentence. He did have two minor children, with a possibility, as I understand it, that a third child would be born later, presumably on the basis

that his girlfriend was pregnant. Although he was unemployed, he had been promised employment in the security industry in the event that a non-carceral sentence was imposed.

The court *a quo* made two other points that bear repetition. Firstly, it noted that the appellants, as police officers, had a legal duty to prevent the crime from unfolding, rather than displacing that duty by inappropriate loyalty to February. Accordingly:

> "A message needs to be sent out to remind police officers that their loyalties lie first with the oath to uphold the law and that they are not above the law."

Furthermore, the court noted that accessories after the fact are usually treated more leniently than perpetrators. This was taken into, as was the fact of the "cruel and inhuman manner" in which the deceased had been killed. In the light of all of that set of considerations, the sentences I have indicated were imposed.

The approach to sentence in these matters on appeal, is well known. As set out in S v Malgas 2001 SACR 469 at 478 (SCA), an appeal court may interfere with a sentence imposed by the trial court, where the disparity between the sentence of

the trial court and the sentence which would have imposed, is marked to the extent that the appeal court can consider it to be shocking or disturbingly inappropriate. The only other basis by which this court may interfere is pursuant to some evidence of material misdirection.

What could this evidence be in the case that I have outlined? Mr Calitz on behalf of appellants raised four separate considerations. He submitted, on behalf of the appellants, the role that they had played were such not to justify a sentence of eight years of direct imprisonment as had been imposed. There had been no consideration of the possibility of rehabilitation and reintegration of appellants into society, so that they "could be given a second chance". There was further a question of the remorse which had been shown, presumably, amongst other things, by some of the evidence that they had provided to the court and their conduct. And finally, in respect of appellant 2, the assault charge which had carried the further sentence of one year should have been considered separately.

When these factors are evaluated together with the sentence within the context of appellate jurisdiction, as I have outlined it, the issue remains if these matters are to be taken into account, what weight is to be given to them and if they were not, is the weight of the other factors such as to justify

interference or confirmation of the sentence as the case may be? In this case the court is dealing with a profoundly disturbing and violent event. A man was murdered by a police officer. Two other police officers contrived to assist the murderer by

1. placing the body in the police van;

2. disposing of the body and then in various ways removing incriminating evidence.

The duty of the police is to protect the public from violence. The question may be asked in the circumstances of this case, who is to protect the public from their guardians, when the guardians turn their guns on the public? The court *a quo* was clearly aware of the magnitude of the crime in this case and accordingly imposed the sentences it did.

In my view, whatever remorse might have taken place subsequent thereto, it certainly was not sufficient to ensure that, within a short while thereafter, appellants had come to their senses, performed their duties as they should have done and reported the crime to the police station. It certainly does not excuse the fact that they sought to disguise a crime in the manner that they did, or as the court *a quo* has suggested, to

have shown adherence to their fiduciary responsibilities as police officers rather than to a rogue colleague.

It is correct that rehabilitation is a factor to be taken into account, but so are the interests of the community, the interests of the victim and the nature of the crime which was committed. It is further correct, as Mr Calitz submits, that accessories are treated, in many instances, more leniently than would be a perpetrator. He referred to S v McCarcey & Others 2002 (2) SACR 609 (T) at 614, where Cachalia, J (as he then was) noted with regard to section 257 of the Criminal Procedure Act 51 of 1977 that there was no indication in the legislation regarding minimum sentences, that when it came to accessories after the fact, a court did not have a discretion insofar as the imposition of punishment was concerned. The learned judge correctly noted:

> "While an accessory sentence may not be more severe than the sentence imposed upon the principal offender, such offenders are generally treated more leniently than the perpetrator when the court considers an appropriate punishment. The reason for this is that the accessory plays a less significant role in the commission of the crime."

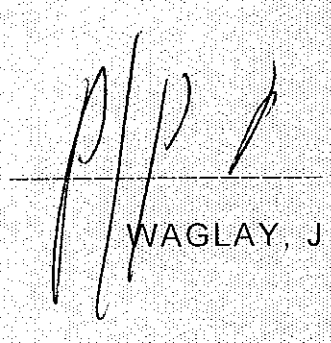
Of course, this begs the question: what would have been the sentence for the murderer had he been alive to stand trial? The answer is it would have been far in excess of eight years and rightly so. Therefore, the argument that the accessory has to be treated more leniently than the perpetrator, does not have any weight in this particular case. This court is concerned with one question: was the sentence appropriate or disproportionate in the context of this case? The answer, given the nature of the crime, the nature of who the appellants were, must be a resounding 'no'.

Insofar as the question of assault is concerned, it must be remembered that this was an assault on another person, on one Cheslyn Jacobs. It was a separate crime, unrelated to the murder and again was perpetrated by a police officer supposedly in the execution of his duties. A 12 months sentence for such a crime, can hardly be regarded as disproportionate or inappropriate in the circumstances of this case.

In the circumstances, therefore, the court *a quo* was correct in the approach that adopted. For that reason **I would dismiss the appeal and confirm the sentences**.

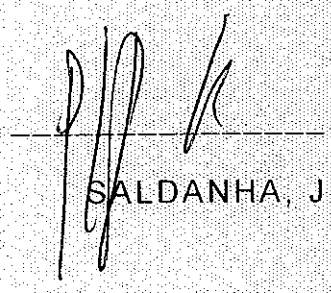
/bw /...

I agree:



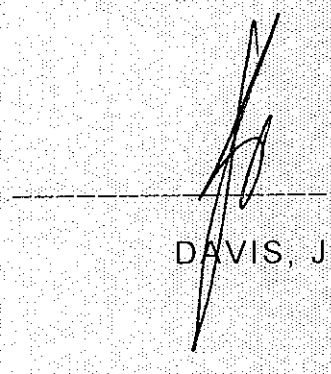
WAGLAY, J

I agree:



SALDANHA, J

It is so ordered:



DAVIS, J

/bw