REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 305/99

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS TRANSVAAL **Appellant**

and

DEXTER ALLAN ROBERTS **Respondent**

CORAM: GROSSKOPF, MARAIS, PLEWMAN JJA

DATE HEARD: 18 September 2000

DATE DELIVERED: 29 September 2000

Sentence - murder of ex-wife by strangulation - appeal by Director of Public Prosecutions against leniency of wholly suspended sentence of 15 years imprisonment - mitigating circumstances present - sentence altered to 7 years imprisonment.

JUDGMENT

MARAIS JA

MARAIS JA:

[1] A wholly suspended sentence of imprisonment of 15 years for murdering an ex-wife by strangling her is, to say the least, a highly unusual sentence. Disturbingly inappropriate, the product of misdirection by the trial judge, and therefore warranting interference upon appeal says the State. Whether that is so, is the question before us. It arises in this way.

[2] On 23 April 1998 respondent was convicted by Grobbelaar J in the Delmas Circuit Division of the murder of his ex wife. On 14 May 1998 he was sentenced to imprisonment for 15 years the whole of which was suspended for 5 years on condition, first, that he was not again convicted of any offence involving violence committed during the period of suspension and, secondly, that he commenced with therapy on a regular basis as directed by a particular psychiatrist, the cost thereof to be met by respondent himself. The Director of Public Prosecutions of the Transvaal considered the sentence to be unduly lenient but the relevant member of the staff failed to make application for leave to appeal against the sentence within the period prescribed by s 316 B of Act 51 of 1977. On 3 August 1998 an application in which condonation of the failure to timeously apply for leave to appeal against the sentence was sought was signed by the Director of Public

Prosecutions. For reasons which are not apparent from the record the application was heard on 9 November 1998 and refused by the trial judge.

[3] An application was made to the Chief Justice for leave to appeal against that order and the sentence. On 18 May 1999 it was ordered by this Court that if the appeal against the refusal of condonation of the late filing of the application for leave to appeal against the sentence should succeed, leave was granted to appeal against the sentence and both appeals were ordered to be heard conjointly. An explanatory note accompanied the order. It was pointed out that no leave to appeal was required in order to appeal against the refusal by the trial judge of condonation and that an appeal lay to this Court as of right.

[4] The appeal against the refusal of condonation was opposed by counsel for respondent on the ground that the appeal against the sentence had no or little prospect of success. It was not argued that the remissness of the relevant member of the staff of the Director of Public Prosecutions in failing to check what the applicable period was within which an application for leave to appeal had to be made was of itself fatal to the success of the appeal against the refusal of condonation. So it was that the hearing was devoted principally to the question of the propriety of the sentence.

[5] Viewed objectively and in isolation the crime is an horrific one. The medical evidence led at the trial and respondent's own extra-curial statements show quite clearly that respondent seized the deceased by the throat with both hands and then exerted very considerable sustained pressure until her eyes and tongue protruded, blood welled from her nose, and she dropped dead from his grasp. Attempts made by respondent at the trial to minimise the period for which he applied pressure to her throat and to suggest that cardiac arrest caused by pressure unwittingly applied to the vagus nerve came to naught. Respondent, when faced with the consequences of what he had done, placed the deceased's body temporarily in a bath to enable blood which was still emanating from her mouth to drain away and to avoid staining the carpet. He then hid the body for a few days in a manhole on the premises. In the end, he dug a shallow grave within the borders of the property and buried her there. For nearly six months he feigned ignorance of her whereabouts notwithstanding the distress which her unexplained absence was causing members of her family and their own twelve year old daughter.

[6] When it became apparent, quite coincidentally, that some excavation would take place which would inevitably result in the discovery of the body, he wrote a note to his brother in which he revealed where the

deceased's body was buried and left it to his brother to decide whether to disclose what he had told him or whether to pave the area over so that the body would not be discovered. Indeed, he offered to contribute R1 000 towards the paving of the area. His brother's decision to disclose what he had been told led to respondent making a confession to a magistrate.

[7] So seen, the crime is an abhorrent one which calls for severe punishment. It is yet another manifestation of the scourge of domestic violence which has become endemic in South Africa. Yet that is not the full picture. The crime and the subsequent reprehensible conduct of respondent must be seen in the context of his personal history and the tempestuous emotional relationship which existed between him and the deceased. To relate the history of that relationship in all its distressing detail will serve no useful purpose. It will suffice to paint the picture in the broadest of brush strokes. Respondent was 36 years of age at the time of his trial. He was unusually short of stature and suffered slights and humiliation throughout his life as a consequence. His emotional entanglement with the deceased was intense. She was 18 years of age when he met her. An intimate relationship ensued and she became pregnant. A daughter was born to them. They married in 1986 after she had attained the age of 21, her parents having been

unwilling to give their consent to their marriage before then. During 1987 the deceased became involved with one Fourie. It culminated in respondent divorcing her. The deceased and their daughter commenced living with Fourie.

[8] Respondent established a new relationship with another woman but it ended when the deceased left Fourie and returned to respondent. The reconciliation was short lived. The deceased left respondent after only a week. Respondent commenced yet another relationship with a woman but the deceased returned to him yet again and put an end to the relationship. Respondent and the deceased married one another for the second time.

[9] In September 1991 the deceased left the respondent again and went to live with one Payne in Cape Town. She took the child with her. In December 1991 the child spent some time with respondent. He simply refused to return her to the deceased and in due course divorced her for the second time, obtaining custody of their daughter at the same time. On 15 October 1992 respondent married another woman. The deceased in her turn married Payne.

[10] In December 1992 the deceased arrived unexpectedly at respondent's office. Sexual intercourse took place between them. The

resumption of a relationship with her bedevilled his relationship with his wife and culminated in him leaving her in February 1995. He moved to Cape Town. The deceased succeeded in tracking him down and again their relationship was re-established. In April 1995 respondent returned to Gauteng and rejoined the deceased in Benoni. In January 1996 his wife divorced him.

[11] Not long thereafter the deceased commenced another affair. On Friday 16 February 1996 he told her to leave. On Saturday 17 February the deceased telephoned respondent's mother to say that she would not be returning. On Wednesday 21 February 1996 respondent arranged to meet the deceased in order for her to hand over the keys of the cottage in which they had been living and to make arrangements for her to collect her clothes and other belongings. They met at the hotel at which she was accommodated that evening. Respondent consumed two "rum and cokes" while at the hotel. The deceased suggested that they dine at a Chinese restaurant in Bedfordview. Respondent needed to change his clothes and to borrow a car from his parents so they repaired to the cottage where he then lived.

[12] I take up the narrative in his own words as conveyed to the forensic criminologist who testified in mitigation of sentence on his behalf at

the trial. "While I was getting dressed at the cottage I wanted to know from Marion (the deceased) what was going on and why she was doing this to her family. We started to argue. She said that I was oversexed and I retaliated by calling her a whore due to the extra-marital relationships that she had had over the years. I asked her why she destroyed my relationship with Joyce after she had promised me that she loved me and that she really wanted me back. She told me that she couldn't live with me but that she didn't want anybody else to have me either."

[13] In another passage which appears in the report of the forensic criminologist he is reported as having said:

"I strangled, out of rage, my ex-wife Marion and buried her body and tried to get away with it. I left my wife for Marion. Marion wanted me to come back and I came back and moved in with her so my wife divorced me. In early 1996 Marion found a job. We were having strainful (*sic*) times and her boss became her lover. She was a whore to her boss who gave her clothes and money and on the 16th February I kicked Marion out of our common home. She moved into a hotel and on the 21st February I killed her. I loved her. With every bit of me I loved her. I enjoyed making love to her but she would rather have sex outside the marriage than with me. Marion and I started our

relationship built on good sex but as the years wore on she used sex as a prize, a reward and at an even later stage I had to agree to have sex every four days because she did not want it all the time."

[14] When he testified at the trial he described what happened after the deceased told him that she could not live with him, but could not allow anybody else to live with him.

> "Yes? — As an instinctive response I called her a whore, she slapped me in the face, I slapped her back, she slapped me again and then I grabbed her, I started shaking her. She was beating me with her arms on my shoulders. I was shaking her and shouting at her. I accused her of not having any, she didn't care about her daughter, that I did love her. I asked her why she was doing this and the next thing I recall is a popping noise .....(intervenes)
> Is a 'popping noise'? — Like somebody clearing their nose and she just (makes sound).
> A popping noise? — Yes, and blood gushed out of her nose. She went limp and very, very heavy and I dropped her, I realized that I was actually strangling her, I could not hold her up, and that (inaudible).
> MR SMIT: Just before she went limp, was she still reaching you. — It was all simultaneously, she stopped, she just went limp. She stopped hitting, and I could not hold her up. It all happened together, (inaudible).
> Okay she fell? — She fell on the ground. There was a lot of blood coming out of her nose and her mouth. Her extremities shook a bit, her legs and her arms for a couple of seconds maybe.
> COURT: For a couple of minutes or second? — A couple of seconds. I knew I had done something terrible here, because she looked dead to me. I felt her pulse, there was no pulse. There was still a lot of blood coming from her nose and mouth. I fetched a plastic bag from the kitchen and I put it over her head to stop the blood. It was pouring out onto the carpet. When that did not stop the blood I put her

into the bath.
Yes? — I didn't know what else to do. I closed the bathroom door and I went and I, I went and I lay on my bed and I fell asleep."

[15] Yet another description of what occurred was given by respondent to a magistrate on 30 September 1996. (It was common cause that the dates which appear in brackets in the description are the correct dates.)

"On the 13th of March 1996 (21 February 1996) it was a Wednesday. I phoned my ex-wife during the day to arrange to collect my keys from the cottage.
I met her at 08:00 in the evening at the Van Riebeeck Hotel. We had a drink and went up to a room and she gave me the keys. She then asked me if we could go and have supper and I agreed to do so.
We left at about 8:15 and went to my brother's cottage where we are staying. We started arguing about our relationship. We said nasty things to each other and started hitting each other. I strangled her. I just grabbed her by the neck, I stopped strangling her when the blood came from her nose.
It lasted about 3 to 4 minutes. She stopped hitting and kicking. She was dead. I killed her.
I put her body into the bath.
The following day at lunch time I moved her into a manhole outside the house. On Saturday the 16th March (24 February 1996) I buried her in a flower bed in the garden. That's it."

[16] The view of the forensic criminologist who testified in mitigation of sentence, Dr Labuschagne, was that long-term imprisonment of respondent would be counter-productive in his case and that non-custodial options coupled with psychological therapy would best serve the interests of

respondent and the community. In her written report her conclusion was expressed thus:

> "It is, with respect, my opinion that this crime was caused by human weakness. Although there are always choices, there are, however, both conscious and subconscious influences on those choices. There are many factors present that made Dexter vulnerable at the specific time of the offences. His motive - his reason for offending - is, when taking all his specific circumstances into account, understandable.
>
> He has no deep-seated desire to intentionally injure others. Constructive punishment - such as a medium term of imprisonment coupled with therapeutic assistance, will enable him to, upon release, live a conventional and law-abiding life. A harsh sentence now will finally crush Dexter. It will lead to a total personality breakdown and disintegration of an already fragile human being. While his act cannot be excused or condoned, his personal context, psychological circumstances and the context in which the crime was committed need to be seriously considered. These problems explain and, with respect, mitigate his conduct.
>
> Whilst offenders should be punished, there should also be mercy for those in our society who do need help and who committed their offence because of human frailty. Dexter's acts, in my opinion, stemmed from deep-seated emotional factors which have been unresolved over time. It is vital that he undergoes therapy to gain more understanding into ways of dealing and coping with his emotional life and gains skills in order to deal effectively with life's demands. He requires more insight and understanding in order to gain confidence in who he is as a person. Society will, in the long run, not gain by a long imprisonment in this case. It is my opinion, with the deepest respect, that constructive intervention now will prevent Dexter from becoming a very troubled person - a liability to his community."

Her report, as is to be expected, centred predominantly upon the interests of respondent which are suggested to be co-extensive with those of society in this particular instance. With much of what Dr Labuschagne said in her

report there can be no quarrel. Where it falls short, in my opinion, is in its failure to accord sufficient weight to the gravity of the crime and the need for the sentence imposed to serve as a deterrent to other members of society who may be minded to give vent to their frustrations by resorting to domestic violence.

[17] Respondent was convicted of murder on the basis of *dolus eventualis*. It is implicit in that finding that he did not desire the death of the deceased but that he appreciated at the time that his throttling of her could result in her death and that he persisted in doing so, not caring whether or not that consequence ensued.

[18] The desirability of therapeutic psychological treatment for respondent and the unlikelihood that it will be available in prison was allowed to play a significant role in the consideration of sentence. Assigning a high priority to that factor in the circumstances of this case was, in my opinion, uncalled for. That the trial judge was beset by doubts as to whether or not the sentence he intended imposing was appropriate, is evidenced by his concluding statements. He said: "After careful consideration of all the facts in this case and I am coming to this conclusion with extreme reluctance, I have decided to give you one final chance in life. I just hope that I am correct

in coming to this conclusion." Later, after imposing the suspended sentence, he said: "Now you have a few tasks ahead of you. You will have to show to the community that the trust which I possibly wrongly placed in you is warranted. Secondly you have a daughter to which you have got to make up and thirdly I accept that the deceased also has relatives. You will have to prove through your actions and behaviour in future, that I was not wrong in giving you this chance." The trial judge's subsequent refusal to condone the late application for leave to appeal against the sentence cannot alter the fact that he entertained those misgivings at the time when sentence was imposed.

[19] The circumstances in which an appellate court will interfere with a sentence imposed by a court of first instance are so well-known that they do not merit repetition. I had occasion to restate them earlier this year in *S v Sadler* 2000 (1) SACR 331 (SCA) at 334d - 335g. In my view, the sentence imposed by the trial court was entirely inappropriate and disturbingly so. Quite apart from the fact that it is plainly undesirable to impose a sentence of so great a length and then to wholly suspend it, the breadth of the condition of suspension is equally unacceptable. A conviction of common assault involving no more than a slap with a flat hand could potentially trigger the coming into operation of a 15 year prison term. However, there is a more

fundamental reason than those why that sentence cannot be allowed to stand.

[20] It fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships.

[21] On his own admission, this was not the first occasion upon which respondent had assaulted the deceased. He had struck her with his fist on the side of the head on a previous occasion. His physical stature had obviously proved to be no handicap in cementing intimate relationships with a number of women and, hurtful and wounding though the deceased's conduct towards him may have been, his brutal response to it, and his self-centred and cruel withholding of her fate from her family and their child for nearly six months calls for nothing less than direct imprisonment. The only question that remains is what length of imprisonment is appropriate.

[22] In answering that question it would be callous to leave out of account the mental anguish which respondent must have endured pending the hearing of this appeal. For some three months after the sentence had been

imposed by the trial court he was lulled into the belief that the law had taken its course and, fortunate though he may have considered himself to be, he was free to pick up the scattered threads of his life. That belief was shattered when the Director of Public Prosecutions set in motion an appeal against the sentence. He has had to live in suspense since then. I consider that a significant reduction of the notional period of imprisonment that would have been appropriate at the date when he was sentenced in May 1998 is warranted. In my view, a sentence of imprisonment for seven years should now be imposed.

[23] That conclusion necessitates the granting of the appeal against the refusal to condone the late application for leave to appeal against the sentence and of course the upholding of the appeal against the sentence. The sentence imposed by the trial court is set aside and there is substituted for it a sentence of seven years imprisonment.

[24] This case has highlighted the need for appeals of this kind to be disposed of as quickly as circumstances will permit. The need is particularly pressing where non-custodial sentences have been imposed and a Director of Public Prosecutions seeks to have a custodial sentence imposed on appeal. Applications for such leave should be brought with the minimum of delay

and priority should be given on the relevant appeal court's roll to such cases.

R M MARAIS
JUDGE OF APPEAL

GROSSKOPF)
CONCUR
PLEWMAN)