NOT REPORTABLE
DATE: 13 JUNE 2008

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A 576/2006

In the matter between:

YUGEN MOODLEY Appellant

and

THE STATE Respondent

JUDGMENT

HARTZENBERG J

[1] The appellant was charged with murder. It was alleged that he shot his wife on 2 December 2004 with a fire-arm. Although he pleaded not guilty and raised a defence that the deceased, who had threatened to commit suicide, was accidentally fatally wounded when he tried to remove the fire-arm from her possession, he was found guilty and sentenced to 15 years imprisonment. He was granted leave to appeal against the sentence imposed.

[2] After having been found guilty he consulted with one Truter a clinical

psychologist who worked for the S A Police and specializes in forensic work for more than 12 years. Truter prepared a forensic report for sentence purposes from which the following inter alia emerged:

2.1 The appellant had lied to court about the circumstances under which he shot the deceased because he was scared to go to gaol.

2.2 The appellant has a low IQ.

2.3 The appellant's mother dominated him and treated him like a little boy.

2.4 The appellant was deeply in love with the deceased and cared very much for their children and that he feared losing them.

2.5 That the deceased had left him with one of the children earlier during 2006.

2.6 That the deceased wanted him to arrange that he and his family could stay independently from his parents, but that due to his mother's domination he was not able to arrange such accommodation.

2.7 He was caught between his affection for his wife and his affection for his own family.

2.8 That the deceased only returned to him for the sake of the children and was aloof and failed to be intimate with him after her return.

2.9 That he feared that the deceased would return to her family and that he would lose her and one or both of the children.

2.10 He shot the deceased after a meaningless argument about a cellular telephone and from which her previous calls could be ascertained and confirmed.

2.11 That the deceased fled from the flatlet where they lived to the main

house of the parents on the premises and that he followed her having taken possession of the fire-arm that was usually kept in a cupboard.

2.12 That he was shocked and sorry about the death of the deceased.

2.13 Even after the death of the deceased, her family who always regarded him with fondness, had empathy with him and forgave him for what he had done. The children, who are now 10 and 12 years old also still dearly love their father.

[3] The learned magistrate found it difficult to find in favour of the appellant that he was truly remorseful about what he had done. If I understand it correctly, the approach was that in view of his fabricated evidence to exculpate himself it is impossible to accept that he is truly penitent. In this connection there is much force in Adv. Wilkins' argument that the appellant is no hero and is indeed scared of many things and that his fear of going to gaol overshadowed his better judgment and led him to concoct a story to avoid a prison sentence. Moreover the learned regional magistrate concluded that the appellant committed a "cold-blooded" murder. I have difficulty to go along with that finding. In my view the appellant was in an emotional state and committed a crime of passion when immensely angered. In saying so I must not be understood to say that anybody else or anything else but himself is to be blamed for his anger.

[4] On behalf of the appellant adv. Wilkins relies heavily on the decision in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) and argues that the appellant should as far as possible not to be given a custodial sentence. She

argues that the interests of the children are paramount, that the appellant is a single parent and primary caregiver and that it is in the children's interest that he is to be available to care for them. She indicates to us that the magistrate was not aware of the judgment. By the nature of things he could not have been aware of the judgment as it was only argued on 27 February 2007 and the appellant was sentenced on 11 May 2006. The learned magistrate did not specifically investigate the circumstances of the children and weigh up their rights in terms of section 28 of the Constitution against the interest of society to have serious criminal conduct appropriately punished.

[5] In paragraph 37, 38 and 39 of the aforesaid judgment in *S v M supra,* Sachs J explained that the State has a constitutional duty diligently to prosecute crime and to see that criminal misconduct is properly punished, but that that duty has to be balanced, on a case-by-case basis, with the duty to have the integrity of the family properly maintained. He said:

> "*The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the* ***Zinn*** *approach, one of which is a non- custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them."*

In paragraph 42 he proceeds to say:

> *"The paramountcy principle, read with the right to family care, requires that*

the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."

[6] It is clear from the aforegoing that the interests of the children of a person who is about to be sentenced are to be taken cognizance of. In cases where a non-custodial sentence may be an appropriate sentence it may very well be that the interests of the children, to be kept in a family environment, may tip the scales that a non-custodial sentence be imposed. Where however a non-custodial sentence will not be an appropriate sentence, even if the interests of the children cry for the care of the parent, the court will be constrained to impose a custodial sentence.

[7] The magistrate stated the following:

"*As giving due consideration to all these facts (the possibility to impose a sentence in terms of section 276(1) (i), the provisions of Act 105 of 1997 and in particular the fact that a regional magistrate's jurisdiction in respect of sentence is extended to 20 years imprisonment and that he was of the view that the appellant was not truly remorseful) I was of the view that 20 years imprisonment is indeed called for in this instance, as the deceased in this case did not provoke you in any way. So in the end this was actually senseless and as Mr. Truter put it in his report "cold blooded killing". Nothing but that. But*

we must give consideration to your personality traits, etcetera, and that is the only aspect and the fact that the family of the deceased seems to have reconciled with you and there are children involved, etcetera, that caused me not to impose the 20 years imprisonment."

[8] Thereafter the magistrate indicated that although he had been asked to invoke section 276(1) (i) he regarded a sentence in terms thereof totally inadequate in this case. He then remarked that the people that remain behind are the ones that suffer most. It is so that in Truter's evidence he described the appellant as an involved parent who acts in the best interests of the children. He also indicated that the children had the support of the grand parents. The magistrate clearly had that evidence also in mind when he imposed sentence.

[9] The magistrate's approach that a non-custodial sentence was the only option in this case can, in my view, not be faulted. It would be a sad day if the conduct of someone, who in a rage, not provoked by the other person, gets hold of a weapon and kills that person, is made off as not so serious as to warrant imprisonment. It follows then that although the magistrate had to take cognizance of the needs of the children he had no option but to sentence him to a term of imprisonment. The only question was what an appropriate term of imprisonment was.

[10] It is clear that the appellant committed a crime of passion. Ordinarily he has no criminal tendencies. His fears that he would lose his wife and children overcame him and caused him to act the way he did. In his case there is no question

about rehabilitation. It can be accepted that this was a once-off action. In my view the magistrate overstressed the appellant's lack of candour to the court when he gave evidence and the magistrate did not attach enough weight to the fact that the appellant was besides himself out of anger when he shot the deceased. In my judgment a term of imprisonment of 10 years would be an appropriate sentence.

The following order is made:

1. The appeal succeeds.
2. The sentence imposed by the magistrate is set aside and substituted with the following: "10 (Ten) years imprisonment".
3. The sentence is back-dated to the date on which the magistrate imposed sentence.

W J HARTZENBERG
JUDGE OF THE HIGH COURT

I agree.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

HEARD ON : 9 June 2008

ON BEHALF OF THE APPELLANT

Counsel : P A Wilkins
Instructed by : BOTHA BOOYENS & VAN AS ATTORNEYS
C/O GERHARD STOOP ATTORNEYS

ON BEHALF OF THE RESPONDENT

Counsel : V L N Davhana
Instructed by : THE DIRECTOR OF PUBLIC PROSECUTIONS