(Inlexso Innovative Legal Services) hvr

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA (BENONI)

CASE NO: CC155/2018

DATE: 2020-08-25

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES : YES / NO
(3) REVISED

.....
SIGNATURE

DATE: 8/10/2020

In the matter between

THE STATE

and

CHARLES PETER BARKER Accused

SENTENCE

BROODRYK, AJ: The accused, a 42 year old male, currently an inmate at the Modderbee Prison, where he is serving a sentence, has been convicted of the following offences:

Count 1: Murder read with the provisions of section 51(1) of Act 105 of 1997, that is the Criminal Law Amendment Act. He was convicted of a premeditated murder, the deceased being

one Adriana Coke.

Count 2: He was further convicted in respect of Count 2, of attempted murder where the complainant was one Betina Anne Coke.

Both these incidents occurred on the 5th of March, 2018, at 171 Kempston Street, Benoni West. After conviction, the state proved previous convictions which, according to the form SAP69 was under the name of one David Swanepoel, that is the same person as the accused before Court. According to the form SAP69, the accused was convicted of assault on 29 October 2003, and he was sentenced to a fine of R1000 or four months imprisonment, totally suspended for a period of five years. Furthermore, he was convicted of murder, on 24 May, 2005, in the High Court in Pretoria and he was sentenced to 14 years imprisonment.

In respect of this sentence of murder, the state appealed and on appeal the sentence was increased to 20 years. A judgment of the Supreme Court of Appeal under case 261/2006 was handed up and the contents thereof was formally admitted. As I have stated, the sentence was increased to that of 20-year imprisonment, the date of the judgment of the Supreme Court of Appeal is the 1 December 2006.

I should add that the accused admitted his previous convictions. The accused was released on parole on the 18 June 2015, his parole-period would have stretched until 15

March 2025. As a result of his arrest in this case, he was readmitted and he is thus serving sentence in respect of the 2005 murder.

After proving the previous convictions, Ms Harmsen for the state applied for an order in terms of section 286A of the Criminal Procedure Act, that the accused be declared a dangerous criminal. In this regard, a psycho-social report by one Rene Pretorius, was handed in by consent as was marked as EXHIBIT L. I should add that this was a report handed in during the accused trial, for the murder in 2005.

For that purpose, the accused had to be referred to Weskoppies Mental Hospital for an inquiry, in terms of section 286A(3) of Act 51 of 1977. In terms of section 286A(3)(a) the Court is vested with a discretion to refer the accused for such an inquiry. After hearing argument by the state, by Ms Harmsen, and no submissions by Ms Fick at that stage, I, in exercise of my discretion, decided not to refer the accused for such an inquiry. Briefly my reasons for declining to make such an order, is the following, it is often said that:

> "Sentencing is pre-eminently a matter for or within the discretion of the trial Court."

See *State v Sadler* 2001 SA Law Reports 331 (SCA) para 6. However, section 286A prescribes that once the finding of the psychiatrists in respect of the inquiry, is unanimous in subsection (4)(a) of section 286A, that is that the accused is a

dangerous criminal and that the Court declares the accused a dangerous criminal, the Court shall, in terms of section 286B(1)(a):

> "...sentence such a person to undergo imprisonment for an indefinite period."

In other words, this is a peremptory provision and I am uncomfortable with that. To me, it seems as if the Court is a mere rubberstamp of the finding of three psychiatrists and my discretion is impaired. It seems a strained and artificial procedure. See in this regard, Du Toit, *Commentary on the Criminal Procedure Act* 28-24 G in its comments on section 286B.

> "After having declared a person a dangerous criminal, the Regional Court and Supreme Court therefore have no option but to sentence the accused to undergo imprisonment for an indefinite period. It is unfortunate that the legislature found it necessary to bind the discretion of the trial court."

I emphasise the last sentence:

> "It is unfortunate that the legislature found it necessary to bind the discretion of the trial court."

I accept that declaring an accused a dangerous criminal, in terms of section 286A and 286B, has been found to be Constitutional. In this regard, I refer to the case of *State v Bull and Another*; *State v Chavulla and Others* 2001 (2) SACR 681

(CC). So, without making a firm finding thereon, I am uncomfortable in following the procedure of declaring an accused a dangerous criminal.

In any event, following the decision of *State v Makwanyane & Another* 1995 (2) SACR 1 (CC) of the Constitutional Court, which abolished the death penalty, the judgment clearly stated that life imprisonment is now regarded as the ultimate sentence, replacing that of the death penalty.

In *casu* the case was then postponed for a pre-sentence report as well as victim impact statements which the state wanted to rely on. The case was postponed on several occasions and then it proceeded on 24 August 2020. A pre-sentence report marked EXHIBIT M as well as the victim impact reports, marked as EXHIBIT N, was handed in by agreement between the parties, and I have had due regard to the contents thereof.

The state and the defence both presented heads of argument for which I am very grateful. The state argued that there were no substantial and compelling circumstances and that the accused should be sentenced to life imprisonment, in respect of Count 1 and to at least 15 years in respect of the Count 2.

Ms Fick for the accused, and correctly so, conceded that there were no substantial and compelling circumstances present and agreed in broad terms with the sentences

suggested by the state.

Both counsel then also submitted that a non-parole-period of 25 years, be fixed. As to section 103 of the Firearms Control Act 60 of 2000, Ms Fick conceded that no such order had to be made, as the accused by his mere conviction on the offences in *casu*, is automatically regarded to be unfit to possess a firearm.

Sentencing is always difficult. Although in *casu* the task is somewhat ameliorated by the able assistance I received from counsel, and even more their concurrence as to the proposed sentences.

In *State v Zinn* 1969 (2) SA Law Reports 537, a judgment of our then Appellate Division, it was stated that the Court had to consider the following factors in imposing sentence. It has to consider the interest of society, the personal circumstances of the accused, as well as the nature and gravity of the offence.

The Court must then also consider the well-known objectives of sentencing, that is prevention, rehabilitation, deterrence and retribution. I do not deem it necessary to deal with the Criminal Law Amendment Act 105 of 1997, in detail, as the state and the defence are ad idem that there are no substantial and compelling circumstances and that in respect of Count 1, a sentence of life imprisonment is therefore to be imposed.

Ex abundanti cautela I however find that there are no substantial and compelling circumstances either singularly or seen collectively present in order to deviate from a prescribed sentence. Similarly, in respect of Count 2, that is the count of attempted murder, both counsel are ad idem that direct imprisonment is called for.

The personal circumstances of the accused are dealt with in detail, in respect of both the socio-psychological report handed up during the previous murder trial, as well as the pre-sentence report handed up in this case.

It is summarised in paragraph 4 of Ms Fick's heads of argument, and I briefly refer thereto. I quote from her paragraph 4, from Ms Fick's heads of argument:

> "Further to the personal information and circumstances as set out in the report of Ms Portia Morudi, dated 24 August 2020, the following may be noted. Personal circumstances and information:
>
> (1) The accused is 42 years old.
>
> (2) The accused is a third time violent crime offender, having admitted his two previous convictions:
>
> 2003 - Assault with intent to do grievous bodily harm, and
>
> 2005 - Murder and robbery with aggravating circumstances."
>
> The way I read the SAP69 it is actually a charge

of assault, but I notice that the suspensive conditions referred to assault with the intention to do grievous bodily harm, so I am not so sure whether the SASP69 was completed correctly.

(3) The accused is unmarried, he is the father of two children. He has no contact with his son, Danillo, but maintains a good relationship with his daughter, Zoe Graull, 18 years old who has between adopted by the mother of the accused. The accused does not contribute towards the maintenance of Zoe.

(4) Prior to his arrest on the current crimes, the accused was employed as a branch manager, at Sprinter Zone.

(5) While serving his sentence of 20 years, on the 2005 conviction, the accused completed his studies and obtained a diploma in mechanical engineering in 2012, and also qualified for his Red Seal Artisan Certificate, in Diesel and Petrol Mechanics.

(6) Apart from clothing and some personal items, the accused does not own any moveable property.

(7) The accused does not own any immoveable property.

(8) The accused was diagnosed with epilepsy and

> takes chronic prescribed medication for his condition. The accused has previously undergone surgeries to his abdomen in 2012 and his left arm in 2004."

This is a helpful summary of the reports as handed in by consent.

There is no doubt that the accused had a traumatic childhood and the state concedes as much. However, I also agree with the state that the credibility of some of the allegations of sexual abuse by his father, is in some doubt. If one has cognisance in respect of both reports, there are clearly some contradictions and improbabilities in this regard. However, I will accept that he had a traumatic childhood.

Ms Fick, in her heads of argument also referred to the finding of the panel of psychiatrists dated 30 August 2019, where the accused was diagnosed as having an antisocial personality disorder. I quote from paragraph 15 from her heads.

> "It is further important to keep in mind the finding of the panel of psychiatrists at Weskoppies Hospital (dated 30 August 2019) diagnosing the accused with antisocial personality disorder. This disorder is defined as 'a mental health disorder characterised by disregard for other people. Those with antisocial personality disorder, tend to lie, break laws, act

impulsively and lack regard for their own safety or the safety of others.'

This definition is obtained from Online Medical Definitions, 2020 from the Mayo Clinic.

The state has pointed out that there are several aggravating factors, and I agree therewith. In this regard I refer to paragraph 4 of the state's heads of argument. In D 4.1 the following aggravating factors are noted:

"The impact of the crimes on the victim and her family is discussed in the detailed statements. the main aggravating factors can be stipulated but are not limited to the following:

(i) The deceased lost her life.

(ii) The deceased was 21 years old and still had her whole life in front of her.

(iii) The deceased was murdered in a brutal and coldblooded way.

(iv) The accused did not show any remorse.

(v) The accused also displayed a prominent refusal to take any responsibility for any of his actions including the actions that cause the marriage to be unhappy.

(vi) The accused belittled and humiliated the victim and the deceased until the last opportunity in court.

(vii) Domestic violence and gender-based violence is a plague which causes great trauma to thousands of children in our country.

(viii) The accused is the creator of his own misfortune.

(ix) The deceased viewed the accused as a father figure.

(x) The complainant sustained penetrating stab wounds, one which passed the abdominal wall. The complainant was hospitalised from 5 to 12 March 2018 and received physiotherapy and occupational therapy for several months after the incident.

(xi) The complainant had to learn to write again.

(xii) The accused is not a first offender, he is prone to violence and was on parole when he committed the offence.

(xiii) The accused saw his parole officer on the morning before he killed the deceased.

(xiv) The Court found that the murder was planned and not committed on the spur of the moment.

(xv) The prevalence of these types of offences

is alarming.

(xvi) The family of the deceased is devastated by the loss of the deceased."

I agree with the aggravating features as pointed out by the state. If I have regard to the heads of argument filed by Ms Fick, it is clear that she does not, in her heads, really dispute these aggravating features.

As to the seriousness of the offences, as well as the interest of society, I can really do no more than start off by quoting from *State v Pillay* 2018 (2) SACR 192 Judgment of Henriques, J, of the KwaZulu Natal Local Division:

"(1) Violence by men towards women is endemic in this country. South Africa's femicide rate is five time higher than the global average. It is the duty of Courts to impose harsh sentences to recognise the seriousness of the situation."

As pointed out by the state in paragraph 3.1.6 of her heads of argument, both probation officers expressed their view that the accused is a violent person, a danger to society and that he may reoffend.

In this regard, I refer firstly to the report by the psychological report dated 28 May 2005, at page 20, the last paragraph and I emphasise the date of this report, as 28 May 2005. This report was drawn up by one Rene Pretorius, who describes herself as a probation officer. It is in Afrikaans and I

will just quote the last paragraph on page 20:

> "Daarteenoor is die kommer dat hier 'n persoon voor die hof staan wat beskou kan word as 'n gevaar en 'n risiko tot verdere misdaadpleging en veral om hom weer skuldig te maak aan 'n geweldsmisdaad. Die beskuldigde het self aangedui dat hy geen waarborg kan gee dat hy hom nie sal kan weerhou van geweld nie."

That is now stated in 2005. Then I refer to EXHIBIT M, that is now the report, the pre-sentence report drawn up for this case, which is dated 24 August 2020, in other words, 15 years and three months later.

I specifically refer to the last page of this report where Ms Morudi states as follows - it is actually the second last page. It is in the second paragraph from the top on page 15:

> "The accused has been found guilty on the charge of murder and attempted murder. He has attempted to murder his fiancé and has killed the daughter of his fiancé. The accused has previous convictions of murder and assault with intent to do grievous bodily harm. He is not showing remorse towards the offence he has committed, rather he is blaming the victim for his actions. However, the Court has found him guilty. The accused stabbed both the victim and the deceased more than once, which clearly indicates

that he had the intention of killing. The probation officer is of the view that the accused is a violent person who is committing similar offences, he is a danger to the society.

Given the circumstances the probation officer is of the opinion that the has committed offences, which are serious in nature, that is not in the best interest of society and it is punishable by a Court of law. It should be considered that such offences are prevalent in the society and impact negatively on the safety of societies."

I then quote from the last page:

"(d) The probation officer is of the opinion that this is a suitable sentence (and she refers here to direct imprisonment), to impose and recommends that it should be considered. The accused is not showing remorse, rather he is blaming the victim for his actions.

A life has been lost, the victim has suffered trauma of losing her only child and furthermore she has sustained injuries from the stabbing, that happened while she was trying to protect the deceased. The way the crime happened clearly indicates that the accused is a violent person and he is a danger to the society, and the

society needs to be protected from people like him. The possibilities of him reoffending are very high.

The Court should further consider the psychological and emotional effects the accused has caused the victim. There is no doubt that the actions of the accused destroyed the family and the emotional wellbeing of the complainant and her whole family."

It is important to note that the similar type of finding in two probation officer's reports, more than 15 years apart, is significant. Clearly the accused is still the same person, and has not rehabilitated and probably never will. He is still a danger to the society and it is the Court's duty to protect society from him.

It appears that in this case, the accused displayed an attitude of no respect for those of the female gender. Clearly he does not know how to treat women, and only shows contempt by his behaviour.

If one takes a holistic view of the psycho-social and pre-sentence reports, one things becomes abundantly clear, and it is like a golden thread throughout the reports, that the accused can only be described as a very selfish person, who never takes any responsibility for his own actions. Nothing is ever his fault.

Similarly, there is no question of any remorse, as he defiantly and arrogantly refuses to acknowledge any insight or responsibility for the most serious crimes he has committed.

I refer in this regard to the well known case of *State v Matyityi* 2011 (1) SACR 40 (SCA) and specifically refer to paragraph 13 in this regard, I do not deem it necessary to go into whether regret or remorse has been indicated, because there is nothing of any of that.

It is therefore clear that the accused is nothing else but a brutal, vicious killer, and should and is deserving of a life imprisonment in respect of Count 1. The state has furthermore submitted that the Court should also fix a non-parole-period in respect of Count 1. Ms Fick on behalf of the accused, is ad idem therewith. I then refer to section 276B of the Criminal Procedure Act:

> "(1)(a) If a Court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the Court may as part of the sentence, fix a period during which the person shall not be placed on parole.
>
> (b) Such period shall be referred to as the non-parole-period and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter
>
> (2) If a person who is convicted of two or more

> offences, is sentenced to imprisonment and the Court directs that the sentence of imprisonment shall run concurrently, the Court, shall, subject to (1)(b), fix the non-parole-period in respect of the effective period of imprisonment."

Furthermore it is clear that it is not necessary for the Court to order a term of imprisonment it intends to impose in respect of Count 2, that is the count of attempted murder, to be served concurrently with the sentence imposed in respect of Count 1, as section 39(2)(a)(i) of the Correctional Services Act, states as follows:

> "(i) Any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence..."

In terms of section 276B(1)(b), the non-parole-period must clearly be that of 25 years. As two thirds of a life imprisonment is not a determinate sentence, or put otherwise, cannot be calculated. Therefore, a period of 25 years is the shorter one. On this, the state and the defence are ad idem, in other words, that the non-parole-period should be that of 25 years.

The state then, in its heads of argument, referred to *State v Stander* 2012 (1) SACR 537 (SCA). I want to refer to this judgment. This is the judgment in the Supreme Court of Appeal, where Snyders, Judge of Appeal, writing for the full

bench, stated as follows:

> "16. Seen in this context, s 276B is an unusual provision and its enactment does not put the Court in any better position to make decisions about parole than it was in prior to its enactment. Therefore, the remarks by this Court, prior to section 276B still hold good.
>
> An order of section 276B should therefore only be made in exceptional circumstances, when there are facts before the sentencing Court, that would continue, after sentence, to result in a negative outcome for any future decision about parole. Mshumpa offers a good example of such facts, namely undisputed evidence that the accused had very little chance of being rehabilitated."

Earlier on in this judgment, in paragraph 10, reference is made to the case of *State v Mshumpa*, I quote from page 543, at paragraph 10, next to the small letter 'b' that is at page 543:

> "Froneman, J, in *State v Mshumpa and Another*, 2008 (1) SACR 126 (EC) made a non-parole order in circumstances of which he said that:
>
> 'It is difficult to conceive of a more aggravated form of assault on a pregnant mother, than the attempted murder on Ms Shelver in this matter.'

He also referred to the undisputed evidence by a psychologist that the accused suffered from an antisocial personality disorder which, in lay terms manifested as self-centredness, deceitfulness, manipulative behaviour and a lack of conscience - all found to have been features of the conduct of the accused in the commission of the crimes."

It is clear that this reference to the case of Mshumpa is very much apposite with the facts in this case, as he has also a finding of the same type of disorder as described in Stander's case as antisocial personality disorder.

In its argument, the state then referred with reference to this question of whether exceptional circumstances exist, for the Court to fix a non-parole period and I quote from her heads, it is noted as paragraph 6.4, but it should actually be 6.6.

"6.6 It is respectfully submitted that the pattern of violent behaviour by the accused, the diagnosis by Weskoppies Hospital of antisocial personality disorder, the danger to society, the inability of the accused person to control his anger, and the improbability that the accused will rehabilitate, are exceptional circumstances that warrants the imposition of a non-parole-period."

I agree with that and I add thereto, the significance that I drew earlier of the two probation officers or psycho-social reports, drawn up 15 years apart, which still give the same diagnosis. The community must be protected against the accused.

In respect of Count 2, the state has argued that the accused should at least be sentenced to a period of 15 years direct imprisonment.

Bearing in mind the serious nature of the injuries as alluded to earlier, with reference to the four stabwounds, the fact that in time it took place after a brutal murder of the daughter of the complainant, as well as the accused previous convictions for violent crimes, a sentence in excess of 15 years imprisonment is justified.

Mr Barker please rise.

[1] In respect of Count 1, that is the murder read with the provisions of section 51(1) of Act 105 of 1997, you are sentenced to life imprisonment.

[2] In respect of Count 2, that is the count of attempted murder, you are sentenced to 18 years imprisonment.

[3] In terms of scene 276B(1)(b) of Act 51 of 1977, the non-parole-period is fixed at a period of 25 years, from the date of the sentence imposed in respect of Count 1, that is the sentence of life imprisonment.

[4] No order in terms of section 103(1) of the Firearms Control Act, Act 60 of 2000 is made.

- - - - - - - - - - - - - - - - - -

Do you understand your sentence, Mr Barker?

ACCUSED: I understand, Your Honour.

- - - - - - - - - - - - - - - - - -

.....

BROODRYK, AJ

ACTING JUDGE OF THE HIGH COURT

DATE: 8/10/2020

FOR THE STATE:
Advocate CP Harmzen
Instructed by the Director of Public Prosecutions, Pretoria.

FOR THE ACCUSED:
Adv L Fick
Instructed by AJ Venter Incorporated