REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG
CASE NO: 164/2012

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

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DATE SIGNATURE

In the matter between:

THE STATE

and

JUSTIN PIERRE RAUTENBACH **THE ACCUSED**

SENTENCE

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1. The accused has been found guilty of five counts:

   1.1. Murder

   1.2. Theft

   1.3. Unlawful possession of a firearm

   1.4. unlawful possession of ammunition

   1.5. unlawful possession of cannabis and methaqualone.

2. It is now well established that a just and fair sentence is one that takes into account the gravity of the crime, the personal circumstances of the criminal

and the societal interests.[1] In the course of taking these factors into account the courts have, at times, drawn on concepts such as retribution, deterrence and rehabilitation to determine what a fair and just sentence would be.

Count 1

3. The deceased is the late father of the accused, the accused's two siblings and the late step-father to the children of his second marriage. He is also the late lover of Peggy.

4. He was shot in the most brutal fashion. The accused made sure that the deceased would not survive the shooting.

5. The taking of the life of another person is an act that is justly scorned by society. Society demands that the offender in such a case is appropriately punished. This demand is expressed in *s 51 of the Criminal Law Amendment Act 105 of 1997* ("the Act") which provides for minimum sentences for certain serious offences such as the one *in casu*. In terms of s 51(2) read with Schedule 2 of the Act, this court is enjoined to impose a minimum sentence of fifteen years imprisonment unless the court finds that there are "*substantial and compelling circumstances*" to warrant a lower sentence. This minimum sentence is to be imposed to, *inter alia*, reflect the view that society regards the severity of the crime of taking another person's life in a serious light and to ensure that the punishment meted out is consistently applied to all perpetrators of this crime. The legislature has deliberately left it to the courts

[1] *S v Zinn* 1969 (2) SA 537 (A)

to determine whether any circumstances specific to a particular case are "*substantial and compelling*" enough to warrant a departure from the minimum sentence of fifteen years imprisonment, for the circumstances are normally specific to a case. The circumstances must "*cumulatively justify a departure from the standardised response that the Legislature has ordained.*"[2] The minimum sentence, however, is not to be deviated from for "*flimsy reasons.*"[3] In sum,

> "*If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society,* (the Zinn triad) *so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.*
>
> *In so doing, account has to be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.*"[4]

6. This approach has been endorsed by the highest court in the land.[5]

7. The accused did not present any testimony demonstrating that there are substantial and compelling circumstances warranting the imposition of a lesser sentence than the one prescribed by the Legislature for count 1. He

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[2] *S v Malgas* 2001 (1) SACR 469 (SCA) at [25]
[3] *Id.*
[4] *Id.*
[5] *S v Dodo* 2001 (1) SACR 594 (CC) at [11]

deemed it necessary to present certain facts from the bar and asks that they be taken into account for determination of an appropriate sentence. They are:

7.1. he is thirty eight years old,

7.2. he is a first offender;

7.3. he had left school after completing standard eight;

7.4. he has a child who is eight years old residing in the U.K and that when he could, he sent some money to the mother for the benefit of the child;

7.5. he has qualified as a boilermaker

7.6. at the time of the murder he was employed in an electronics company earning ten thousand rands per month;

7.7. the murder was not premeditated;

7.8. the deceased was his father, whom he loved dearly;

7.9. on the day of the murder he had taken brazipam tablets with alcohol and this diminished his moral blameworthiness

7.10. there is no need to protect society from him as his crime was not directed at any random member of the public but was a result of a domestic conflict that got out of control;

8. These factors in my view do not constitute "s*ubstantial and compelling circumstances*" warranting a reduction of the minimum sentence prescribed by the Act. Most of them are circumstances ordinary to most people's lives. However, strong emphasis was placed on one of these factors: the supposed impact of his intoxicated state. It was submitted that this resulted in the

diminishing of his moral blameworthiness. In support of this claim, reliance was placed on a number of cases, namely *S v Cele*[6], *S v M*[7] and *S v Raath.*[8]

9. In *Raath* there was "*a considerable body of evidence that, as a result of the very substantial quantity of alcohol consumed by the appellant on the night* (in question) *his faculties were substantially impaired and thus his moral blameworthiness was diminished.*"[9] There is no such evidence in this case.

10. In *S v M* the accused had consumed "*alcohol during the entire day and by nightfall*", and by the time he committed the crime, he *was* "*thoroughly intoxicated.*"[10] Again, there is no evidence in this case as to how intoxicated the accused was at the time he murdered the deceased.

11. In *Cele* the Court found that "(t)*his was, in other words, not one of those cases where the accused is simply shown to have consumed some liquor. The finding that it diminished the accused's moral blameworthiness carried with it the corollary that intoxication had impaired or affected their mental faculties or judgment and thereby influenced them in regard to the crime.*"[11] In our case, there is no evidence that the accused's "*mental faculties or judgment was impaired* "at the time he committed the crimes, especially the crime of murder.

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[6] 1990 (1) SACR 251 (A)
[7] 1994 (2)SACR 24 (A)
[8] 2009 (2) SACR 46 (C)
[9] *Id.* at [28].
[10] n 7, at 26d
[11] n 6, at 255b-c

12. Hence, the evidence in this case does not allow for drawing of the conclusion that the accused's control of his senses was so weak as to significantly diminish his moral blameworthiness. Accepting that he consumed alcohol with brazipam that day, this does not mean that his moral responsibility was diminished at the time he committed the murder, which was at about 21h00. The evidence shows that: (i) As soon as he committed the murder, he had sufficient control of his senses to search for the money and bank card, which he claims to have given to the deceased; (ii) to further take the decision to steal the property of the deceased; (iii) to lie to Macfarlane about the death of the deceased; (iv) to start the deceased's car without the keys, i.e. to "*hotwire*" it; (v) to drive the car to Solly Kramers and to Freddies; and, (vi) to attempt to sell the stolen property to the bartender at Solly Kramers and thereafter to Freddie. All this took place immediately after the murder. Thus, whatever the impact of the alcohol and brazipam, may have been it certainly was not of such a nature as to have affected his judgment to such an extent that he was unable to take any of the decisions which underlay the actions he took immediately after committing the murder. Thus, it would be incorrect to draw the inference that the consumption of alcohol and brazipam during that day impaired his ability to make a rational decision to such an extent that it diminished his moral blameworthiness.

13. As I hold that the evidence does not demonstrate that the consumption of the alcohol by the accused affected the crime of murdering the deceased, it does not, in my view, constitute "*substantial and compelling circumstances*" warranting a lesser sentence than the one prescribed in the Act. The

minimum sentence prescribed in the Act is fifteen years and I hold that given the gravity of his crime this sentence is not excessive.

Count 2

14. As regards count 2 it was submitted on behalf of the accused that the items stolen consisted of bedding and clothing and were of so negligible a value that it does not warrant a sentence of imprisonment. No evidence was presented as to the value of these goods. However negligible in value the goods may be, the crime should not be treated as a trivial one. The very act of stealing them after the deceased was out of the way and the fact that they were taken with complete disregard for the deceased who lay dead in the garage, demonstrates the callousness with which the accused carried out this crime. His actions in this regard demonstrate the extent to which he had immunised himself of any feeling for the deceased. Society would rightly consider this an abhorrent act. It warrants severe punishment.

Counts 3 and 4

15. It was not submitted on behalf of the accused that a sentence of imprisonment is not warranted for the conviction on these counts. However, it was submitted that the sentence of imprisonment imposed for the conviction on these counts should be ordered to run concurrently with the sentence of imprisonment imposed for the conviction of count 1.

Count 5

16. It is common cause that an appropriate sentence for this conviction would be one that avoids imprisonment. I agree that the amount of cannabis and methaqualone for which the accused has been convicted is so small that it does not warrant a sentence of imprisonment.

General

17. A factor that should be taken into account is that the accused did not express any remorse for the crimes for which he has been convicted: be it for the murder, the theft, the unlawful possession of a firearm, the unlawful possession of ammunition or the unlawful possession of cannabis and methaqualone.

18. This Court is required to take appropriate notice of the fact that the accused has spent one year and four months in custody awaiting trial. In *S v Brophy and Another*[12] a full bench of this Court endorsed the approach of Schutz J (as he then was) who, in *S v Stephen and Another*[13] to the effect that: "*Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length.*"[14]

19. An appropriate sentence for the murder in this case is 18 years. It is necessary to take note of the fact that the accused has spent approximately one year and four months in custody awaiting trial. In terms of *Brophy* this, strictly speaking, is equivalent to spending two years and eight months in

[12] 2007 (2) SACR 56 (W) at [19]
[13] 1994 (2) SACR 163 (W)
[14] *Id.*

prison as a sentenced prisoner. However, in *Brophy* the Court after determining the appropriate sentence did not reduce it exactly by two times the amount of time spent in custody awaiting trial. In that case accused 1 had spent four years and four months in custody. Finding that the appropriate sentence was twenty-four years imprisonment, the Court reduced this by eight years and imposed a sentence of sixteen years imprisonment. Thus, the guideline that time spent in custody awaiting trial is twice the time spent as a sentence prisoner is not to be applied mechanistically.

20. Taking all the factors mentioned above into account it is the decision of this court that a fair balanced and just sentence to be imposed upon the accused is as follows:

20.1. On count 1: 16 years imprisonment;

20.2. On count 2: 8 years imprisonment;

20.3. Counts 3 and 4 taken together: 4 years imprisonment;

20.4. Count 5: 6 months imprisonment suspended for 5 years on condition that you are not convicted of the same offence during the period of the sentence.

21. Six years of the sentence imposed for count 2 shall run concurrently with the sentence imposed for count 1. The entire sentence imposed for counts 3 and 4 shall run concurrently with the sentence imposed for count 1. The sentence imposed for count 5 shall take effect from the date of this judgement.

22. Thus, the accused is sentenced to an effective period of 18 years imprisonment.

23. The accused is declared unfit to hold a firearm licence in terms of s 103 of Act 60 of 2000.

Vally J
Judge of the South Gauteng High Court
Palm Ridge

Appearances:

For the State	:	Adv L Gcaba
For the Defendant	:	Adv E Guarneri
Instructed by	:	Legal Aid Board

Dates of hearing on sentence : 26, 27 March 2013
Date of judgment on sentence : 28 March 2013