

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO SS12/2019

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED: YES/NO

10/06/2022

In the matter between :

THE STATE

and

Davids , JERMANE LLOYD

Accused 1

SHIMIDZU OTTIE

Accused 2

JUDGMENT ON SENTENCE

STRYDOM J :

[1] The two accused were each convicted on one count of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act"); on three counts of attempted murder of which two counts, counts 2 and 4 fell within the ambit of the provisions of section 51(2) of the Act as the offences involved an assault where a wound was inflicted with a firearm; and, further, the accused were convicted of the unlawful possession of a firearm and ammunition.

[2] The court found that on 27 September 2018, the two accused acted in concert proceeded to go and shoot and kill Mr L [...] M [...]1 (“M [...]1”) and Mr S[...]1 M [...] 2 (“M [...] 2”). The accused were both armed with firearms and actively participated in the shooting. As a consequence of their direct intent to shoot these people, they foresaw that other persons might get injured or killed through their actions. They reconciled themselves with this possible consequence and as a result caused the death of Ms H [...] P [...] (“deceased”) and injured Ms S [...]2 B [...].

[3] Why the two accused acted in this manner remains unexplained by them as they persisted in their innocence.

[4] During the trial, the court heard evidence about the existence of two rival groupings or gangs which were active in the Westbury, Johannesburg, area where the shootings took place.

[5] In evidence extensive references were made to a previous shooting incident where a person by the name of Mr M [...] 3 C [...] was shot and killed by people in front of the takeaway shop of Accused 2 on 19 July 2018. The two complainants, who became state witnesses, M [...]1 and M [...] 2, were implicated in this regard. They were never tried on these allegations. Statements were made that the police protected them. The state’s case was that one R [...] N [...] was arrested for this killing. The matter was later withdrawn against him.

[6] The killing of one B [...] 2 was also mentioned. The two state witnesses were also not arrested in this case.

[7] On 27 September 2018, M [...] 2 came into Stadler Street, the street where Accused 2 had his takeaway business. Just after he crossed the street and on his way back, a vehicle followed him. Accused 1 and 2 alighted from the vehicle and started to fire shots at him and M [...] 1 who was in a passage referred to as Tamboekiehof. Several shots were fired, one of which hit M [...] 2. Also in the passage were the deceased, with three children. She was shot and died on the scene. One of the children with her, Ms S [...] 2 B [...], was shot through her knee from the back.

[8] Considering all the evidence in totality, the court has no doubt that the shooting was motivated by what previously happened when Mr M [...] 3 C [...] was shot. The probabilities indicated that the shooting was either gangster related or in retaliation for his killing. Warrant Officer Saunders testified that the community of Westbury prior to this incident staged protests as rival gangs in the community were causing havoc in this area. Innocent bystanders were killed and children were affected. He was appointed with 10 other members to investigate these shootings.

[9] The evidence in this matter show how some people in the Westbury/ Coronation area have no regard for the life of other people and that they will not hesitate to deal with others without involving the police whom they mistrusted. This is evidenced by how the two accused were prepared to fire shots in a public area without concern for the life and limb of others.

[10] In convicting the accused, the court found that the accused formed a direct intention to kill M [...] 1 and M [...] 2. When they fired the shots, acting in concert, they must have foreseen the possibility that they could also kill or injure innocent bystanders. This is exactly what happened. The two accused stood reckless as to the consequences of their actions and on the basis of *dolus eventualis* were convicted on the murder count.

[11] A court sentencing accused will take into consideration the nature and seriousness of the offences, the personal circumstances of the accused and the interests of society.

[12] The court will also bear in mind what the purposes of punishment are, to wit, deterrence, retribution, rehabilitation and prevention.

[13] As far as the murder count is concerned, the prescribed minimum sentence in terms of section 51(1) of the Act is life imprisonment unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[14] The court will have to consider all the circumstances relevant to this matter to determine whether the ultimate sentence which can be imposed in this country, i.e. life imprisonment, would be the appropriate sentence which should be imposed. Section 51(1) of the Act became applicable because the offence was committed by the two accused who acted in the furtherance of a common purpose or in concert. When they followed M [...] 2 and got out of their vehicle with firearms in their hands, they already formed a common intention to shoot and possibly kill him and M [...] 1.

[15] The court must now decide, after a careful consideration of all the evidence whether substantial and compelling circumstances exist which would justify the imposition of a lesser sentence than the ultimate sentence.

[16] It is established law that specified prescribed sentences are not to be departed from lightly or for flimsy reasons. All the factors traditionally taken into account in sentencing, whether or not they diminish moral guilt, will thus play a role in the exercise of the court's discretion. The court has considered the circumstances under which the shots were fired which killed the deceased and concluded that there are indeed circumstances present which justify the imposition of a lesser sentence than life imprisonment. This does not mean that the taking of the life of the deceased was not serious. It remains an extremely serious crime which will call for a heavy punishment.

[17] The substantial and compelling circumstances are to be found in the circumstances under which the deceased was shot. The accused did not form a direct intention, in the form of *dolus directus* to shoot the deceased. She was not the target. She was shot and killed when the accused tried to shoot and kill M [...] 1 and M [...] 2. Although they foresaw the possibility that innocent bystanders could have been killed, there was no evidence that they wanted to cause the death of deceased. What in fact happened is that they continued shooting with reckless disregard to the lives of other people. The court is also mindful that the shooting took place within this bigger gangster violence context. This factor can be an aggravating circumstance depending on the reason why a victim is shot, but at the same time the court must consider the circumstances under which people living in that area grew up. It is a negative environment where gangsters thrive and drugs are abused. To break away

from this culture must be difficult and poor homely circumstances will make it even more difficult. A court considering such matter must guard against the taking of a proverbial *arm chair approach* when considering a sentence.

[18] It appears that the intention to kill M [....] 1 and M [....] 2 was, at least to some extent motivated, on the probabilities, by what has happened previously happened when M [....] 3 C [....] was killed. The continued reference in evidence to this shooting caused an inference to be drawn that the shooting of M [....] 2 and M [....] 1 was driven by some form of retribution whereby the accused took the law into their own hands. There was a perception that the police was not dealing with the M [....] 3 C [....] case, at least how the accused wanted them to deal therewith.

[19] Considering these circumstances I am of the view that life imprisonment would be inappropriate despite the fact that the crimes committed by the two accused remain extremely serious and that the public interest demand that the court should deal with the accused, who have shown no remorse whatsoever, appropriately.

[20] But before considering an appropriate sentence the court will first deal with the position of accused 1 concerning the delay to finalise the sentencing procedure, his previous convictions and his refusal to participate in sentencing procedures. The accused were convicted on 18 March 2021 and since that date there were many delays in finalising the sentencing procedures.

[21] On or about 28 M [....] 1 2021 the wife of accused 1, Ms L [....] D [....] , laid a complaint address to the office manager of the Johannesburg High Court against me as the presiding judge. She accused this court of gross incompetence, gross misconduct, racial discrimination, unconstitutional and inappropriate conduct. The court will not deal with this unfounded attack against me suffice to say that this caused the legal representative of accused 1, Mr Spies, to withdraw from the matter. This was the cause of many delays to finalise the sentencing of the accused. At first accused 1 indicated that he will obtain his private representative. This he initially did but after a while and more postponements this legal representatives withdrew. He then indicated that he will require legal aid. An application was made but as he was

previously represented by legal aid his application was refused. He then internally appealed this decision and his appeal was upheld. A legal representative was then appointed by legal aid. Thereafter further postponements were granted to obtain the record of proceedings. Accused 1 was not prepared to admit his previous convictions and evidence had to be led in this regard. Accused 1 also applied for a special entry. This application was heard. The record will speak for itself in this regard. At first accused 1 denied all his previous convictions but at a later stage it was placed on record that the only dispute relates to the murder count for which he was sentenced to 15 years imprisonment. Evidence was led on behalf of accused 1 after which it was admitted, through statements from the bar after consultations with accused 1, that he in fact was previously convicted on a murder count. The sentence was disputed. Accused 1 never took the witness stand to explain his convictions and sentences.

[22] In light of this admission, there was no need for this court to further pronounce on this previous convictions of the accused save to state that after a perusal of Exhibit O, which was handed in by a representative of the Department of Correctional Services, Correctional Supervision, Mr Sello Lucas Mugakwe during evidence, it became clear to this court that annexure A to the warrant in terms of which accused 1 was allegedly sentenced by the High Court on 15 January 2004, appeared, on the face of it, not to be an authentic document. This conclusion is underpinned by the absurd conditions of suspension which allegedly form part of the court's sentences. In relation to the various sentences, it was stated that the suspensive condition would be that the accused "*behaves well during the period of suspension*". In my view, no judge or magistrate would make such an order. In relation to a sentence of 12 years imprisonment an insertion was made by way of an amendment suspending 4 years of the sentence "*on condition of good behaviour by the accused during the period of suspension*". The judge who purportedly sentenced the accused was the late Judge Stegmann and the Court case number is stated to be 193/03. If Exhibit O is then compared with Exhibit N, which is a document handed in during the evidence of Lt Col Raymond Peters of the Criminal Record Centre of the South African Police Service a different picture is sketched. The same case number 193/03 appears on a document that went to the Criminal Record Centre but this document was signed by Judge Labuschagne. A sentence of 6 years direct

imprisonment was imposed on the accused on 26 November 2003 by the High Court for a different crime on a different date. Although accused 1 was charged with murder and robbery, he was found guilty by Judge Labuschagne on a count of house breaking with the intent to steal and theft. On this warrant there is written "*Lasbrief i of ii*" and on the warrant with annexure "A" "*Lbif ii van ii*" although the Judges differ. All together a strange state of affairs.

[23] According to Exhibit "N" accused was arraigned in the Regional Court and sentenced on 19 October 2006 to 15 years imprisonment after being convicted on a count of murder. According to Exhibit N he was never sentenced by Justice Stegmann in the High Court for murder as is set out annexure "A" to Exhibit O. The effect of the alleged suspension of his sentences as per annexure A was that accused 1 was sentenced to an effective term of 8 years imprisonment. This is in direct conflict with the record of previous convictions as per the Criminal Record Centre.

[24] For purposes of sentencing in this matter, the court already found that accused 1 admitted that he previously was convicted on a murder count and that there was no need to make a further finding on his previous convictions. The accused admitted his other convictions as per the SAP 69 although he did not sign his SAP 69 as he persisted in his dispute of the murder conviction in the Regional Court. The court is however, in the interest of justice, of the view that an investigation should be conducted how it came about that certain convictions according to Exhibit "O" did not appear on his SAP 69 whilst documentation that went to the office of Correctional Services, dealing with parole and correctional supervision, indicate a different or further conviction. The status and authenticity of Annexure "A" should be investigated considering the nonsensical suspensive conditions.

[25] This judgment on sentence, including Exhibits "N" and "O" should be made available by the state to the Department of Correctional Services, to the Criminal Record Centre of the South African Police Services for investigation purposes. The investigating officer Warrant Officer Saunders, with the assistance of the Director of Public Prosecutions, Johannesburg, are requested to oversee the delivery of this judgment and Exhibits to the mentioned parties.

[26] Having found that substantial and compelling circumstances exist for deviation of the prescribed minimum sentence, the court will now proceed to consider the appropriate sentences of the two accused.

[27] Accused 1 was asked whether he wanted to place any evidence before court in mitigation of his sentence. He then requested that the matter yet again to be postponed for him to present evidence to show how he assisted the community. No explanation could be provided why that evidence was not available after the court indicated during previous postponements that the court will proceed with the sentencing. In my view, what transpired since the conviction of accused on 18 March 2021 indicated a delaying tactic to prevent the court from sentencing accused 1. All of this was prejudicing accused 2 and the state. These parties opposed the granting of a further postponement. The court then refused a further postponement of the matter. Accused 1 then elected not to take part in any of the sentencing procedures. He also elected to provide no instructions to his counsel to place before the court from the bar.

[28] From the evidence before court, the court ascertained that accused 1 was born on 2 April 1986. This would mean that he is currently 36 years old. He has a long list of previous convictions. He was previously convicted on a count of murder although it was placed in dispute exactly when and what the sentence was. Since accused 1 was still a juvenile he started engaging in criminal activity. He has no less than five previous convictions for housebreaking with intent to steal and theft. His criminal activities started during 1999 and his last conviction according to the SAP 69 was during 2016. The effective sentence for the last conviction was 3 years imprisonment which would mean that shortly after he came out of prison he committed the current offences.

[29] Having a previous conviction of murder means that the only appropriate sentence which should be imposed would be a long term imprisonment as accused 1 is clearly a danger to society. Clearly, the previous terms the accused spent in prison did not have the effect that he rehabilitated himself. The interests of society demands that he should be placed in custody for a long period.

[30] The position of accused 2 is on a different footing. On behalf of accused 2, a pre-sentence and background report was admitted in evidence by consent. He is currently 47 years old and had a difficult upbringing with an absent father. His mother initially cared for him but later his aunt took over this roll when he was 7. He moved to Westbury. His mother continued to support him financially. According to the report accused got involved with the wrong group of friends and got involved in criminal activities. He started with criminal activities for which he was convicted. This all changed when he managed to open a take away shop from which he could earn a reasonable living. He was assisted by his fiancée. He fathered 7 children and could support them. He managed to turn his life around but things changed when Mr M [...] 3 C [...] was shot in front of his shop.

[31] Accused 2 has previous convictions. In 1992 he was convicted of being in possession of presumably stolen property. During 2001 he was convicted on a count of theft and being in possession of housebreaking and theft implements. During 2008 he was convicted on a count of assault and during 2010 on a count of housebreaking with intent to steal and theft. After that for some years accused was not again convicted on any further counts up until these current convictions.

[32] The crimes on which the two accused were convicted remains extremely serious. An innocent mother of small children was killed for being present in a public place. Her 4 year old child was left without a mother and the husband of deceased was left with the responsibility for her upbringing. This kind of violence perpetrated by people who have no regard for an orderly legal system cannot be tolerated. These people, like the accused, use firearms rendering it unsafe for ordinary citizens to carry on with their lives without the fear of being killed when they go outside of their homes. and walk in the streets.

[33] Unfortunately the Westbury area is renowned for this gangsterism and violence. Through sentencing this court must send out a message to gang members and other potential criminals that within a constitutional state, this kind of behaviour cannot be tolerated. Firearms are illegally possessed and it is just a matter of time before these firearms are used in criminal activity. Society demands assistance of courts to make their areas safer for them to live in. All what a court can do is not

send perpetrators of violence to jail and hope that potential perpetrators would soon realise that their behaviour will not be tolerated and will be dealt with harshly through sentencing by courts.

[34] Apart from the murder count, the other counts are also very serious. An innocent child was shot through her leg, which must have been extremely painful. This poor child was lucky not to have been killed herself. Mr M [...] 2 was also shot through his shoulder.

[35] The accused have shown no remorse whatsoever and persist in their innocence. This in my mind is an aggravating factor.

[36] The court will consider the cumulative effect of the sentences it intends to impose.

[37] As far as the conviction on the possession of unlawful firearm is concerned, the court will sentence the accused in terms of the Firearms Control Act 60 of 2000 and not in terms of the minimum sentences prescribed in the Criminal Law Amendment Act 105 of 1997, which prescribes a minimum sentence of 15 years imprisonment if an accused is convicted of being in possession of a semi-automatic firearm. The indictment made no mention of the sections dealing with minimum sentences.

[38] Lastly the court will take into consideration the fact that the two accused have been in custody for almost 3½ years. It is quite a long time which was partly caused by the Covid-19 pandemic but, as far as accused 1 is concerned, he took an extra year as referred to hereinabove.

[39] Considering all factors the court is of the view that the two accused should be dealt with differently. The main reason for this is that accused 1 has a previous conviction for murder.

[40] Accused 1 is sentenced as follows:

40.1 On count 1, murder read with section 51(1) of Act 105 of 1997 to 20 years imprisonment.

40.2 On counts, 2, 3 and 4, attempted murder to 5 years imprisonment on each count.

40.3 On count 5 to the unlawful possession of a firearm 5 years imprisonment.

40.4 On count 6 unlawful possession of ammunition to 2 years imprisonment.

40.5 It is ordered that the sentences on counts 2, 3, 5 and 6 are to be served concurrently with the sentence imposed on count 1.

40.6 Three (3) years of the sentence imposed on count 4 is to be served concurrently with the sentence imposed on count 1.

40.7 Effectively accused 1 is sentenced to 22 years imprisonment.

[41] Accused 2 is sentenced as follows:

41.1 On count 1 murder, read with section 51(1) of Act 105 of 1997 to 15 years imprisonment.

41.2 On counts, 2, 3 and 4, attempted murder to 5 years imprisonment on each count.

41.3 On count 5, unlawful possession of a firearm to 5 years imprisonment.

41.4 On count 6, unlawful possession of ammunition to 2 years imprisonment.

41.5 It is ordered that the sentences on counts 2, 3, 5 and 6 are to be served concurrently with the sentence imposed on count 1.

41.6 Three (3) years of the sentence imposed on count 4 is to be served concurrently with the sentence imposed on count 1

41.7 Effectively, accused 2 is sentenced to 17 years imprisonment.

**RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Appearances

For the State:	Adv. Z. Peck
For Accused one:	Adv. S. N. Maluleke
Instructed by:	Legal Aid
For Accused two:	Adv. J. Muir
Instructed by:	Mr. D. Greef
Date of Hearing:	24 February 2020
Date Judgment Reserved:	02 June 2022
Date of Judgment on sentence:	10 June 2022