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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC113/2013

DATE: 2014-10-21

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In the matter between

STATE

and

OSCAR LEONARD CARL PISTORIUS Accused

S E N T E N C E

MASIPA J: The accused in this matter has been found guilty of the following counts:

1. One count of culpable homicide.
2. One count of contravention of section 120(3)(b) of the Firearms Control Act 60 of 2000.

It now remains for me to sentence him. At the outset it needs to be emphasised that although I am sitting with two assessors in this matter, the decision on sentence is mine and mine alone. To reach an appropriate sentence, this court is duty-bound to consider the nature

and the seriousness of the offences that the accused has been found guilty of, the personal circumstances of the accused as well as the interests of society. I am also duty-bound to take into consideration the main purposes of punishment; namely retribution, deterrence, prevention and rehabilitation. All these must be accorded due weight in any sentence.

In *S v RO and Another* 2000 (2) SACR 248 (SCA), Heher JA said the following at paragraph 30:

> "Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."

Finding an appropriate sentence is a challenge faced by criminal courts daily as sentencing is not a perfect exercise. What complicates this even more is that there may be more than one appropriate sentence in a particular case. *SS Terreblanche* Guide to Sentencing in South Africa, second edition, states that an appropriate sentence as determined by a trial judge need not be the only appropriate sentence. On page 146, paragraph 3.1, line 5, the learned author states the following:

> "In the light of the fact that the presiding officer is

> endowed with a wide discretion in the imposition of the sentence, appropriateness tends to be subjective judgment according to the views of the sentencing officer."

In footnote 110 the author cites *S v Martin* 1996 (2) SACR 378 (W) at 380A-B in this regard. Also cited in the footnote is *Smith v Queen* 1987 (34) CCC (3d) 97 at 109.

> "Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences."

This was cited in *S v Vries* 1996 (2) SACR 638 (Nm) at 643F-G.

I now deal with the evidence in mitigation and in aggravation.

MITIGATION OF SENTENCE AND AGGRAVATING CIRCUMSTANCES

The defence called four witnesses, namely: Dr LM Hartzenberg, Mr MJ Maringa, Mr PJB van Zyl and Ms A Vergeer to give evidence in mitigation. On the other hand, the state called Ms K Martin who represented the family of the deceased and Mr MZI Modise, the Acting National Commissioner of the Department of Correctional Services.

Dr Hartzenberg is a psychologist who is an expert in trauma counselling. She met the accused for the first time on 23rd February 2013 when he was referred to her by a colleague for grief therapy. Although the sessions that she had with the accused were initially aimed at grief counselling, eventually Dr Hartzenberg had to conduct trauma therapy. Since February 2013 she has had many consultations

with the accused. The accused presented with acute stress reaction, subsequently he was diagnosed with prominent symptoms of post-traumatic stress disorder as well as depression. On many occasions the sessions had to be rescheduled, because the accused was too emotionally drained to commence with therapy. Dr Hartzenberg exhorted this court to take into account the following in sentencing the accused:

- The accused had lost his love relationship with the deceased.
- He had lost his moral and professional reputation.
- He had lost his friends and he had lost his career.

Mr MJ Maringa is a social worker, correctional officer, probation officer in the employ of the Correctional Services Department. He compiled a report in terms of section 276A (1) (a) of the Criminal Procedure Act 51 of 1977 and recommended that this court consider correctional supervision as a sentence option in terms of section 276 (1) (h) of the Criminal Procedure Act.

If such a sentence were to be imposed, the accused would be placed under house arrest for the duration of his sentence (which is three years in terms of this section). He would then have to do 16 hours in a month of community service, entailing general work at the Transvaal Museum in Paul Kruger Street in Pretoria. Also recommended was that he be obliged to attend various programs aimed at assisting inmates to deal with identified problem areas.

Mr Maringa gave evidence that the accused would be a suitable candidate for a correctional supervision sentence. He highlighted the

accused's achievements as a professional athlete, affiliated to a number of professional and sports bodies, both in South Africa and abroad. He noted that the accused had been involved in various projects that were aimed at lifting the standard of living of the poor and the physically disabled.

According to Mr Maringa, the accused in this matter would benefit from correctional supervision as a sentence option in that:

> "In the process of compensating for the wrong done, he will get an opportunity to restructure and modify his offending behaviour within the community context where there are sufficient resources to produce the expected outcome."

Mr Maringa submitted that it would be easy to monitor the accused as he currently stayed with his uncle at his home in Pretoria.

Mr PJD van Zyl was the manager of the accused with regards to his professional career in athletics. He highlighted the accused's career as an athlete and as someone who was involved in charity work worldwide to uplift others. His evidence was that prior to the incident of 14 February 2013 the accused was 'commonly perceived as a global sporting icon due to his achievements in the London Olympic and Paralympic Games.' The accused gave his time and money to various deserving causes and had opportunities to advance his career in the process. According to Mr van Zyl all those opportunities had now been taken away from the accused.

Ms A Vergeer, a probation officer compiled a pre-sentencing

report. The report was handed in and marked EXHIBIT EEEE. Ms Vergeer set out the background of the accused's personal circumstances and the suitability of a correctional supervision sentence in terms of section 276 (1) (h) of the Criminal Procedure Act in respect of the accused. A portion of her report dealt with prisons in this country, poor conditions in Correctional Service Centres and how the centres were, in her view, inadequately equipped to cater for the needs of the accused.

Ms Kim Martin is the oldest cousin of the deceased. Her evidence dealt with the deceased as a person, the family of the deceased, her own family and the bond between the two families. Although she was 12 years older than the deceased, she and the deceased grew up together and spent a lot of time together. She described the deceased as someone who loved people, who loved mixing with people and hosting. She was very good in front of a camera and landed her first permanent job in Johannesburg in Fashion TV. She was a happy person. Family was important to the deceased. She was sad that she could not take her parents with her to Johannesburg where she lived and worked. She, however, spent every December with them in Port Elizabeth. In 2011/2012 she helped her parents financially when their medical aid lapsed. She reinstated it and continued to pay towards it.

She met the accused only once in Cape Town on the 2nd January 2013 in the company of the deceased. A little over a month later she learnt that the accused had killed the deceased. She recalled how on the morning of 14 February 2013 she and her husband heard the news

over their car radio that the accused had shot and killed his girlfriend. In vain she had prayed and hoped that it would not be the deceased.

Both her family and the deceased's family were devastated by the death of the deceased. The death of the deceased left both parents bereft. The deceased's dad had been suffering from ill-health even before the incident. After the death of the deceased his health took a turn for the worse as he suffered a stroke.

Mr MZI Modise is the Acting National Commissioner of Correctional Services. He joined the Department of Correctional Services 35 years ago and has worked in various capacities and in different centres throughout the country. During that period he has seen a lot of improvement and a lot of progress in the Correctional Services Department. He also has had an opportunity to visit correctional facilities in other countries and felt that the Correctional Services Department in this country was comparatively amongst the best. He was certain that Correctional Services Centres in this country would be able to deal with every kind of need from individual inmates.

PERSONAL CIRCUMSTANCES

The accused is 27 years old, a double amputee, single, with no dependants. He currently stays with his uncle in the latter's house in Pretoria. An athlete by profession, he is currently not employed and has no income. He also has no property as he sold his properties during the course of the trial. He has no previous convictions.

His parents were divorced when he was 6 years old. He was then

raised by his mother who passed away when he was 15 years old. The accused was born with a congenital abnormality. At the age of 11 months the accused had a bilateral below-knee amputation. The physical changes in the accused's stumps following the amputation at an early age and the difficulties in walking experienced by the accused were described in the evidence of Professor Derman. His evidence confirmed, inter alia, that the accused's physical disability was a big challenge.

Dr Versfeld's evidence was to the same effect. I quote from an extract when Dr Versfeld observed the accused during one of his consultations with him:

> "He walked with his left knee bent, his hip externally rotated and the stump tipped inwards (to get to the weight on the outside of the stump). When he put weight on the left stump, the knee buckled. Because of the bent left knee, his left leg was shorter than his right. He walked with difficulty without holding on. At the time he was on Marley tiles in my consulting room. He could not walk on the industrial carpeting. When trying to stand without holding on, he had difficulty standing and was moving all the time.
>
> The biggest stride he could take, bearing weight on the left stump while holding onto something, measured 23 centimetres. While holding onto something and bearing weight on his right stump,

> the maximum stride he could take was 33 centimetres. The left leg actually buckled when he put weight on it. When standing or walking he was bending his back forwards."

Arguing that the accused was seriously vulnerable and that prison would not be able to cater for the mental and physical needs of the accused, counsel for the defence submitted that a suitable sentence in this matter would be a non-custodial sentence of community service of 3 years as suggested by Ms Vergeer and Mr Maringa. He added that this court could amend the conditions as it deemed fit.

While taking note of the evidence of Mr Maringa, I was not impressed at all by Ms Vergeer as a witness. Though an expert Mrs Vergreer, as a witness, did not inspire any confidence in this court. Her method of investigation in respect of prison conditions and her use of out-dated information concerning prisons in particular, was slapdash, disappointing and had a negative impact on her credibility as a witness. Counsel for the state correctly described Ms Vergeer's evidence as sketchy, out-dated, uninformed, generalised and negatively biased towards prisons in this country. I found her evidence perfunctory and unhelpful – something quite disturbing from someone with 28 years of experience.

On the other hand, Mr Modise, the Acting National Commissioner of Correctional Services, impressed me. He came across as a candid and a willing witness who wanted to assist this court. He testified that prisons in this country were not perfect, but were progressive and

professional. I have no hesitation in accepting his evidence as true and reliable. He answered questions honestly and did not hesitate to make concessions where such concessions were warranted.

Mr Modise did not paint a picture of a problem-free department, but I got the impression that the Department of Correctional Services had made strides and was moving with the times. I have no doubt that if prisons in this country were below the required standard, the ever-vigilant human rights bodies in this country would not hesitate to take the necessary steps to remedy the situation. If the accused in this matter were to be given a custodial sentence, it would not be the first time that the Correctional Services Department was confronted with an inmate with disabilities.

Mr Modise's evidence was that on admission, each inmate went through a health assessment procedure within six hours. This was followed by a sentencing plan within 21 days of admission. Mr Modise stated that in Kgosi Mampuru II, the Correctional Services Centre in Pretoria, the administration dealt with just over 100 inmates with disabilities daily and he was certain that if a custodial sentence were to be imposed in respect of the accused, there would be no problem in catering for his needs. None of this was controverted. I am satisfied that the Correctional Services Department is equipped to deal with inmates who have special needs.

Counsel for the state submitted that the duty of this court was to impose an appropriate sentence after evaluating all the evidence and the submissions of counsel. Whatever the form of punishment (including

incarceration), the duty of the administrators in the Correctional Services Department was to execute the punishment properly. I agree. It would be unreasonable to expect this court to usurp the functions of the Department of Correctional Services once sentence had been imposed.

What is certain is that in performing its duties, the Department of Correctional Services is guided by the Constitution. Should it fail to perform its duties in accordance with the Constitution, courts would intervene as they are duty-bound to do so. If any inmate were to feel that he was not being treated fairly and justly where he is incarcerated, he has a right to approach these courts to seek redress. Many inmates do so and they have never been turned away by these courts. In my view, there is no reason why, if the accused were to find himself in a similar position, he would be treated differently.

From the evidence led during the trial and during the course of argument in mitigation, it became clear that the concern was not just about the disability of the accused as someone without legs, but it was also about the fact that he needed treatment, not only for his physical disability, but also to deal with the trauma and the depression that he suffers from.

Mr Modise assured this court that there was a medical team whose job it was to attend to inmates who needed medical attention. There were, however, instances where the inmates were sent to outside clinics for medical care. In instances where an inmate preferred to use the services of his or her own doctors, he or she was allowed to do so. There was, therefore, no reason to think that the accused might be

forced either to terminate any of the treatment that he was currently receiving or that he might be forced to terminate his relationship with his own doctors.

The Department of Correctional Services deals with a number of inmates with a variety of disabilities and vulnerabilities, and from the evidence it seems that it is coping reasonably well. I have no reason, therefore, to believe that the accused would present the Department of Correctional Services with an insurmountable challenge. As counsel for the state correctly pointed out, if an inmate with a special need wanted a bench in his shower, it would be unreasonable to think that he could not be provided with one. I would imagine that such flexibility would be nothing new to the department.

Just by way of example: it cannot be disputed that a pregnant woman belongs to one of the most vulnerable groups of people. Although pregnancy cannot be termed a disability, it cannot be denied that it does compromise one's freedom and ability physically to do as one wills. Yet a pregnant woman will be sentenced to jail if such a sentence is warranted. I might add that it would be a sad day for this country if an impression were to be created that there was one law for the poor and disadvantaged and another for the rich and famous. I know this was not the submission by counsel for the accused, as he specifically pointed out that the court had to weigh all the relevant factors before deciding on the appropriate sentence.

There was, however, a feeling of unease on my part as I listened to one witness after another, placing what I thought was an over-

emphasis on the accused's vulnerability. Yes, the accused is vulnerable, but he also has excellent coping skills. Thanks to his mother, he rarely saw himself as disabled and, against odds, excelled as a top athlete, became respected worldwide and even went on to compete against able bodied persons. For some reason, that picture remains obscured in the background. In my judgment to get to the real picture, the correct approach would be to balance the two.

There is also the question of the accused's contribution to society. There is no doubt that the accused's contribution to society has been enormous as he gave his time and money to various charities and institutions. He also helped change the general public's perceptions of disabled people and inspired disabled young people in particular as he grew and excelled in his career. This impact on others worldwide cannot be ignored, but it ought to be put into perspective. As state counsel pointed out to Mr van Zyl, if a sportsman was approached for assistance, it would not be clever not be involved as such involvement enhances one's career.

THE SERIOUSNESS OF THE OFFENCES

The accused was found guilty of two offences, both very serious. In respect of the charge in count 1 the accused was convicted of culpable homicide. Counsel for the state correctly referred to negligence in this matter as gross negligence that bordered on *dolus eventualis*.

On his own version the accused knew that there was someone behind the door. He had heard the window slide open. He had heard the

toilet door slam shut. He had heard a noise coming from the inside of the toilet. It would have been different if he had just heard a noise and assumed that something, maybe a stray animal, was in the toilet. In this instance the evidence shows that he thought an intruder was behind the door. Using a lethal weapon, a loaded firearm, the accused fired not one but four shots into the toilet door.

It is so that in his evidence he said he would have fired higher if his intention was to kill and this court accepted that. However, that does not change the fact that he knew the facts above and that the toilet was a small cubicle and that there was no room for escape for the person behind the door. What is also significant is that the accused had been trained in the use of and in the handling of firearms. In my view, all that is very aggravating.

Mitigating factors are inter alia the following:

- The accused is a first offender and seems remorseful.
- Although counsel for the state suggested that the accused's apology to the parents of the deceased may not have been genuine as it was made in open court, this court accepts the evidence that the accused had earlier attempted to apologise privately to the deceased's parents, but they were not ready. So the attempt failed.
- This court accepts as a mitigating factor the conduct of the accused after the incident which indicated that the accused wanted the deceased to live. I also do not agree with state counsel that because mental and physical vulnerability of the accused was

taken into consideration in reaching a decision on judgment, it cannot be taken into consideration for purposes of sentence. Vulnerability of a person forms part of his or her personal circumstances and ought to be considered together with other relevant factors during the sentencing procedure.

- In mitigation, counsel for the defence referred to the accused's compromised emotional and depressed state. He sought to argue that some negative untrue media reports about the accused had made the accused a victim to the extent that the actual punishment for the crime would do little to alleviate the ill-effects caused by such reports. Much as I agree with counsel for the state that media reports can affect a person only if he or she follows such reports, it is a fact that negative media reports about someone may affect his or her reputation, his or her career or prospects thereof. This would happen whether or not that person was personally exposed to such reports. I have taken note of only that fact and not the details and the merits of the allegations in the media reports.

THE INTERESTS OF SOCIETY

The interests of society demand that those who commit crimes be punished and, in deserving cases, that they be punished severely. As counsel for the defence correctly submitted, we ought to differentiate between what is in the public interest and what society wants. Members of society cannot always get what they want as courts do not exist to win popularity contests, but exist solely to dispense justice. What may

appear to be justice to the uninformed general public, however, may not necessarily be justice. The general public may not even know the difference between punishment and vengeance – a distinction which is very important when a court is exercising its sentencing function.

Fortunately, regardless of the level of understanding among the general public, South Africa has a Constitution which applies to everyone and which protects everyone, including those who transgress the laws. As a country we have long moved from the dark ages – that is the era of 'an eye for an eye' to a modern era of balancing all the relevant factors. Retribution, which, however, from the legal point of view is not the same as vengeance, has, inter alia, yielded ground to other purposes of punishment.

In *R v Karg* 1961 (1) SA 231 (A), Schreiner JA stated the following at 236A-C:

> "While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing, but the element of retribution, historically important, is by no means absent from the modern approach.
>
> It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in

> mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

It is impossible to deal with the interests of society without reference to the deceased and her family. At the time the deceased met her death she was young, vivacious and full of life. Talking about the deceased, Ms Martin painted a picture of a promising young woman who cared deeply for family, who was full of hope for the future and who lived life to the full. While giving evidence it was obvious that Ms Martin still felt the pain of the loss of someone dear to her. Doubtless this pain reflects the pain of the family of the deceased. She spoke of the deceased's parents who were not coping very well without their daughter, especially financially. The loss of life cannot be reversed. Nothing I say or do today can reverse what happened on 14 February 2014 to the deceased and to her family. Hopefully this judgment on sentence shall provide some sort of closure for the family and for all concerned so that they can move on with their lives.

CONCLUSION

There is a delicate balance between the crime, the criminal and the interests of society. The extent of the negligence in culpable homicide cases plays an important role in coming to an appropriate sentence which should neither be too severe, nor too light. In *S v Nxumalo* 1982

(3) SA 856 (A) at 861G-H, Corbett JA stated the following:

> "It seems to me that in determining an appropriate sentence in such cases, the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act.
>
> Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded."

Counsel for the defence referred this court to a number of cases where accused were found guilty of culpable homicide. In my view, none of these cases is on point. There are, however, two cases that I need to deal with. One is the *State v Warren Vorster* (case number 125/2009 in the South Gauteng High Court). In that case the accused fired a shot at the roof of the Zozo on the premises, believing that there was an intruder who endangered the life of Kgopotso Ramolefe, who was the 12-year old grandson of his helper, Ms Elizabeth Ramolefe. However, the shot went through the window frame and struck Kgopotso who must have been standing just behind the window. The shot struck him on the forehead and he died almost instantly.

The accused's version in that case was that he was hoping to

scare the intruder and that his decision was made in haste and in fear against the background of his own constant anxiety about intruders. When the accused saw Kgopotso lying on the floor, he broke down the wooden door, which had been bolted from the inside, and tried to resuscitate the child. The paramedics arrived and found the accused still trying in vain to resuscitate Kgopotso. The accused was then arrested the same night and charged with murder. The court in that case found that the accused did not fire with gross negligence into areas where he knew that there might be people. He fired at an angle which was lower than that which he intended.

In respect of remorse from the accused the court noted the following:

> "Mr Vorster was beside himself with grief, pain and remorse to the extent that the police brought in a trauma counsellor to the cells to try help him. It is now almost two years later and Mr Vorster is still clearly in a state of post-traumatic shock. I have never before seen an accused person as devastated and remorseful as he is. He has had therapy initially apparently from someone connected to his church, but since May 2010 from a clinical psychologist to whom he was referred by his legal representative."

A few months after this incident, that is the incident in the Vorster matter, Ms Ramolefe resigned from her job as she felt she could no

longer work and live in the place where Kgopotso had died so dreadfully. She felt that he had died like an animal. I again quote from the judgment:

> "She rejected offers of help and a possible trust fund set up to help her or to educate members of the family and she asked that nothing of the sort be done. She is in great emotional pain at present and said that she thought that her pain would never end."

In imposing sentence, the court found that:

> "A court should strive for balance between the interests of society, the interests of the accused and the seriousness of the offence. A sentence which over-emphasises one element... cannot be balanced and it is likely to be a wrong sentence.
>
> Finally, in imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused's own particular circumstances at the time of the offence.
>
> Where the offence is one of negligence, I believe this is particularly the case for ordinary everyday people who are not criminals are capable for the kind of negligence that has tragic and lifelong consequences.

A court should strive to keep such a person out of prison where this is possible. As I have said, the loss of an innocent life is almost always serious and society tends to be even more shocked when the victim is a child, as here. Members of the child's family are particularly badly affected.

I have considered the needs of society and I believe that these would be best served by it knowing and seeing that Mr Vorster is donating some of his time to the service of other less privileged people."

The court further said the following:

"It is being done for two purposes: To try to show society and Kgopotso's family that Mr Vorster is being punished, albeit relatively lightly for what he has done and, secondly, to assist Mr Vorster to interact with needful people and to help him to find some form of emotional equilibrium while doing so.

I have decided that the appropriate sentence in this case is one of 3 years' imprisonment suspended completely for 5 years, on condition that, firstly, he is not again convicted of culpable homicide caused by an assault and committed during the period of imprisonment and, secondly, that he performs 300 hours of community service over one year which commences running on the date of the sentence...

> He is to be placed under the supervision of Mr Phillip Hall of the Rotary Club of Blackheath. Mr Hall will decide upon the work which Mr Vorster is to do in assisting the Rotary Club in any of the various charitable undertakings which it engages in."

Counsel for the accused submitted that the facts in the Vorster case bore similarities to those in the present case. He conceded that in this instance the accused, by discharging four shots into the door, created a more dangerous situation. He argued that on the other hand Mr Vorster did not suffer from the disabilities and vulnerability of the accused in the present case, and the slow burn effect of the disability and vulnerability.

It is clear that the facts in Vorster are dissimilar to the facts in the present case. It is so that, like Vorster, the accused was reacting to a perceived threat and that soon after the incident he, like the accused in the Vorster matter, tried to resuscitate the deceased and that he was very emotional and suffers from trauma, even 18 months after the incident.

However, there are a number of important distinguishing features:

1. In the Vorster matter the accused did not know that there was a person behind the door. In the present case the accused did. He stated that after he had heard the bathroom window slide open and the slamming of the door, the noise or movement in the toilet confirmed to him that there was someone in the toilet.
2. In the Vorster case only one shot was fired and it had been aimed above the roof, not into the door. In contrast, the accused in the

present case deliberately fired four shots into the door.

3. In the Vorster matter the aim was to frighten away the intruder, in the words of the accused. In the present case the aim was to shoot the intruder.
4. In the Vorster matter, if there had been an intruder on the premises, he might have had an opportunity to flee or escape the harm or death. In the present case the opposite is true. The toilet was a small cubicle. An intruder would have had no room to manoeuvre or to escape. And what is more, the accused knew this fact.
5. The accused was trained in the use of firearms and intended to be a collector. In my view, a high degree of responsibility would be required from such a person.

Although it is so that in the Vorster case the accused did not suffer from the disabilities and vulnerabilities of the accused, I find that that fact regardless, the degree of negligence in this matter, is such that the sentence as suggested by Ms Vergeer and Mr Maringa would not be appropriate, considering the circumstances in the matter.

In the matter of the *State v Siyabonga Mdunge* (RC777/12 Regional Court Pietermaritzburg), the accused and the deceased were sleeping at their home when at about 00:30 the accused was awoken by a noise as if a window was opening. He thought a burglar was trying to get into the house. Fearful for his life he grabbed his firearm from his bedside pedestal drawer and made his way to the entrance of the room. He could hear the noise coming from the bathroom. Slowly he made his way to the bathroom door to investigate. As he reached the bathroom

door it suddenly opened. Startled and afraid for his life, he discharged his firearm thinking that the person who opened the door was a burglar. That person, however, was not an intruder, but his wife. He rushed her to hospital, but it was too late.

The accused in Mdunge was arrested for murder, but entered a plea and sentence agreement with the National Prosecuting Authority (NPA) in terms of section 105A of the Criminal Procedure Act. In terms of the agreement, the National Prosecuting Authority accepted a plea of guilty to culpable homicide. The National Prosecuting Authority agreed to the following sentence in the plea and sentence agreement:

> "It is agreed that a just sentence in all the circumstances shall be that the accused is sentenced to 8 years' imprisonment which is wholly suspended for a period of five years on the following conditions:
>
> 1. The accused is not again convicted of murder or assault or any other offence of which assault is an element during the period of suspension."

Again, counsel for the defence argued that the facts in the Mdunge case had a striking similarity to those in the present case. I disagree. It is so that in both cases the accused were reacting to a noise they interpreted as someone entering their home. The huge distinguishing feature was that in the Mdunge case someone, that is the deceased, did open the door, whereas in the present case no such thing happened. This fact as well as the additional factors already referred to above, would make the

present case so serious that a suspended sentence would not be appropriate in my view.

For a very good reason an appropriate sentence should neither be too light, nor too severe. The former might cause the public to lose confidence in the justice system and people might be tempted to take the law into their own hands. On the other hand, the latter might break the accused and the result might be just the opposite of what the punishment set out to do, which ultimately is to rehabilitate the accused and to give him an opportunity, where possible, to become a useful member of society once more.

I have considered all the evidence placed before me and all the submissions and argument by counsel. I have weighed all the relevant factors, the purposes of punishment and all forms of punishment, including restorative justice principles. I have also taken into account the seriousness of the offence which led to the death of the deceased, the personal circumstances of the accused and the interests of society. I have taken the particular circumstances of the accused at the time of the offence into account.

Having regard to the circumstances in the matter, I am of the view that a non-custodial sentence would send a wrong message to the community. On the other hand, a long sentence would also not be appropriate either as it would lack the element of mercy. A sentence cannot be said to be appropriate without the feelings of mercy for the accused and hope for his reformation. (See *S v Mhlongo* 1994 (1) SACR 584 (A) at 588J-589B) I am mindful, however, of the fact that true

mercy has nothing to do with weakness or maudling sympathy for the criminal, but is an element of justice. (See *S v V* 1972 (3) SA 611 (A) at 614)

In respect of the conviction in count 3, I have taken into account that no one was hurt, though the offence is a serious one, especially in the setting of a restaurant. I do not believe that the degree of negligence in respect of this count, that is count 3, justifies a sentence of direct imprisonment.

The following is what I consider to be a sentence that is fair and just, both to society and to the accused:

1. Count 1 – Culpable homicide: The sentence imposed is a maximum imprisonment of 5 years imposed in terms of section 276 (1) (i) of the Criminal Procedure Act, number 51 of 1977.
2. On Count 3 – The contravention of section 120 (3)(b) of the Firearms Control Act, number 60 of 2000: The sentence imposed is 3 years' imprisonment, wholly suspended for 5 years on condition that within the period of suspension the accused is not found guilty of a crime where there is negligence involving the use of a firearm.
3. The sentence in count 1 and the sentence on count 3 shall run concurrently.
