

Record

1

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS88/1992

DATE: 17 FEBRUARY 1993

In the matter of: 5

THE STATE

versus

1. MELVIN SWENI
2. JOHANNES WILLIAMS
3. SINDILE SWENI 10

S E N T E N C E

BERMAN, J: This case started in the beginning of June last year and as I recall having stated - if I recall correctly - that for one reason or another, judgment was only delivered at the beginning of this month when all three of you were found guilty on all the four counts with which you were charged, i.e. murder of Mr Mario Kaplan; robbery with aggravating circumstances; with the unlawful possession of a firearm; and the unlawful possession of ammunition. 15

The time has then arrived when sentence has to be considered and passed. Mr van Vuuren, who appeared for the State, handed in three writs of admitted previous convictions, but instead of Mr Badenhorst, who appeared for accused number 1 dealing one way or another with the question of mitigation, he informed the Court that his client (accused number 1) had dispensed with his services and wished to retain another advocate. Mr Ipser, who appeared for accused number 2, gave the Court 20 25

SENTENCE

the same information and made a similar request. Mr Wilker, who appeared for accused number 3, had his services retained. Nothing was said to the Court to indicate the basis or bases upon which the services of Mr Badenhorst and Mr Ipser were dispensed with.

I must record, however, that whatever cause accused number 1 and number 2 had for taking the decision they did, there was certainly nothing in counsel's conduct, in and during the court proceedings, to indicate that slightest short-comings in their conduct in their erstwhile clients' defence. Indeed, Mr Ipser was good enough to take what steps he could, after his dismissal as counsel, to ensure that accused number 2 obtained representation, which was then offered in the person of Mrs van der Horst. The Court formally records its appreciation for her assistance, such as she was able to afford accused number 2, at a late but crucial stage of the trial, although in the end he declined her services. Accused number 1 re-retained the services of Mr Badenhorst.

I want to formally put on record at the commencement of this judgment the appreciation of the Court to all four counsel for appearing *pro deo* for the three accused, for the manner in which they discharged their duties. Mr Badenhorst, Mr Ipser and Mr Wilker, having been initially hampered in the preparation of their clients' defences, where they originally declined to participate in a trial following my refusal to transfer the case to Cape Town. We have heard Mr van Vuuren in argument on sentence and counsel for two of the accused have addressed the Court in mitigation, none of the accused having chosen to testify, or to call any witnesses in mitigation. Accused number 2, as I have said, has elected

to stand mute.

The time has finally arrived when the three of you are to be sentenced for the crimes of which each one of you has been found guilty. It is well-known that one of the most difficult tasks facing a judicial officer is to have to pass sentence upon a fellow human being who has been convicted of a very serious crime. In a case like this, a judge has a man's life in his hands, for this is in fact a matter of life and death. Every judge is different from another judge and every convicted person is different from another convicted person and there are no set rules for sentences for different crimes. There is a scale of punishment provided where sentencing is called for.

There are several helpful guidelines which have been laid down by the Appeal Court as to what is to be taken into account when sentences are to be imposed. In the first place the Court must consider the nature of the crimes which have been committed. In the second place the Court must have regard to the interests and concerns of society, that is of the community. In the third place the Court must take into account each convicted person's own individual, personal circumstances. In doing this, the Court must be careful not to place too heavy an emphasis on any one of these three considerations. Equal weight must be given to each of them. No one of them is to over-emphasised or under-emphasised. Coming to a view of the matter in the light of all this, the Court is enjoined to have regard to the element of mercy.

Insofar as the nature of the crimes which you have committed are concerned and as far as the interests of the community are concerned,

SENTENCE

I can deal with these two aspects of the matter at one time because what I have to say applies to all three of you. Murder, the unlawful taking of the life of another human being, is a most serious offence, one of the most serious, if not the most serious in the catalogue of crimes. The murder in this case was a particularly cruel, brutal, vicious, shocking and savage one. This innocent man was done to death, not one on one, but by three persons acting together. He was a person known to one of the three of you as being nervous of the possibility of being at the mercy of intruders. He was not killed cleanly with a single shot or a single stab or a single blow. He was stabbed time after time after time. Nobody can say after which particular stab wound this poor man died, but his blood was splattered all over the place. His death was not brought about spontaneously; rather was it premeditated in the sense that it was the intention of all three of you to rob him and, lest he identify one or all of you, you deliberately decided to kill him, first to procure his revolver and then, having debated whether or not to use it to shoot him in order to silence him, and considering that a shot would make a noise, you deliberately set about the blood-thirsty task of silencing him by using him as some kind of human dart board.

5

10

15

It was an appalling murder that you three committed and in the end, to what purpose. In order to rob him of his possessions which turned out to be of little use to any of you, some goods hidden along the road-side, a BMW motor car which you effectively put out of action, a musical instrument which accused number 1 took and which I doubt he could play, a diamond ring which accused number 2 took and still had

20

25

SENTENCE

when arrested. The firearm which accused number 3 robbed the deceased of after luring him into a homosexual bout. I have described your conduct as cruel, vicious, brutal, shocking and savage. To this description I must add the words cowardly and inhuman.

With regard to the interests of the community at large I have this to say. The public look to the police and to the courts to protect them and to make sure that people can live happy and peaceful lives. That is what the community expects from the police, from magistrates and from judges and it is our duty to do our best to see that this is what the public gets - the chance to lead peaceful and secure lives without fear and concern of danger and threats to their lives and property from criminals who live by violence. The public wants to know that wrong-doers will be punished. They want to live and to work peacefully in the daytime and to sleep peacefully in their beds at night.

Knysna is, or should be, a quiet and happy town. I do not know how prevalent crimes of violence are in that community but I certainly know that in recent times two notorious murders were committed there; that of an innocent little girl that occasioned great publicity, and that of an unfortunate visiting hitch-hiker whose murder also gained great publicity. Something must be done to show the public that its security is well cared for by the Court and this case is an excellent opportunity to assure the public on that concern.

I turn then to deal separately with the personal circumstances of each of you and the sentence to be imposed on each of you.

With regard to accused number 1 you have a number of previous

SENTENCE

convictions. You have been in trouble with the courts before. I note particularly that you have a previous conviction for being in unlawful possession of a firearm and ammunition. Nevertheless, the impression I gained of you is that violent criminal that you are, what distinguishes you from accused number 2 and number 3, is that in my opinion you are not as bright nor intelligent as the other two. I may be wrong but that is exactly the view which I take of you. You were content in making your escape after the deceased's car had broken down, with a musical instrument which, as I said, I doubt you could play; which would not have been easy to sell; and which was readily identifiable.

5

10

What little could be said in your favour was said by Mr Badenhorst. I think I am correct in recalling that he made mention of your youth. I see, however, that you were in your late 20's. You were nevertheless a man of limited education, a poor upbringing and there was mention of some measure of drink. I will deal with the question of drink in due course, but even if I take it into account there was little enough said to mitigate your crimes.

15

Mr van Vuuren has called in the first place for a sentence of death on all of you. I will deal with this submission in due course, but for all the history of violence I consider you differently placed to your co-accused. You were the first to confess and, to some extent, your confession may well have been of assistance to the police in their investigation. I note, however, that there was no single expression of remorse on your part. Taking all this into consideration and having due regard to what Mr van Vuuren and Mr Badenhorst have had to say, a

20

25

SENTENCE

proper and appropriate sentence for you, and which the Court now imposes on you is the following:

1. On the count of murder - a sentence of 20 years' imprisonment.
 2. On the count of robbery with aggravating circumstances - a sentence of 10 years' imprisonment. 5
 3. On the count of unlawful possession of a firearm and ammunition which I shall take together for the purposes of sentence - a sentence of five years' imprisonment is imposed which is to run concurrently with the term of 10 years' imprisonment on the robbery charge. 10
- This means that you are sentenced to an effective 30 years' imprisonment. 15

I turn to deal with accused number 2. You too have a history of crimes behind you. There are, I think, some seven previous convictions for theft. It appears from your record of previous convictions that corporal punishment had no effect on you. In all you have spent some three years in jail for theft. I do not know of anything that can be said in mitigating your sentences because you elected to say nothing and give no evidence. 20

You are in a totally different position to accused number 1 and accused number 3. You had a position of trust vis à vis the deceased in that you worked for him. You had ready access to his home. You knew 25

SENTENCE

what there was to steal. There was a sexual relationship between the two of you. He was kind to you. He had enough faith and trust in you to look after him and his home, when he was there and when he was away. At one time he took you back into his employ when you came out of jail. At one time also he made you a beneficiary in his will and this is how you repaid him, by getting together with two social misfits and embarking on this cowardly, callous and brutal murder of a man who regarded you as a loyal and trustworthy employee. As with accused number 1, not a single word or expression of remorse or regret has this Court heard from you.

5

10

Mr van Vuuren has asked the Court to sentence you to death and quite simply, why not? In answering that question, one is faced today with a problem as to whether or not there is no equally appropriate and effective sentence. That is a problem which the Court must these days put to itself. An alternative is, I suppose, life imprisonment. To be sent in your case to prison for life at the age of 24 is in itself a terrible punishment. I do not want to enter here into any controversy about the death penalty or indeed, any discussion as to whether the death sentence will or will not be carried out in the future; that is as to the future of the death penalty as an ultimate punishment. This neither the occasion nor a forum for doing that.

15

20

It seems to me that whether your life is terminated by hanging or effectively by having to spend the rest of your days in jail, amounts to very much the same thing, so long as you are permanently removed from society. Life imprisonment for you at the age of 24 must be an awful

25

SENTENCE

prospect. To know that you may live another 10, 20 or 30 or more years each and every morning you wake up to the same thought, that you will never ever again breathe the free air of the outside world and that you are doomed to die behind bars. That, I feel, is an appropriate sentence for you.

5

I do not need to distinguish your sentence in any substantial way upon the three remaining counts from which the Court has imposed on accused number 2 because you and number one both have records as thieves and deserve the same punishment, except of course that accused number has a previous conviction relating to a firearm and ammunition. What I want to stress insofar as you are concerned is this - should for some reason or other your sentence of life imprisonment is at some future date changed so that you have a prospect of being released from imprisonment before you die, the additional sentence on the count of robbery with aggravating circumstances will then come into operation.

10

15

The Court thus imposes the following sentences:

1. On the count of murder - a sentence of life imprisonment.
2. On the count of robbery with aggravating circumstances - a sentence of 10 years' imprisonment.
3. On the count of unlawful possession of a firearm and ammunition which I shall take together for purposes of sentence - a sentence of three years' imprisonment which is to run concurrently with the

20

25

SENTENCE

terms of 10 years' imprisonment on the robbery charge.

This means that you are sentenced to life imprisonment plus 10 years.

I turn now to deal with accused number 3. You have a shockingly serious record of violence. You have also a conviction for assault with intent to do grievous bodily harm, which was committed after the offences with which I am now dealing, but which I will not take into account.

In January 1990 you were sentenced to seven years' imprisonment for culpable homicide, to which three months later in April 1990 were added a previously suspended sentence of three years, in respect of which you had already been effectively jailed for three years. The fact is that in April 1990 you had the prospect of spending some nine and three-quarter years in jail. You participated in the crimes which you are now charged with and for which I am now about to sentence you in July 1991, at a time when you should have been in jail in terms of sentences properly passed upon you. In fact, you had at most served 15 months of almost 10 years' imprisonment when you went back to work with a knife.

I do not know what prompted your extraordinarily release from jail but I record with sadness that had that not happened the unfortunate deceased, who did you no harm, might still have been alive today. It may be that you were released, with what I can only call unseemly haste, because prisons are over-crowded or that you were assessed and very

SENTENCE

incorrectly deemed suitable for release, but whatever the reason or reasons may be, the fact remains that I am strongly of the view that you should never, ever be allowed out on the streets again.

Can one blame police officers who put in long investigating hours in cases bringing people before the courts to see those convicted and sentenced to long terms of imprisonment, freely walking around the towns long before they have served their sentences, can you blame them for being frustrated? Can one blame judicial officers who carry out their duties diligently, who spend much time in considering what an appropriate sentence should be, also for feeling a sense of frustration to see people who have been duly sentenced by them released long before their sentences have been served, quite apart from remissions for good behaviour in jail.

Your case is a sad and, indeed, shocking instance of premature release because look what has resulted from it. Even if you had enjoyed a remission for good behaviour, you would have still been socially behind bars on the night this murder and robbery were committed and an innocent, law-abiding, useful citizen might well have been alive today. It is indeed a shocking state of affairs. Quite apart from your record, there is very little to be said in mitigation of your crimes. You are, relatively speaking, well educated. You attained a level of education of Standard 8. You appear to me to be certainly the most intelligent of the three of you and you are certainly no fool.

Mr Wilker made the point that there had been drinking that day or evening or night, both before you went to the house of the deceased,

SENTENCE

and while you were there. I am not moved by this in respect of any of you. You personally were sober enough to plan how to dispossess the deceased of his firearm and you were all sober enough to plan how to avoid using the revolver to kill the deceased, and you were sober enough to know that you were handy and experienced with a knife and sober enough to take the firearm and ammunition with you.

5

Mr van Vuuren asked in your case also for the death sentence to be imposed and in the alternative, as in the case of accused numbers 1 and 2, for life imprisonment. Mr Wilker conceded that a long term of imprisonment would not be inappropriate. Certainly what little can be said in mitigation on your behalf is overwhelmingly outweighed by the aggravating circumstances present. This does not mean that where there are only aggravating circumstances that the death sentence must necessarily be imposed. What the Court must do is to impose a proper sentence and what I am about to say in this regard has reference to accused number 2 as well.

10

15

Quite apart from the cases to which counsel referred me, particularly Mr Badenhorst, there have been a number of Appellate Division decisions very recently dealing with this question of a proper sentence: S v Mazibuko & Another 1992(2) SACR 491; S v Marshall 1992(2) SACR 494; S v Jordaan 1992(2) SACR 495; S v Ntshangazi 1992(2) SACR 141; S v Van Vuuren & Another 1992(2) SACR 148; S v Nkobo 1992(2) SACR 515. In the first two cases there were dissenting judgments in the Appellate Division. In the end it all boils down to this - it is a value judgment which is called for. It has been

20

25

SENTENCE

stated that the death penalty should be imposed only in extreme circumstances. I can conceive of circumstances which can make the appalling set of circumstances in this case even more dreadful, but as I have already said, in the end what is a proper sentence in given circumstances is ultimately a value judgment.

5

What I have already said about life imprisonment and what it means and what its consequences are for accused number 2 is equally applicable in the case of accused number 3. The purpose of a life imprisonment sentence will serve to keep him outside the community, to secure the safety of members of the public from him, and to serve as a deterrent to all persons that life is not to be taken lightly and that where murder is committed for no purpose except robbery and in association with robbery, a proper sentence, if not the death penalty, is not one necessarily limited to imprisonment for a specified and lengthy number of years, but for the term of the offender's life. You certainly can lay no claim to mercy. As with your fellow accused, not a mention or a sign of remorse has been heard or seen from you or on your behalf.

10

15

It is with a measure of some reluctance that I do not take the easy way out and let the community be shot of you once and for all and simply impose the death sentence. But I have decided on consideration that you too should spend and live your life behind prison walls. You too will derive little comfort from the knowledge that the purpose of this sentence is that you should spend each and every day and each and every night for the rest of you life in jail.

20

Accordingly, taking all relevant considerations into account, this

25

SENTENCE

is what, in my view, is a proper and appropriate sentence which I pass on you:

1. On the count of murder - the sentence of life imprisonment.
2. On the count of robbery with aggravating circumstances - a sentence of 10 years' imprisonment. 5
3. On the counts of unlawful possession of a firearm and of ammunition which I shall take together for the purposes of sentence - a sentence of three years' imprisonment which is to run concurrently with the term of 10 years' imprisonment on the robbery charge. 10

As I said, with reference to the sentence passed on accused number 2, the purposes of adding a sentence of 10 years' imprisonment to the sentence of life imprisonment is that in the event that in the uncertain future you should be considered for release whilst you are still alive, the 10 years' imprisonment will still have to be served by you. 15 20

I have already referred to the fact that your premature release from jail afforded you the opportunity of participating in this bout of savagery. Let it hang heavily on somebody's conscience if history is allowed to repeat itself. 25

15

SENTENCE

In short, you are sentenced to life imprisonment plus
10 years' imprisonment.

5

BERMAN, J

10