Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A 220/2010

In the appeal between:

WILLEM FILAND **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED ON 8 DECEMBER 2010

AP LAUBSCHER, AJ:

INTRODUCTION

1. On 2 September 2008, in the Cape Regional Court at Malmesbury ("the trial court"), the Appellant was convicted on one charge of murder and one charge of attempted murder. On 4 September 2008, the Appellant was sentenced to twenty (20) years imprisonment on the charge of murder (count one) and ten (10) years imprisonment on the charge of attempted murder (count two). Half of the latter sentence was ordered to run concurrently with the former sentence, as a result of which the Appellant was sentenced to an effective sentence of twenty five (25)

years' imprisonment. The Appellant was legally represented at all stages of the proceedings and now appeals to this court against both conviction and sentence.

AD THE CONVICTION

2. It was alleged that, on 10 December 2005 and at a BP garage in Malmesbury, the Appellant poured petrol over Paul Coetzee ("Coetzee") and Koos Swartz ("Swartz"), who were both sitting next to a braai fire, as a result of which they both caught alight. Coetzee died, resulting in the charge of murder, and Swartz was seriously injured, resulting in the charge of attempted murder.

The charge sheet

3. The relevant part of the charge sheet regarding the charge of murder read as follows: "DAT die beskuldigde skuldig is aan die misdryf van Moord (gelees met die bepalings van Artikel 51(2) van die Strafregwysigingswet 105 van 1997)...".

4. I will return to this fact later in this judgment.

The plea

5. The Appellant pleaded not guilty to both charges and elected to remain silent in respect of both counts. No plea explanation was tendered in terms of Section 115 of the Criminal Procedure Act 51 of 1977 (as amended).

Admissions

6. In terms of Section 220 of the Criminal Procedure Act 51 of 1977 (as amended), the Plaintiff admitted the cause of death, the correctness of the contents of the post mortem report in respect of Coetzee, certain photographs and the correctness of the contents of the medical report for Swart.

The evidence

7. The Respondent called three witnesses.

8. Koos Swartz ("Swartz"), testified he knew the Appellant for approximately six months before the incident. The witness, the deceased, the wife of the deceased Sophie Adonis and Meidjie / Jasmina were seated at a fire and the deceased was preparing food. The witness was seated next to the deceased. They were all drinking wine from a two litre container. The Appellant approached them carrying a plastic two litre bottle which the witness thought was wine. He was wearing blue jeans and a jacket. The Appellant spoke to them for a short while and then offered them a drink. The Appellant opened the container he was carrying and poured the contents thereof over the head of the deceased. The deceased was wearing shorts and his upper body was naked. The deceased and the witness both caught fire. The witness sustained burns to the face, his neck and both hands. He was saved because his girlfriend, Sophie Adonis, who helped him to extinguish the fire. The police attended the scene and called an ambulance which

took both the deceased and the witness to hospital. When asked if the Appellant acted intentionally, the witness said there was a history between the deceased and the Appellant and the Appellant hated the deceased. The Appellant left the container and left the scene. Under *cross examination*, the witness testified girlfriend of the deceased, Jasmina, had walked to a tree to fetch a bag of wine and that is why she was not burned. The Appellant squeezed the container when the fluid landed on the deceased and the witness. The Appellant had an affair with the wife of the deceased. The witness said he thinks the Appellant poured the petrol on him to stop him from being a witness to the murder of the deceased. In reply to the Appellant's contention that he was not there and in reply to repeated cross examination on this point, the witness confirmed he is sure it was the Appellant who poured the petrol on him and on the deceased. Although he had been drinking she was not drunk at the time of the incident.

9. Jasmina Cloete testified she knew the Appellant for three or four months prior to the incident. The deceased had told her they were going to braai and he made a fire. They drank wine from Koos' container. The deceased then told her to fetch their bag of wine from where they were sleeping. She went to the tree where the wine was. When she returned to the fire the Appellant was standing there. He was wearing blue jeans. The Appellant had a two litre container with a plastic bag around it in his hand. She turned around and walked away. She felt the heat, turned around and saw someone in flames. She also saw someone who was running away. The Appellant was no longer at the fire. Although she drank about two litres of wine she was not drunk. The deceased, she and the Appellant had

slept together at times. Under *cross examination,* said she did not see who ran away but she did see the Appellant was no longer at the fire. She did not see the Appellant pour petrol on the deceased. The Appellant was at the scene, but after the fire the Appellant was no longer there. Prior to his death, she and the deceased were involved in a relationship for two years. There was no animosity between her and the Appellant. However, the Appellant had threatened to burn the deceased the Wednesday prior to the incident. After this threat, the Appellant did not sleep with them any longer. She testified that Koos Swartz and she were both sober at the time of the incident. She pointed the Appellant out to the police who arrested him.

10. Johannes Daniel testified he knew the Appellant for around five (5) days prior to the incident. On the Saturday of the incident, he met the Appellant near the swimming pool near the park. The Appellant gave him five rand and a two litre Coke container and asked him to go and buy petrol. The petrol was for his car but he did not see a car anywhere. He went to buy the petrol and gave it to the Appellant. The Appellant told him he would hurt him if he did not buy the petrol. The container was plastic. He did not know what the Appellant did with the petrol and he did not see the Appellant again until the next day, the Sunday, at the farm Stal Bou or Bella Vista. The Appellant said he felt like a drink. They started walking and the witness asked the Appellant why they were not walking in the road but taking a back way. The Appellant told him "ja, maar hy het die mense aan die brand gesteek". The Appellant did not tell him who these people were.

Under *cross examination,* he said the petrol he bought was green and it was not in a plastic bag when he gave it to the Appellant.

The approach of the trial court

11. The trial court summarised the plea, the admissions and the evidence. The trial court reminded itself the evidence has to be regarded in totality, the Respondent had to prove the guilt of the Appellant beyond reasonable doubt, the Appellant bears no onus, and if the Appellant had testified and the court could only convict if the version was false beyond reasonable doubt. The trial court remarked that, from the cross examination of the State witnesses, it was clear the only issue in dispute was the identity of the person who committed the crime. The trial court reminded itself that evidence regarding identification has to be approached with caution.

12. Regarding the evidence of Koos Swartz, the trial court noted his evidence was clear and logical. The witness was sober, he observed the Appellant in a relaxed atmosphere as he was standing next to the fire and offering them a drink, saw the container as the Appellant was offering them a drink. The observation was not a fleeting one and the witness knew the Appellant for six months prior to the incident. During cross examination it was not disputed the witness knew the Appellant very well. In conclusion, the trial court decided the identification was strong enough to exclude that another person than the Appellant was the person who poured petrol on the deceased and the witness.

13. Regarding the evidence of Jasmina Cloete, the trial court noted she had consumed alcohol and minimised her state of drunkenness. That explains her evidence that the container was in a plastic bag and she could not see the fluid. She had an affair with the deceased for two years and although she might have had reason to falsely implicate the Appellant, she remained neutral and was honest enough to testify she did not see the Appellant pour petrol on the deceased and Koos and she did not see who the person was who ran away from the fire. She knew the Appellant very well as they had been sleeping as a group. She saw him talking to the deceased and to Koos. She knew the Appellant by name and could not have been mistaken about seeing him at the fire. The trial court concluded by saying it was satisfied the witness was telling the truth.

14. Regarding Johannes Daniels, the trial court found the identification of the Appellant on the day of buying the petrol and the next day could not be mistaken as he had known the Appellant for five days before the incident, which was not disputed during cross examination. The trial court held this witness could not have made a mistake in identifying the Appellant as the person who sent him to buy petrol on the one day and who told him the next day that he had burnt the people the previous night.

15. The trial court correctly found that as the Appellant had exercised his Constitutional right not to testify at the trial, the trial court had to decide whether or not the State had established a *prima facie* case against the Appellant that necessitated an explanation. The trial court found the State had established a

strong case against the Appellant, which the Appellant had failed to challenge by testifying. Accordingly, the trial court found the cumulative effect of all the evidence presented by the State was to prove the charges against the Appellant.

Discussion

16. On Appeal, it was submitted the trial court erred in not having due regard to various contradictions in the evidence of the State witnesses. In my respectful opinion the trial court dealt with these differences fairly and correctly when the evidence is viewed as a whole.

17. From the evidence summarised above, it is clear the trial court applied the correct approach to the evidence which it analysed and discussed thoroughly. There was clearly a case established which called for an answer by the Appellant.

18. Of particular importance to this appeal and to the sentences imposed by the trial court, is the finding the murder was premeditated or planned. In this regard, the evidence was clear: the Appellant threatened to burn the deceased on the preceding Wednesday, he bought petrol on the Saturday morning, kept the petrol for the duration of the day and poured it over the deceased that evening.

19. Accordingly, having considered all the evidence, as summarised above, as well as the approach of the trial court, I am not persuaded that the trial court erred or that the conviction should be set aside.

20. Accordingly, I would respectfully suggest the Appellant's appeal against his conviction should be dismissed.

AD THE SENTENCE

The evidence regarding sentence

21. The relevant evidence regarding sentence consisted of the Appellant's previous convictions, an *ex parte* address by the Appellant's counsel in mitigation of sentence and an address by the state prosecutor to the trial court in aggravation of sentence.

The trial court's approach to sentence

22. The trial Court commenced sentencing by telling the Appellant the trial court would take into account his personal circumstances, the circumstances of the offences, the interests of society, as well as the main purposes of punishment, being prevention, retribution, rehabilitation and deterrence.

23. Regarding the Appellant's personal circumstances, the trial court noted the Appellant was 47 years old, divorced with two children aged 15 and 3 years, but does not contribute toward their maintenance. A qualified painter, he was not working at the time of the incident. He passed Standard six at school and never had a stable family life. He moved from place to place living on the streets. At date of sentencing, on 4 September 2008, the Appellant had been in custody for two years and nine months.

24. Regarding the Appellant's previous convictions, the trial court noted most of the previous convictions were relatively old, although six of them were relevant to the current convictions. Accordingly, the trial court stated it would not attach too much weight to these previous convictions.

25. The trial court found the offences were planned in that the Appellant had purchased the petrol during the day and then kept it knowing he was going to use it that night.

26. The trial court found the murder was particularly gruesome, the deceased was doused with petrol over his naked upper body and was engulfed in flames. He died a slow and painful death in hospital days later.

27. The trial court found the offences convicted of are prevalent in society and that, given the levels of violence and serious crimes, the emphasis should be on retribution and deterrence.

28. The trial court referred to the various prescribed minimum sentences as provided for in Section 51(1) and 51(2) of Act 105 of 1997 (as amended) and found that the murder the Appellant was convicted of was planned or premeditated, as a result of which the provisions of Section 51(1) of Act 105 of 1997 (as amended) were applicable, providing for a sentence of life imprisonment unless the trial court found that "substantial and compelling circumstances", as provided for in Section 51(3) of Act 105 of 1997 (as amended), were present.

29. Accordingly, the trial court turned to investigate the presence or otherwise of "substantial and compelling circumstances" as provided for in Section 51(3) of Act 105 of 1997 (as amended). The trial court found the fact that the Appellant had had a hard life and the fact that although 47 years old, he could still be rehabilitated, even after a long prison sentence, were substantial and compelling circumstances.

30. Accordingly, the trial Court sentenced the Appellant to 20 (twenty) years imprisonment on the murder charge (count one), to 10 (ten years imprisonment on the attempted murder charge (count two), ruled that one half or 5 (five) years of the latter sentence would run concurrently with the former sentence, and declared the Appellant to be unfit to possess a firearm in terms of Section 103 of Act 105 of 1997 (as amended).

Submissions on appeal

31. On appeal regarding sentence, it was submitted: *firstly*, the trial court erred in failing to ensure the Appellant fully understood he could be sentenced to the minimum period of life imprisonment by virtue of Section 51 of Act 105 of 1977 (as amended); *secondly* the trial court overemphasized the retributive aspect of sentencing; *thirdly* the trial court imposed a sentence which is disproportional to the crime.

Discussion

32. It is trite law that where the State intends to rely upon the minimum sentencing regime created by Act 105 of 1997 (as amended), a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial. This should be done either in the charge-sheet or in some other form, so that accused is placed in a position to appreciate properly and in good time the charge that she or he faces as well as its possible consequences. What will at least be required is that accused is given sufficient notice of State's intention to enable accused to conduct her or his defence properly (See *inter alia*: S v Ndlovu 2003 (1) SACR 331 (SCA); S v Erskine 2008 (1) SACR 468 (C); Sv Raath 2009 (2) SACR 46 (C).

33. Section 51(1) of Act 105 of 1997 (as amended) as read with Part I of Schedule 2, determines that a person convicted of "planned or premeditated murder" shall be sentenced to imprisonment for life, except if the court finds that substantial and compelling circumstances which justify the imposition of a lesser sentence, exist (hereinafter "Section 51(1)").

34. Section 51(2) of Act 105 of 1997 (as amended) as read with Part II of Schedule 2, determines that a person convicted of murder committed in circumstances other than those mentioned in Part I of Schedule 2 (none of which are relevant in this matter), shall in the case of a first offender, be sentenced to imprisonment for a period of not less than 15 years (hereinafter "Section 51(2)").

35. As set out hereinbefore, the trial court found that the Appellant was guilty of "planned or premeditated murder" and considered the provisions of Section 51(1) of Act 105 of 1997 (as amended) as read with Part I of Schedule 2, to be applicable to sentencing the Appellant.

36. However, as referred to hereinbefore, the relevant part of the charge sheet regarding the charge of murder read as follows: "DAT die beskuldigde skuldig is aan die misdryf van Moord (gelees met die bepalings van Artikel 51(2) van die Strafregwysigingswet 105 van 1997)...".

37. In addition, as appears from the record (in particular on page 247/8), save for the mention of Section 51(2) on the charge sheet, at no stage was the Appellant

alerted the State intended seeking a sentence in terms of Section 51(1) or Section 51(2). It is also clear both the prosecutor and the trial court never ensured the Appellant was aware of the provisions of Section 51(1) or Section 51(2).

38. Accordingly, in my respectful opinion, the trial court clearly misdirected itself by applying the provisions of Section 51(1) and by sentencing the Appellant to twenty (20) years imprisonment on the charge of murder, as a result of which this Court on Appeal should set aside this sentence and replace it with an appropriate sentence.

39. Moreover, in my respectful opinion, the mere mention of Section 51(2) on the charge sheet was insufficient to ensure the Appellant's right to a fair trial was safeguarded, *firstly* as the Appellant was represented by different legal representatives at pleading stage and during the resulting hearing and, *secondly,* both the prosecutor and the trial court failed to ensure the Appellant was aware of the provisions of Section 51(2).

40. Accordingly, in my respectful opinion, for these reasons, had the trial court applied the provisions of Section 51(2), this Court on Appeal would have been compelled to set aside such a sentence as well.

41. Therefore, in my respectful opinion, this Court on Appeal, in considering an appropriate sentence on the murder conviction, cannot and should not apply the provisions of either Section 51(1) or 51(2).

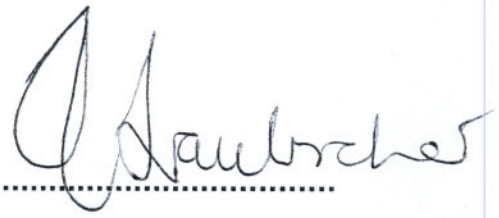
42. The relevant factors this and any other Court must take into account in reaching an appropriate sentence, *to wit* the Appellant's personal circumstances, the circumstances of the offences, the interests of society, as well as the main purposes of punishment, have been set out hereinbefore and will not be repeated herein.

43. After carefully considering and weighing up all these relevant factors, I am of the respectful opinion an appropriate sentence on the murder charge (count one) would be one of fifteen (15) years imprisonment. Moreover, I am of the respectful opinion that the sentence of ten (10) years imprisonment on the attempted murder charge (count two) should run concurrently with the sentence on count one.

THE ORDER

44. In the result, I would respectfully recommend that an order be made that the Appellant's appeal against conviction be dismissed, that the Appellant's appeal against the sentence on the murder charge (count one) succeeds and the sentence of 20 (twenty) years direct imprisonment be set aside and replaced with

a sentence of 15 (fifteen) years direct imprisonment, antedated to 4 September 2008.



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AP LAUBSCHER

VELDHUIZEN, J: I agree and it is so ordered, the Appellant's appeal against conviction is dismissed, the Appellant's appeal against the sentence on the murder charge (count one) succeeds and the sentence of 20 (twenty) years direct imprisonment is set aside and replaced with a sentence of 15 (fifteen) years direct imprisonment, antedated to 4 September 2008. The sentence on the attempted murder charge (count two) shall run concurrently with the sentence on count one.

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A VELDHUIZEN