



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: SS17/2013

Before: The Hon. Mr Justice Binns-Ward  
sitting with an assessor

In the matter between:

**THE STATE**

and

**GARY PETERS  
MOEGAMAT SHAFIEK MINNIES**

Accused No. 1  
Accused No. 2

---

**SENTENCE JUDGMENT DELIVERED 5 FEBRUARY 2014**

---

**BINNS-WARD J:**

[1] Accused no. 1, Mr Gary Peters, has been found guilty of the unlawful possession of a firearm without a licence. His co-accused, Mr Moegamat Shafiek Minnies, has been found guilty of the murder of Junaid McKenzie and the attempted murder of Mrs Leticia Jacobs, as well as the unlawful possession of a firearm and ammunition without a licence. The circumstances in which the offences were committed were fully described in the conviction judgment delivered on 4 November 2013 and it is therefore unnecessary to retrace the facts at length. Suffice it to say that the offences were committed in the context of the gang-related violence which is, and has for too long been, a social scourge in the greater Cape Town metropolitan area.

[2] It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime or crimes that the accused has committed, the interests of the community - which includes matters such as victim impact, the need for punishment to contain an appropriate element of retribution to sustain confidence in the

effectiveness of criminal justice and affording some measure of deterrence, while also offering sufficient opportunity for rehabilitation and reform for the offender if the accused is amenable thereto – and the individual circumstances of the accused. These considerations are commonly referred to as the 'Zinn triad' after the often quoted decision of the late Appellate Division that authoritatively confirmed them to be the relevant compass points, *S v Zinn* 1969 (2) SA 537 (A).

[3] The offences of which the accused have been convicted were grievous crimes, particularly in the case of accused no. 2. Their commission in the context of the social evil of gangland violence is an aggravating factor. The effect of that violence on innocent individuals in poor communities on the Cape Flats has been graphically illustrated by the facts of this case. A young boy of just eight years of age was killed by a bullet through his head while playing with a football on the pavement outside his house and a housewife was struck down while walking nearby going about her everyday personal business with her young teenage daughter.

[4] The effect of the violence has lived on long after the event. The family of the young child has suffered a grievous loss, from which, as apparent from the victim impact assessment report, it is clear that they have not recovered and will probably haunt them for the rest of their lives. Tragically, violence appears to have been attracted to their house because the young boy's elder brother had become enmeshed in the gang culture, being a member of a rival gang to that which accused no. 2, the shooter, belonged. Accused 2 had proceeded to the area to wreak vengeance for shootings that the rival gang had apparently carried out in the area in which the accused lived. The indiscriminate effect of the endemic violence is, however, evident in the resulting death and injury of innocents. Mrs Jacobs and her daughter were traumatised so badly by their experience that they do not feel safe anymore, whether it be in their home or going out on the streets. Mrs Jacobs endured surgery and the inconvenience and indignity of living with an open colostomy for several months. She suffers pain and discomfort to this day and is likely to do so for the rest of her life. While it is important that the court sees to it that the accused are not punished twofold for the same offence, the fact that the firearm and ammunition related offences were committed in the aforementioned gang violence context makes these serious instances of the statutory offences involved.

[5] When serious offences such as murder are involved, the personal circumstances of the accused have to be subordinated to the public interest in the imposition of appropriately severe sentences. The prescribed minimum sentence legislation reflects the public interest in

a standardised regime of severity in respect of certain offences, including murder. The courts are bound to respect this statutory regime and to apply it within constitutional norms. The prescribed sentences must be imposed unless there are compelling and substantial reasons not to do so and provided that in the given case the prescribed sentence is not grossly disproportionate to the blameworthiness of the accused; cf. *S v Matyityi* 2011 (1) SACR 40 (SCA), [2010] 2 All SA 424, and *S v Vilakazi* 2009 (1) SACR 552 (SCA), [2008] 4 All SA 396. The public interest in the proper administration of justice has been demonstrated in these proceedings by the regular attendance at court during the trial of members of the victims' families. They would certainly not feel that justice had been done if the personal circumstances of the accused were given undue weight.

[6] In the current matter the offence of murder of which accused no. 2 has been convicted carries a prescribed sentence of life imprisonment.

[7] The consideration that the personal circumstances of the accused should not enjoy undue weight does not mean, however, that they must not enjoy appropriate consideration. A balanced approach is indicated.

[8] Accused no. 1 is a young man of 22 years. He was just short of 21 at the time of the commission of the offence. He had a very limited education, leaving school before completing grade 6, apparently because he had a learning disability, which is reported to have been the consequence of excessive alcohol consumption by his mother while she was carrying him in the womb. He grew up in straitened circumstances in a crime ridden area and has never held fixed employment. He has done odd jobs as a casual labourer and as a caddie. He also street-vended fruit and vegetables. He has been using undesirable and dangerous dependence producing drugs like dagga and 'tik' (methamphetamine) since the age of 17, although he claimed to the correctional services officer who reported to the court for sentencing purposes that he has ceased to do so. The accused is a first offender. His involvement in the incidents of 26 June 2012 was incidental, in that he had been invited by accused 2 to tag along merely because he happened to be noticed by the latter while the group of Mongrels gang members of which accused 2 was part set out from the flats in Lavender Hill on its way to wreak violence in the neighbouring suburb of Steenberg. The role that he has been found to have played was a minor one. He assisted in taking the weapon used in the shooting away from the scene and back to Lavender Hill, where he returned it to accused 2. That is not to downplay the seriousness of his assistance to accused 2 in respect of looking after the weapon while he, accused 2 and Anwar Hendricks fled from the scene of the shooting. He was aware of the circumstances in which the weapon had been used and he

must have appreciated that it was not being vouchsafed back to accused no. 2 to be held in legitimate possession.

[9] A factor counting in favour of accused no. 1 is that he co-operated with the police from the time of his arrest and, despite not being the most impressive of witnesses, gave essentially honest evidence at the trial. He has been in custody since his arrest at the beginning of September 2012 (a period of about 17 months).

[10] A court assessment official from the Department of Correctional Services, Ms N Giyose, reported to the court that accused no. 1 is a suitable candidate for correctional supervision. The report was shown under questioning of Ms Giyose and the evidence of the accused's aunt, Ms Claire Ben, to be incorrect in several material respects. This was a matter of serious concern. The input of a correctional officer is a statutory requirement in all matters in which a sentence of correctional supervision might be appropriate. The object of the statutory requirement is defeated if the content of the reports is of poor quality and materially inaccurate. The inadequacy of the report was, however, fortunately for the accused, to a great extent remedied by the evidence of the accused's aunt. She made a good impression on the court. We are satisfied after hearing her evidence that if the accused were to reside with her during a period of correctional supervision he will probably receive suitable moral support and be living in a reasonably disciplined environment notwithstanding the relatively overcrowded conditions there, which in the court's experience are typical of the socio-economic environment from which the accused's family comes. Ms Claire Ben lives at 8C Abdullah Moosa Road, Parkwood, which is outside, albeit not that far away from the Lavender Hill-Steenberg district where the events giving rise to the charges took place.

[11] Accused no. 2 was 23 years of age at the time of the commission of the offences. He was a member of the Mongrels gang. His personal circumstances were investigated and reported on for the assistance of the court by a probation officer, Mr Manona. The accused grew up in the gang infested area of Lavender Hill and also had a limited education, leaving school during grade 7. He too has never held down fixed employment. Indeed, it was indicated to the court on his behalf that he had joined the gang in order to make an income to support his girlfriend and young baby. His girlfriend gave birth to a second child while the accused was in custody awaiting trial. He was brought up by his mother, who appears to be supportive, having attended every day of the trial. She has reportedly assumed responsibility for the material support of the accused's two children while he has been in custody.

[12] Whereas accused no. 2 cooperated with the police after his arrest and made a statement admitting his complicity in the shootings and expressing remorse for the death of a

child, his expressions of remorse were not borne out by his attitude during the trial, when he denied involvement and conducted himself in the dock during the evidence in a manner that affronted the sensitivity of the victims and their families. The effect of this behaviour was reported on in the reports prepared by the probation officer, Ms Williams. The accused's gang involvement, his related involvement with drug use and dealing and his lack of remorse do not inspire much confidence in his ability to reform and rehabilitate himself.

[13] It falls to be considered whether there are substantial and compelling reasons to deviate from the prescribed sentence of life imprisonment on the count of murder of which accused 2 has been convicted. The aspects that weigh with me in this connection are the relative youthfulness of the accused, his limited intellect, the vulnerable circumstances in which he grew up and the fact that in committing the offences he acted as a pawn in the grander designs of gang bosses who use the likes of the accused as cannon fodder. I also consider that very serious though the offences were, the ultimate sentence of life imprisonment would be disproportionate to the offence in the given circumstances and the role of the accused in its commission. For those reasons I am satisfied that the court may depart from the prescribed sentence. The sentence to be imposed must nevertheless use the prescribed sentence regime as a point of departure and be appropriately severe.

[14] Before imposing sentence it is necessary to say something about the delays that have attended the conduct of this 24 day trial, which commenced as long ago as 9 September 2013 and which concludes today on the 5<sup>th</sup> of February 2014. Delays were occasioned for a number of reasons, including the indisposition of myself for a week related to surgery, the domestic circumstances of the legal representative of accused 2, a request by the counsel for accused 1 for time to consult with witnesses, the indisposition on one day of the assessor and problems on occasion with getting the accused from prison to the court on time. Delays were also occasioned because state witnesses were not lined up or available so as to enable the prosecutor to continue when court time was still available. I expressed my frustration at some of these delays, which seem all too typical in criminal litigation, on numerous occasions during the trial. The last straw, however, was when the sentencing reports that I had directed be obtained were not available on 10 December 2013, after the trial had been adjourned for five weeks for that purpose on 5 November 2013.

[15] Mr Wolmarans, the prosecutor, advised the court that he had addressed telefaxes to the relevant functionaries charged with the preparation of such reports on 12 November 2013. It was not explained why a whole week should have passed after the adjournment before the relevant request was addressed. There was no documentary proof of the transmission of the

relevant telefaxes, and it would appear that when the prosecutor made enquiries of the Departments of Correctional Services and Social Development (Western Cape), only on the very day to which the matter had been adjourned, that no-one at those departments had any knowledge of their receipt. In my judgment the prosecutor should have been more expeditious in conveying the court's direction, he should have obtained an early indication from the departments concerned as to which officials there were dealing with the matter and he should have monitored progress to ensure that the court's directives were being carried out within the requirements of the applicable time-frame.

[16] The prejudice to the State occasioned by the delay is obvious. A judge and a court were unnecessarily occupied needlessly. The legal representatives of the accused and the assessor attended court unnecessarily. The accused were transported from prison to court for no purpose. The members of the public with a particular interest in the case, notably those connected with the victims of the offences, came to court for no reason. They are people who can ill afford the wasted travel costs. The costs of a wasted court day in these circumstances is not insignificant. I would estimate the wasted cost to the taxpayer as between R10 000 and R20 000. The delay in bringing the proceedings to completion in respect of sentencing was prejudicial to the accused, and obviously also to the administration of justice. I therefore decided to formally investigate the delay in terms of s 342A of the Criminal Procedure Act 51 of 1977.

[17] Mr Willem Stipp, the head of Community Corrections at the Department of Correctional Services in Cape Town testified that there was no record of a faxed request having been received from Mr Wolmarans of the Directorate of Public Prosecutions on 12 November 2013. The first time that he became aware of the court's directive was when Mr Wolmarans contacted him on 10 December 2013, which was the trial resumption date for which the requested reports were required. It was evident from Mr Stipp's evidence that there was no formal protocol in place to regulate the receipt and attendance on requests for correctional reports from the High Court. It was apparent that had he received the request for the correctional report on accused no.1 shortly after the report had been called for on 5 November 2013, it could have been prepared well in advance of the 10 December resumption date. Mr Wolmarans's inability to provide the court with proof that his telefaxes of 12 November were transmitted also showed that there was no proper administrative system in place at the office of the Director of Public Prosecutions in Cape Town for such communications to be recorded and monitored.

[18] Ms Folan Benjamin, a supervisor at the Metro-South region's office of the Department of Social Development (Western Cape), also testified that her office had no record of receiving the telefax that Mr Wolmarans had marked for the attention of one Ronda Luyt. Mr Wolmarans had explained earlier that he had come by Ms Luyt's name after numerous telephone calls to establish with whom he should be dealing to obtain the required social worker reports. He mentioned the names of a number of persons with whom he had spoken. Ms Benjamin conceded that a request for reports in High Court matters could be accommodated with the five-week adjournment that had been given for the purpose.

[19] It is quite clear on all the evidence that was adduced in the s 342A enquiry that the delay in the trial after 10 December 2013 was unreasonable. This trial should have been completed before the commencement of the year-end recess. It should not have had to drag on into the first term of 2014.

[20] The court calls for reports from correctional officers and probation officers or social workers on a regular basis. Such reports are required by law in all matters in which a sentence in terms of s 276(1)(h) of the Criminal Procedure Act might be considered and they are also of use to the courts in many other matters. It struck me as absurd in the circumstances that a prosecutor would not have an established point of contact with the relevant departments and a formalised protocol to process such requests. The absence of a formalised administrative system established between the Directorate of Public Prosecutions and the relevant sections of the Departments of Correctional Services and Social Development is bound to result in the perpetuation of the inefficiency and resultant delays that have characterised the current matter. It is also evident that the Directorate of Public Prosecutions should have in place a register of correspondence to exclude the scope for the unseemly debate that arose in the current matter as to whether the requests for the reports were in fact dispatched when Mr Wolmarans understood them to have been. He explained that he did not personally transmit the telefaxes; that was done by some other person without any proof of transmission being provided to him. The evident lack of organisation is quite unsatisfactory and its prejudicial effect on the administration of criminal justice is all too obvious, as demonstrated in the current case. The position should not obtain that when there is an unreasonable delay such as has occurred in the current case it is not evident why, and who is responsible for occasioning it.

[21] In terms of s 342A(3) of the Criminal Procedure Act, if the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to

prevent further delay or prejudice. The provision is widely worded, and whereas most orders made in terms of the section, which was introduced in terms of the Criminal Procedure Amendment Act 86 of 1996, are directed at expediting the completion of pending proceedings, there is no reason, having regard to the evident general object of the legislative insertion, why an order should not be made thereunder which is directed at preventing the recurrence generally of a cause of delay that has manifested in a particular case, but is likely, if left unaddressed, to be repeated in future cases. I therefore intend to make an order in the form of a structural interdict directing the Director of Public Prosecutions, in liaison with the appropriate counterparties at the Departments of Correctional Services and Social Development (Western Cape), to implement measures to put in place a formal administrative protocol that will establish clear lines of communication between the departments in respect of the processing of requests for correctional or probation reports by the High Court, including the implementation of a system of record keeping in respect of such communication

[22] In respect of his conviction on count 5, that is contravening s 3 read with s 120(1)(a) of the Firearms Control Act 60 of 2000 (unlawful possession of a firearm), accused no. 1 (Gary Peters) is sentenced to a term of three years' imprisonment, the whole of which shall be suspended for five years on the following conditions:

- (i) That the accused is not convicted of any offence involving a contravention of the said Act committed during the period of suspension and for which a sentence of imprisonment without the option of a fine is imposed;
- (ii) That the accused undergo a period of 12 months of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 comprising of the following community corrections:
  - (a) House arrest for the full duration of the period of correctional supervision at 8C Abdullah Moosa Road, Parkwood, Cape Town, or such other place as might be determined by the Commissioner for Correctional Services on written application by the accused and on terms to be determined by the Commissioner of Correctional Services, but which shall provide that the accused shall be confined to his places of abode for no less than eight hours on any day in which he is engaged in employment and for no less than 12 hours on any day in which he is not so engaged.
  - (b) 200 hours of community service, to be undertaken at the rate of not less than 16 hours of service per calendar month during the period of



correctional supervision. Subject to the foregoing, the nature of the community service and the place and times during which it shall be undertaken shall be determined by the Commissioner of Correctional Services.

- (c) Participation in such treatment, development and support programmes as may be determined by the Commissioner of Correctional Services. The accused is directed to submit to a complete assessment by a social worker of the Department of Correctional Services to facilitate the determination of the programmes in which he should participate.
- (d) Restriction to the magisterial districts of the Cape and Wynberg and such other districts as the Commissioner of Correctional Services may on written application by the accused determine for the purposes of facilitating the accused's engagement in employment, or for compassionate reasons.
- (e) Refrainment for the whole of the period of correctional supervision from the use of alcohol or illegal drugs.
- (f) Prohibition during the whole of the period of correctional supervision from attendance at any place such as a tavern, pub or shebeen where alcoholic beverages are served.
- (g) Monitoring by the Department of Correctional Services, including electronic tagging if so determined by the Commissioner, in order to ensure compliance with the conditions of correctional supervision.
- (h) The obligation to inform the Commissioner of Correctional Services in advance of any change of residential and/or work address.

The accused shall report to the Correctional Officer at 17 Corporation Street, Cape Town by no later than 14h00 on Thursday, 6 February 2014 for the purpose of commencing his correctional supervision.

[23] Accused no. 2 is sentenced to:

1. 25 years' imprisonment on count 3 (murder);
2. 10 years' imprisonment on count 4 (attempted murder); and
3. 5 years' imprisonment on counts 5 and 6 (contravening s 3 and 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000, that is unlawfully

possessing a firearm and ammunition), both counts being taken as one for the purposes of sentence.

It is directed that the sentences imposed in respect of counts 4, 5 and 6 shall be served concurrently with that imposed in respect of count 3, with the result that the accused will serve an effective period of 25 years' imprisonment.

[24] An order is issued in terms of s 342A(3) of the Criminal Procedure Act 51 of 1977 directing the Director of Public Prosecutions (Western Cape), in liaison with the appropriate counterpart officials at the Departments of Correctional Services and Social Development (Western Cape), to—

- (i) expeditiously implement measures to put in place a formal administrative protocol that will establish clear lines of communication between the Directorate and the aforementioned departments in respect of the processing of requests by the High Court for correctional or probation reports in criminal trial matters, including the implementation of a system of record keeping in respect of such communications;
- (j) submit a written report to the Registrar by no later than 30 April 2014 confirming that the order has been complied with, setting forth the nature of the measures that have been implemented.

[25] The Registrar is directed to forward a copy of this judgment to the Director of Public Prosecutions and to Mr Willem Stipp, Head, Community Corrections, Department of Correctional Services, Cape Town.

**A.G. BINNS-WARD**  
**Judge of the High Court**