Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: SS61/2014

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE STATE

And

ANDREW MASTER CHIMBOZA

SENTENCE JUDGMENT

Delivered 29 April 2015

BINNS-WARD J:

[1] In this matter, the accused was convicted of the murder of Mbuyiselo Michael Manona. The conviction followed on the acceptance by the state of his plea of guilty to the charge. The crime was committed at the Gugulethu residence of one Nomonde Tshabalala. It may be inferred from the proprietary behaviour of the deceased when the accused arrived at

the house that day, as described in the plea statement, that he was in some sort of relationship with Ms Tshabalala. That was also the impression gained by Major Knibbs, the forensic psychologist who testified at the trial, whose evidence I shall discuss later in this judgment.

[2] The indictment was framed with reference to s 51(1) of the Criminal Law Amendment Act 105 of 1997, which implied an intention by the state to prove that the commission of the offence had been premeditated, which would attract a prescribed sentence of life imprisonment in the absence of substantial and compelling reasons justifying the imposition of a lesser sentence. The state, however, accepted a written plea statement tendered by the accused in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 ('the CPA'), the content of which was inconsistent with there having been premeditation on his part. In her address on sentence at the conclusion of the trial, the prosecutor conceded as much. The offence is thus one in respect of which a minimum sentence of 15 years' imprisonment is prescribed in terms of s 51(2)(a) of Act 105 of 1977.

[3] The indictment alleged that the accused had killed the deceased '*by stabbing him with a knife and removing his heart*'. The plea explanation accepted by the state made no mention of the accused having removed the deceased's heart. It stated that the accused had stabbed the deceased in the neck with a fork that was part of the cutlery that had fallen from a wardrobe or walk-in closet in the *en suite* dressing room area off the main bedroom in which a struggle between the accused and the deceased took place in the lead-up to the stabbing. The plea statement proceeded that, after stabbing the deceased in the neck with a fork, the accused disarmed him of the knife that he had picked up and been wielding as if to use to stab the accused, and used it to slit his throat and stab him repeatedly in his face, chest and abdomen.

[4] Judged from the photographs of the scene, which were introduced by agreement in terms of the plea statement, it would appear that the knife used was an ordinary table knife - although how such a knife could have been effective in causing the quite horrendous injuries occasioned to the body of the deceased, which will be described presently, especially by cutting through bone and sinew, is difficult to credit. There was, however, no evidence, other than the pictures of the various table knives depicted in the photograph album, exh. D, which, by their appearance, all appear to come from the same cutlery set, to indicate that any other kind of knife was used. Amongst the 69 photographs in the album there were pictures of what appear to be bloodied shoeprint impressions in the passage leading to the kitchen outside the main bedroom and on the floor of the kitchen itself. There were also pictures of the kitchen, showing, amongst other things, an open drawer. But these were given no

contextual significance in the plea statement, or the evidence adduced by the state in aggravation of sentence, and at the end of the case the court was left puzzled as to why they were put in.

[5] When I queried the absence of any mention in the plea statement of the excision of the deceased's heart, the prosecutor informed the court that the excision of the heart was not the cause of death according to the post-mortem report, and that as the accused had admitted facts making out the essential elements of the offence the absence of any admission concerning the removal of the deceased's heart did not have '*too much bearing*'.

[6] On the basis of the content of the plea statement accepted by the state the offence must be accepted as having been committed in the following circumstances:

> On 4 June 2014 the accused went to the house of Ms Tshabalala at Thembisa Street, Gugulethu. She had invited him there in order to repair a tint-job that he had done previously on her windows. Ms Tshabalala was a friend of the accused. She worked opposite his place of business in Langa and had helped him with personal matters previously. He had also visited her on a number of occasions at her home. When he arrived at Ms Tshabalala's residence the deceased opened the door for him on the house-owner's instruction. The deceased was plainly unhappy about the accused's presence. He kept on saying: '*What do you want here? You must leave this house*'. He called the accused names and insulted him repeatedly. The accused gave Ms Tshabalala R50 and she decided to go out to purchase some liquor with it. Ms Tshabalala asked the accused to stay at the house and assess the work that needed to be done on the windows whilst she was gone. The deceased who had been wearing a dressing gown changed into trousers and a shirt at this stage and the accused formed the impression that he would accompany Ms Tshabalala. The deceased, however, also remained in the house. At some stage the accused needed to use the *en-suite* bathroom facility. As he finished doing so he was confronted in the bathroom by the deceased who '*knocked* [him] *in the face'* and accused him of sleeping with Ms Tshabalala, who was described as '*his* [i.e. the deceased's] *woman*'. The blow caused the accused to fall between the toilet and the walk-in closet and as he fell he heard cutlery falling from a wardrobe. The deceased continued to hit the accused, who then noticed that the deceased had taken a knife from one of those that fallen from the wardrobe and was standing over him. It dawned on him that the deceased wanted to stab him. He was able to lift a leg and kick the deceased in his private parts. As the deceased doubled over with pain, the accused took up a fork which was lying near to

his hand and stabbed the deceased in the neck. He then disarmed the deceased of the knife and used it to stab him. He slit the deceased's throat and continued to stab him. He stated that he was so angry that he was unable to say how many times he stabbed him, or where. He could '*just remember it was in the face, chest and abdomen*'. He appreciated that he could kill the deceased, but persisted with the assault on him regardless. He stated that the deceased's body then fell to the floor and he noticed that the deceased was dead.

[7] Thus, on the facts accepted by the state, the physical encounter between the accused and the deceased occurred entirely in the en-suite dressing room-bathroom area off the main bedroom. Photographs in the album handed in by agreement together with the plea statement as exh.D showed the living area of the house in a chaotic state, including broken crockery on the floor and what appears to be a shattered glass dining room table. Sizable shards of broken glass are also depicted on the bloodied dressing room floor. However, like the shoeprints mentioned earlier, these were given no contextual significance by the accepted plea statement, or the evidence adduced in regard to sentence.

[8] The accused admitted that the police entered the house while he was still there after the fatal assault of the deceased and that the body suffered no further injuries during the period from its removal from the house and the subsequent post-mortem examination. He also admitted the content of the post-mortem report.

[9] The post-mortem report on the deceased noted the following injuries:

On the head and face:

1) A 15mm x 55mm laceration of the supraorbital area.
2) 10mm x 3mm boat-shaped penetrating incised wounds of the left occipital area behind the tragus (which is the small pointed eminence of the external ear above the lobe).
3) 15mm x 3mm incised wound of the right eyebrow and 55mm x 10mm penetrating incised wound of the right mid cheek and 10mm x 3mm and 8mm x 3mm in the right paranasal area.
4) 90mm x 10mm longitudinal penetrating incised wound of the left paranasal area and cortical artefact of the mouth.
5) A longitudinal incised wound of the right half neck from 1420mm to 1620mm above the heel. The temporal area and jaw was exposed by the incision. The right earlobe was also incised.

6) A 50mm x 5mm superficial incised wound of the left half anterior face in the paranasal area with a 10mm x 5 mm incised wound next to it.
7) A 55 mm x 10mm boat-shaped incised wound on the right lateral aspect of the lip.
8) A 15mm x 3mm incised wound of the midline anterior chin.
9) Incised gaping wound of the right half anterior neck from 1420mm to 1500mm and with a width of 80mm. This exposed the neck structures.
10) A triangular shaped 45mm x 25mm penetrating incised wound of the left half anterior neck 1500mm above the heel and 30mm x 15mm at 1460mm above the heel with incised major neck vessels.

On the chest and abdomen:

1) An oblique 55mm x 10mm boat shaped penetrating incised wound of the right lateral clavicular area which went from front to back, downwards into the chest.
2) Three boat-shaped penetrating incised wounds of the left subclavian area from 55mm x 15mm to 30mm x 10mm, which went into the chest cavity.
3) A 24mm x 5mm superficial incised wound of the mid abdominal area 1300mm above the heel
4) An irregular shaped incised wound on the left half anterior chest area from 1210mm to 1300mm above the heel with a width of 70mm. The right edge was irregular and a 50mm x 10mm flap was over the wound. This went into the chest cavity with incised 3rd and 4th ribs.
5) Two penetrating incised wounds of the mid abdominal area at 80mm above the heel of 12mm x 5mm and 20mm x 5mm. These perforated the bowel and incised major abdominal vessels. There was another area adjacent which had 1x1mm and 2x1 penetrating incised wounds in an area of 40 x 10mm.
6) Multiple - approximately six - incised wounds of the back of the left hand ranging from 25mm x 5mm to 10mm x 3mm.

The post-mortem report also noted deep scalp bruising of the right and left frontal supraorbital ridge and occipital area of the deceased's skull. There was a subarachnoid haemorrhage seen on the left cortex and cerebellum of the deceased's brain. In respect of the deceased's '*neck structures'* it was recorded that '[t]*here were incised defects of the neck transversely at anterior neck of the various levels of the cervical spine. The cervical spine was exposed at the level of the 1st and 2nd cervical vertebra. The 3rd and 5th cervical*

vertebrae was also exposed. The edges of the incised wound had vital reaction.' The reference to 'vital reaction' was explained as indicating that the edges of the wound showed signs of blood infusion, which would most likely occur if the incision were made when the victim was still alive. All of the deceased's ribs were fractured 'bilaterally and laterally', which was explained to indicate on both sides of the chest and crosswise - something that would be caused by the application of heavy pressure to the chest anteriorly. The heart had been removed. Pieces of the heart accompanied the body to the post-mortem examination in a plastic bag.

[10] Dr Alli, the forensic pathologist who conducted the post-mortem, was called by the state to give oral evidence in aggravation of sentence. He testified that a number of the injuries sustained by the deceased could have caused his death, either on their own or in combination with the others. These were the incised wound of the neck, the penetrating wounds to the left chest and the multiple rib fractures that would have made it difficult for the deceased to be able to breathe. Dr Alli testified that considerable blunt force would have been required to cause the fractures to the deceased's ribs. How this was applied in the context of the admitted facts accepted by the state for the purpose of obtaining a conviction remained, like much else about this case, unexplained. The same can be said of the injury to the deceased's skull and the haemorrhaging on his brain.

[11] Another peculiarity to emerge during the evidence led by the state in aggravation of sentence was that the incident happened late at night. What the accused would have been doing attending at the house of Nomonde Tshabalala late at night in order to repair a 'tint-job' on her windows remains a mystery. Other evidence led by the state in aggravation of sentence suggests that the accused may have been infatuated with the owner of the house. The evidence of Lelethu Femele, a witness called by the state in terms of s 112(3) of the CPA, was that to the effect that alerted by Ms Tshabalala to the fact that there was something amiss at her house, he went there and peered through a bathroom window. He saw the accused removing the heart from the deceased's dead body and cutting it up with a knife and fork and eating it. According to Femele the accused was speaking to himself while he was eating pieces of the deceased's heart. The accused apparently spoke in a mixture of his own language which the witness does not understand and English. The witness was able to make out that the accused uttered words to the effect of '*Nomonde, I love you. You are the love of my heart. I do everything for you.*'

[12] The evidence of the first policeman to arrive at the scene, Cst. Landule, who was also called by the prosecutor in terms of s 112(3) of the CPA, was to similar effect. When he

came across the accused, he was in the main bedroom holding a piece of flesh in his hands and gnawing on it. He said that the deceased was speaking to himself, saying that he loved Nomonde (Tshabalala), and that Nomonde was his wife.

[13] It was put to Landule and Fumele by the accused's legal representative that the accused denied having done what they described. In other words it was put to the witnesses that the accused denied excising the deceased's heart, cutting it up and eating it. The accused chose, however, not to give evidence in rebuttal of the evidence adduced by the state. His legal representative, Ms *Rajab*, was constrained during argument on sentence to concede that there was no reason in the circumstances for the court not to accept the evidence of the two witnesses. The evidence of the two witnesses is consistent with the content of the post-mortem report and the other admissions about the injuries to the deceased's body made in the plea statement. It is also borne out by the evidence of Dr Alli concerning how the remnants of the heart that accompanied the deceased's body in a plastic bag to the post-mortem examination had been cleanly cut up into small blocks.

[14] The accused was not charged, as he could have been, with violating or desecrating a corpse (Afr. *lykskending*).[1] It would not be appropriate in the circumstances to apply the facts related to an offence of which the accused *has not* been convicted to justify a heavier sentence in respect of the offence of which he *has* been convicted. The only relevance of the accused's conduct in regard to the body of the deceased after he had killed him by slitting his throat is the light it might shed on his over-reaction to the provocation given by the deceased. It was, to say the least, surprising therefore that the state did not see fit to call expert evidence to try to shed light on the accused's conduct and left it to the court to require such evidence to be adduced.

[15] The evidence of Major Hayden Knibbs, the Chief Psychologist in the Investigative Psychology Section of the South African Police Service, was obtained by the state only at the court's instance. The witness was provided with a copy of the transcript of the evidence at the trial and conducted an interview with the accused in the presence of Ms *Rajab*. He was also provided with a copy of a report by the psychiatrist, Professor Tuviah Zabow, who examined the accused at the instance of the defence.

[16] Major Knibbs testified that the offence in issue was properly characterised as a 'psychologically motivated crime', that is one with no external motivation, such as financial

[1] As to the existence of this category of offence in the common law, see *S v Coetzee en 'n Ander* 1993 (2) SACR 191 (T), at 193i-194c. The prosecutor suggested that charging the accused with the commission of the offence would amount to an improper splitting of charges, but there is no substance in that point.

gain. Jealousy would not qualify as 'external motivation'. He gave as examples of psychologically motivated crimes: serial murder, serial rape, domestic violence, sexual murders, and intimate partner murder. With regard to murder, the witness testified that evidence of a psychological motivation can be found in various forms on the crime scene itself. Excessive violence to the body, removal of body parts and mutilation of the body are instances of such evidence.

[17] Major Knibbs described various typologies of criminal human mutilation. He opined that the current matter typified what is known as 'aggressive mutilation', which can be seen as the manifestation of a state of complete rage, during which the victim is killed and the body is mutilated. He said this is sometimes called '*overkill*' because the wounds in these instances may appear random and without purpose. Major Knibbs said that this type of mutilation can also be described as an extreme form of expressive aggression, which is motivated by the desire to actually harm or injure, or make the victim suffer. It is usually an emotional response to frustration, ego threats, insults, physical attacks or personal failures and can be seen as impulsive and uncontrolled, characterised by strong emotional arousal.

[18] The witness opined that the mutilation of the deceased's body by the accused was indicative of a heightened state of rage. The brutality of the assault and the removal and ingestion of the heart were consistent with an extreme form of aggressive mutilation behaviour, indicative of an attempt to completely obliterate the person that the rage is directed towards. Cannibalism is apparently known to sometimes occur in the context of aggressive mutilation.

[19] Major Knibbs also reported on his clinical impressions of the accused obtained in the course of his interview. He described that the accused placed the responsibility of the situation on the deceased and Ms Tshabalala. He said that the accused showed no acknowledgement of the consequences of the murder on them, which he considered indicated a lack of remorse**.** He noted that the accused however, did show regret, as he showed disappointment for the position in which he currently finds himself as a result of having committed the murder. He reported that the accused presented a clear and detailed picture of the events up until the death of the victim (content that the witness described as placing him in a relatively positive light), but presented a vague picture with regards to the criminal mutilation (being content that might place him in a negative light). He said that the accused avoided the topic of criminal mutilation with silence and a lack of eye contact, and when pressured, he maintained his silence, rather than addressing the discomfort. Major Knibbs said that this resulted in the accused coming across as unpredictable and threatening.

[20] In the witness's opinion the accused's behaviour indicated that he may avoid uncomfortable situations by ignoring the other party involved in a threatening manner. He stated that this kind of behaviour has the potential to escalate into conflict with others in the accused's environment. He said that the accused rigidly persisted with this behaviour and indeed displayed it '*across contexts*', as it was also evident in his descriptions of his interactions with the deceased – and indeed, I might add, manifested in his approach to the evidence at the trial.

[21] Major Knibbs stressed that in his view the accused must be regarded as a danger in the community. He stated that the reason why individuals who engage in aggressive mutilation behave in that manner is unknown, making the behaviour all the more unpredictable. He added that the unpredictability of such behaviour coupled with the lack of scientific understanding of its causative factors increases the level of future risk presented by it and decreases the chance of effective rehabilitation.

[22] During the adjournment necessitated to enable Major Knibbs to qualify himself to give opinion evidence in the case after the court had insisted on evidence to assist in providing psychological insight into the accused's extraordinary behaviour, the defence arranged for the accused to be seen by Professor Zabow, a psychiatrist of long and wide experience who has testified in this court in many cases over the years. Professor Zabow also gave evidence during the sentence proceedings.

[23] Professor Zabow agreed with Major Knibbs's conclusion that the accused was not suffering from any psychiatric illness and confirmed that in his opinion there was no evidence of psychiatric disorder at time of the commission of the offence. He opined that the accused's behaviour was indicative '*of an emotional reaction of anger with goal-directed assaultive behaviours towards the object (person) of his anger*'. He continued '*The lack of specific details and the avoidance of direct questioning in relation to the evidence led of the excision of the heart of the victim .. may be* [a] *psychogenic mechanism of denial to* [a] *degree, with dissociative features*'. Professor Zabow testified that the prospects of a recurrence of the accused's behaviour were 'extremely difficult to assess'. He also considered that the prospects of remediating the characteristics in the accused's psyche that led to his having behaved as he did were also impossible to predict. As I understood the witness, a rehabilitative process could only be undertaken when the accused was able to be more forthcoming about what had happened. He said that the prospects of this happening would probably be improved once the criminal proceedings had been completed.

[24] Professor Zabow essentially agreed with Major Knibbs's assessment that while the accused was appropriately depressed about the adverse personal consequences to himself brought about by his commission of the offence, he did not show remorse. (As remarked in *S v Matyityi* 2011 (1) SACR 47 (SCA), at para 13:

> There is… a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.)

The manner in which the accused has conducted himself at the trial and in his interviews with the two expert witnesses gives this court no basis to find that he is remorseful, rather than just regretful, for his actions.

[25] There did not appear to me to be any material conflict between the opinions offered to the court by Major Knibbs and Professor Zabow, respectively; although, for the reasons described, Knibbs considered that the accused's future behaviour was unpredictable and that he therefore represented a danger in the community.

[26] It is trite that the determination of an appropriate sentence entails weighing up and balancing the various interests in the context of all of the evidence before the court. The relevant considerations are usually categorised under the headings of (a) the nature of the offence, (b) the personal circumstances of the accused and (c) the interests of the community – the so-called *Zinn* triad.[2] How the balance is struck depends on the facts of the case in hand. Thus, in a particular case it may be appropriate that one or other of the considerations gets treated as subordinate to what fall, appropriately, to be regarded as more pressing factors.

[27] It is convenient to treat first of the accused's personal circumstances. These were placed before the court by Ms *Rajab* in an oral statement made from the bar, as the accused

[2] After the judgment in *S v Zinn* 1969 (2) SA 537 (A), at

did not give evidence in mitigation of sentence. He is a Zimbabwean national who has been living in this country since 2009 as a refugee. He is 35 years of age, single, with an eight year old child[3] who lives in England with one of the accused's sisters. He has a brother and sister who live in England and two sisters who reside in Johannesburg. He is reported to be in a long-term relationship with a woman described in the report of Dr Zabow as his fiancée. Dr Zabow's report also identified that the accused suffers from certain chronic medical conditions for which he is receiving appropriate treatment. The accused attained a grade 10 level of education and obtained a diploma in marketing from a college in Harare in Zimbabwe. He had established a successful window tinting business in Langa in Cape Town. He has a single previous conviction for common assault committed in March 2011, in respect of which he paid an admission of guilt fine of R150. He has been in custody in connection with the current matter since the date of the commission of the offence.

[28] There was rightly no debate about the seriousness of the offence. Murder, even without premeditation, is one of the most serious offences that there is. On the facts accepted by the state for the purpose of the trial an element of provocation was entailed. To some degree this diminishes the accused's moral culpability. The provocation was confessedly insufficient to justify the accused's conduct, however, and the exceptional brutality of the assault on the deceased is an aggravating factor.

[29] The evidence adduced in relation to the psychological motivation of the manner in which the assault on the deceased was perpetrated gives rise to serious concern. It is evident that the accused is capable of unpredictable and uncontrollable rage and that it is difficult to predict how this might be triggered. The manner in which he literally butchered the deceased testifies as to the potentially catastrophic consequences which might follow if the accused finds himself in a similar situation of conflict with another person. The accused's current refusal to admit to this side of his make-up gives rise to concern about his potential for rehabilitation.

[30] It was surprising in the circumstances that the court was not enjoined in argument on sentence to give consideration to the provisions of ss 286A and B of the CPA, which provide for the declaration of a person as a dangerous criminal if the court is satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her, and for the imposition upon such person of an indeterminate sentence – something which in effect means that the person is

[3] In Professor Zabow's written report (exh. H), the child is described as being nine years of age.

incarcerated indefinitely until the court is satisfied that the person no longer represents a danger. It occurred to me quite independently in the course of preparing the sentence judgment, in particular with regard to the opinion expressed by Major Knibbs, that the accused should be examined in the manner contemplated in terms of s 286A(2) and (3). Thus, after compliance with the requirements of s 286A(2)(b), the accused was remanded for examination by Prof Kaliski and Prof Zabow during a period of in-patient observation at Valkenberg Hospital.

[31] A unanimous report by the examining psychiatrists was produced in terms of s 286A(3)(c) and (d) of the CPA. A third specialist psychiatrist, Dr Roffey, also subscribed to the report. They reported that the accused did not have a history of 'habitual violence and scored low on rating scales for risk assessment [for dangerous behaviour] and psychopathy'. They concluded that it was 'not possible to determine whether he is danger to the mental and physical well being of others'. At the instance of the court Professor Zabow gave oral evidence in elaboration of the written report. In the light of that evidence it was the view of the legal representatives for both the state and the accused that no point would be served in oral testimony also being required from Professor Kaliski, who was not readily available. I took the same view.

[32] In *S v Bull; S v Chavulla* 2001 (2) SACR 681 (SCA), 2002 (1) SA 535; 2002 (6) BCLR 551, the appeal court gave detailed consideration to the approach that a court must adopt in determining whether to declare a person a dangerous criminal with the consequent imposition of the indeterminate sentence. It did so in the context of deciding a challenge to the constitutionality of the relevant statutory provisions. It was contended by the appellants in that matter that the indeterminate sentence was a cruel and inhumane punishment and that the criteria for determining whether a convicted person was a dangerous criminal were so vague as to infringe the principle of legality. These contentions were rejected. The court stressed the procedural protections inherent in the statutory provisions and made the point that a declaration that a convicted person is a dangerous criminal is a discretionary decision that is not to be lightly made. Paragraphs 17 to 19 of the judgment of Vivier ADCJ, which discuss the concept of a 'dangerous person' in the relevant context bear quotation in relation to the issue that arises in the current case:

> [18] …. *Floud and Young (op cit* [*Dangerousness and Criminal Justice* (1981), Heinemann, London] at 20 - 5) discuss the difficulty in identifying and defining dangerous offenders satisfactorily for legal purposes and point out that, as the term is ordinarily used in reference to people, 'dangerousness' refers to a pathological attribute of character: a propensity to inflict harm on others in disregard or defiance of the usual social or legal restraints. Yet, as the writers also point out, a 'dangerous person' is not a psychological entity, nor is 'dangerousness' a scientific or medical concept. It is also not necessarily

associated with mental illness. These aspects were highlighted by the psychiatrists who testified in the present cases.

D A Thomas *Principles of Sentencing* 2nd ed (1979) 37 defines a dangerous offender as someone 'who appears, on the basis of his immediate offence, his previous history and such psychiatric evidence as may be available, to be highly likely to commit grave offences of violence in the future'. *Floud and Young* refer to a widely accepted common-sense definition of the dangerous offender as 'the repetitively violent criminal who has more than once committed or attempted to commit homicide, forcible rape, robbery or assault' and point out that this definition still leaves room for much disagreement. In the end it is for the court to make a predictive judgment of dangerousness and in this regard the writers conclude as follows (at 25):

> *'Judicial determinations of dangerousness must take the form of predictive judgments. Evaluations of character alone will not do: predicted harm of some specified kind must be the criterion. But making a predictive judgment is not simply a question of predicting a future event in the same sense as making a retrospective judgment is a question of establishing a past event. Assessing the "dangerousness" of a legally sane offender does not call simply for an actuarial statement - the answer to the question "how probable is it that a man like this will cause further harm?" It calls for an evaluation of his individual character and circumstances - an answer to the more complex question: "In what circumstances would this person now be going to cause harm and what is the strength or persistence of his inclination to do so in such circumstances?" To which must be added the further question: "How likely is it that he will find himself in those circumstances in the foreseeable future?" '*

With the writers' views as summarised and cited above, I agree.

[18] In making a predictive judgment of dangerousness the court must consider, as the psychiatrists did in both appeals, the personal characteristics of the accused, as revealed by psychiatric assessment, the facts and circumstances of the case and the accused's history of violent behaviour, particularly the accused's previous convictions. The Court must draw its own conclusions. Under the Canadian dangerous offender legislation it must be established to the satisfaction of the court that the offence for which the accused has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct and which is substantially or pathologically intractable. The Court must furthermore be satisfied that such conduct is likely to continue and to result in the kind of suffering the provision seeks to protect, namely, conduct endangering the life, safety or physical or mental well-being of other persons (see the *Lyons* case *supra* at 211 and 221). In *Neve v The Queen* 1999 ABCA 206 the Alberta Court of Appeal said the following about the Canadian dangerous offender legislation (at 211)

> *'The dangerous offender legislation requires a court to focus on the person (and all relevant circumstances relating to what that person has done) and not simply on numbers of convictions. Parliament has not chosen to adopt a formulaic "three strikes and you are out" approach to dangerous offender designations in Canada. Instead, before imposing one of the most serious sanctions under Canadian criminal law, a court is required to conduct a contextual analysis, concentrating on the offender and on the qualitative, quantitative and relative dimensions of the crimes the offender has committed.'*

In my view the approach of the Canadian courts affords useful guidelines to our courts when considering the concept of dangerousness in terms of s 286A of the Act. These guidelines will no doubt be refined and particularised on a case by case basis, as the need arises (cf *Dodo's* case *supra* at para 11).

[19] The requirement in s 286A that the accused must represent 'a danger to the physical or mental well-being of other persons' is no different in essence from the requirement in the Canadian legislation that the offender must constitute ‘a threat to the life, safety or physical or mental well-being of other persons’. A finding that an accused is a danger or threat is, in effect, a present determination that he or she will continue to be dangerous in future, and cannot be regarded as too vague to satisfy the legality principle.

The openness of the standard triggering the enquiry in s 286A, as opposed to the requirement in the Canadian legislation that the offence for which the offender has been convicted must be a serious personal offence as defined, was criticised for being insufficiently precise to meet the standard of legality. I do not think that the criticism is justified. Although the offence of which the accused has been found guilty is not specified in s 286A, it must clearly be of such a nature as to justify a present determination of continued dangerousness in future which, as I have shown, requires a pattern of persistent or repetitively aggressive and violent behaviour. The detailed procedures, including psychiatric evidence, provided for by s 286A, ensure that a declaration of dangerousness will not be lightly made. The purpose of the psychiatric evidence is to provide the court with an expert opinion on

> the interpretation of the accused's past conduct and personal characteristics and the accused's likely future conduct based on that analysis.

[33] The statutory provisions require the court to be 'satisfied' as to the existence of the two qualifying criteria stipulated in s 286A(1) before it makes a declaration that a convicted person is a 'dangerous criminal'. The requirement posits a degree of conviction, rather than a mere apprehension or suspicion. In other words it is necessary that there be some cogent basis for the court to be satisfied. That understanding of the contextual meaning of the word 'satisfied' seems to me to be consistent with the approval by the appeal court of the passage from the Canadian judgment in *Neve* quoted in paragraph 18 of *Bull* supra.

[34] I consider that Major Knibb's opinion that the accused may present a danger in the sense contemplated in s 286A(1) of the CPA amounted to no more than the expression of a sense of apprehension that he might be. The witness gave a cogent explanation for his apprehension, but I did not understand him to resist the notion that a conclusive view would require to be supported by a considerably more in-depth investigation than that permitted in the context of a single consultation. Indeed, it was because I was sufficiently persuaded by Knibbs's evidence that a proper investigation was merited that I issued the direction in terms of s 286A(2)(a). The resultant report by the examining psychiatrists does not support the existence of a basis for the court to be satisfied (in the sense required by the Act) that the accused represents a danger to the physical or mental well-being of other persons and that the community should be protected against him. The accused's apparently almost blemish free past and ability to successfully run his own business, together with the fact that the offence of which he has been convicted appears to have been committed in a unique set of circumstances of uncontrolled jealousy in the context of a particular passionate obsession, support the plausibility of the expert findings that he scored low on rating scales for risk assessment and psychopathy.

[35] Turning then to the determination of an appropriate determinate sentence. No substantial and compelling circumstances exist to warrant a departure from the prescribed minimum sentence. Indeed, the extreme brutality of the assault and the absence of remorse by the accused for what he has done outweigh the mitigating factors in his personal circumstances and his relatively clean record. The extent of his reaction to the provocation described in the accepted plea statement was grossly disproportionate. Having regard to the conspectus of the case I consider that a custodial sentence exceeding the prescribed minimum of 15 years is indicated. Taking into account that the accused has been in custody for the

better part of a year, I am of the view that a sentence of 18 years' imprisonment would be appropriate.

[36] The accused is sentenced to 18 years' imprisonment.

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