THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: SS41/16

THE STATE

and

SEFIRO PETERSEN **FIRST ACCUSED**

ENRICO HARRISON **SECOND ACCUSED**

Coram: ROGERS J

Heard: **22 MARCH 2017**

Delivered: **24 MARCH 2017**

JUDGMENT

ROGERS J:

[1] On 22 March 2017 I delivered judgment on the merits. I found No 1 guilty on all six counts and No 2 not guilty on all six counts.

[2] Having regard to my findings on the main judgment, the prescribed minimum sentence on the murder count is life imprisonment because the offence was committed by a group of persons in the execution or furtherance of a common purpose (Part I of Schedule 2, murder para (d)). The two attempted murder counts involved an assault in which a dangerous wound was inflicted with a firearm. The prescribed minimum sentences thus five years' imprisonment (Part IV of Schedule 2).

[3] In relation to the three counts which carry a minimum sentence, and particularly in respect of the murder count, an important issue is whether there are substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[4] The approach to the question whether substantial and compelling circumstances exist is the one laid down in *S v Malgas* 2001 (1) SACR 469 (SCA), which has been consistently followed. In terms of that case the factors to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that the emphasis has shifted to the objective gravity of the crime and the need for effective sanctions. If, after considering all relevant sentencing factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence.

[5] The Supreme Court of Appeal has emphasised, however, that a trial court should not base a finding of substantial and compelling circumstances on flimsy or speculative grounds or hypotheses (see, eg *S v PB* 2011 (1) SACR 448 (SCA) paras 9-10 and the passages there quoted). In *Malgas* it was said that the lawmaker

has ordained that ‘ordinarily and in the absence of weighty justification’ the prescribed sentence should be imposed. Unless there are ‘truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts’ (para 25).

[6] In determining whether an injustice would arise from the imposition of the prescribed sentence, the customary sentencing considerations which come into play are the well-known triad comprising the offender, the offence and the interests of society. These three factors in turn require a court to bear in mind the varying purposes served by criminal punishment, namely deterrence, prevention, retribution and rehabilitation. Nevertheless, and in respect of crimes dealt with in the Act, the type of sentence to which these considerations point should not be assessed as if the Act had not been enacted. As was observed by Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 25 the Act ‘creates a legislative standard that weighs upon the exercise of the sentencing court’s discretion’, so that even where there are substantial and compelling circumstances one should expect discretionary sentences to be more severe than before.

[7] The State proved one previous conviction, a drug possession offence committed in November 2009 for which he was cautioned and discharged. In my judgment on conviction I mentioned that No 1 had been in prison over the period 2013-2015. According to Mr Nel, he was awaiting trial on charges which was subsequently withdrawn. He is thus for all practical purposes before me as a first offender.

[8] Neither side lead evidence on sentence. Mr Nel and Mr Badenhorst made ex parte submissions.

[9] As to the accused’s personal circumstances, he is 26 years old. At the time of the crimes he was 25. He did not progress at school beyond standard five. He is unmarried and has no children. He lives with his mother in Parkwood. Other residents of the flat are a younger brother aged 16, an uncle and a grandfather aged 74.

[10] No 1 has not ever had employment. I was told he took care of his grandfather while his mother was at work.

[11] He has been in custody awaiting trial for about 14 months.

[12] The accused has been involved with gangs for some years. He lives in an area plagued by gang violence. Mr Nel submitted that it was difficult to know whether these circumstances should be regarded as aggravating or mitigating. The unlawful activities of gangs are a scourge for the communities in which the gangs operate. The community expects persons who commit crime in the course of gang activity to be dealt with severely, particularly where – as here – innocent people become the victims.

[13] On the other hand the accused may have been exposed to the attractions of gang affiliation at an impressionable age. There is no evidence before me as to how he became involved in gangs. It has not been suggested that he was led into gang activity by his immediate family. If the evidence of his co-accused, No 2, is to be believed, it is possible to terminate one's association with a gang. If as a teenager he made immature choices, he has had the opportunity as a young man to correct them. Instead he has elected to continue his association with gangs. Not only was he a member of the Americans while on the street; in prison he chose to become a member of the 27s.

[14] The accused cannot claim that, at the age of 25, he suffered from youthful immaturity and lack of judgement. In *S v Matyityi* 2011 (1) SACR 40 (SCA) Ponnan JA was critical of the trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. The learned judge of appeal said that while someone under the age of 18 years could be regarded as naturally immature, the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor

[15] In regard to the conviction for murder, the crime is by its nature heinous. There are aggravating features. The accused chose to take a gang fight into the home of an innocent family. He knew that the Boltmans had young children. He knew that at night the family was likely to be at home. He fired at least seven shots, reckless as to whether they struck the intended target or innocent occupants. It is an immense tragedy that a 10-year-old boy was killed in the process. For all the accused cared, it could have been even worse. The Boltmans' baby daughter was in the lounge and the older daughter in the bedroom. It is a mercy that neither of them was struck by a stray bullet.

[16] It might be said that a factor in the accused's favour is that he did not have the direct intention of killing any of the children. He may even have thought that it was unlikely that any of them would as a fact be hit, though he was reckless as to whether it happened. In appropriate circumstances the fact that an accused had intent in the form of dolus eventualis rather than dolus directus may be a factor to be taken into account in reaching a conclusion that they are substantial and compelling circumstances to depart from the prescribed minimum sentence (*S v Ndhlovu & Others* 2002 (2) SACR 325 (SCA) para 56; cf *R v Mini* 1963 (3) SA 188 (A) at 192). The weight to be accorded to this factor is fact-sensitive. There are cases where the existence of fault in the form of dolus eventualis has not been regarded as sufficient to amount to substantial and compelling circumstances (see, eg, *S v Combrink* 2012 (1) SACR 93 (SCA); *Director of Public, North Gauteng, Pretoria v Thusi & Others* 2012 (1) SACR 423 (SCA) para 22).

[17] In the present case the accused fired seven shots with the direct intention of killing two persons (Lewin and Joseph Boltman). Where the only form of intention which a person has is dolus eventualis, his moral culpability is arguably not as great as if he had acted with dolus directus. The accused cannot claim the benefit of this distinction. He simultaneously had dolus directus in relation to Lewin and Joseph Boltman and dolus eventualis in relation to the other occupants of the house, whoever they might be. If Lewin or Joseph Boltman had been killed, as the accused intended, he could have not claimed the benefit of a lesser form of fault. The fact that he failed in his nefarious plan while at the same time recklessly killing another

occupant of the house does not justify treating his moral culpability as somehow diminished.

[18] The untimely death of their only son has undoubtedly been a source of great sorrow for his parents. It is a tragedy which will probably haunt them for the rest of their lives. The older of the daughters will grow up knowing that her brother was killed in their house.

[19] The interests of the community must be taken into account. It is in this respect that the elements of deterrence and retribution come to the fore. A court must never sentence in anger or in order to pander to the demands of society. However the administration of justice is brought into disrepute if serious crimes which press down heavily on law-abiding citizens are not firmly punished. Gang violence is a destructive scourge in the Cape Peninsula. We read on a virtually daily basis of gang violence, often with innocent victims injured or killed in the crossfire. People have to barricade themselves in their houses. Even this was not enough in the case of the Boltmans. Society, particularly those who live in areas beset by gang violence, could legitimately complain if courts regarded the reckless killing of innocent bystanders as less heinous than the deliberate killing of gang rivals. Gang members who shoot murderously at each other without regard to the lives of innocent members of the community cannot expect mercy from the courts.

[20] It seems to me that all I am left with in this case is that the accused is a first offender and that he has spent 14 months in custody awaiting trial. As against this there are aggravating features. I cannot in good conscience find that there are substantial and compelling circumstances to depart from the prescribed minimum sentence. The circumstances would be distinctly flimsy.

[21] In regard to the two counts of attempted murder, they are clearly no substantial and compelling circumstances to impose less than the prescribed minimum sentence of five years. The question is whether a sentence of only five years would fit the crime, the criminal and the interests of society. Sentences for attempted murder are frequently more severe.

[22] Insofar as the shooting of Lewin is concerned, the accused's blameworthiness is not reduced by the fact that Lewin belonged to a rival gang. The accused fired one shot 'blind' through the front gate. That shot was clearly intended for Lewin and Jones, whom the accused believed were standing behind the gate. Since one shot was subsequently fired at Joseph Boltman, it seems probable that the accused fired at least five further shots at Lewin. This would accord with the recollections of Joseph and Lewin. The attack on Lewin was sustained. After firing several shots at him, the accused turned to Joseph and fired one shot at him. When Lewin tried to flee, the accused fired several further shots at him. It is remarkable that Lewin was not killed. Were it not for the time the accused has spent awaiting trial, I would have regarded an appropriate sentence as 12 years' imprisonment. I shall reduce this to 11 years on account of the period the accused has already spent in custody.

[23] Insofar as the shooting of Joseph is concerned, only a single shot was fired at him. Fortunately he was not seriously injured. On the other hand an aggravating feature is that he was shot in the sanctity of his own home, having committed no greater sin than being a witness to the accused's shooting of Lewin. I think a sentence of seven years' imprisonment would be appropriate.

[24] In respect of counts 5 and 6 (possession of a firearm and ammunition), the unlawful use of these items is already reflected to some extent in the sentences imposed for the murder and attempted murders. The State did not allege and prove that the firearm was automatic or semi-automatic. In the circumstances I regard sentences of five years' imprisonment and three years' imprisonment respectively on these two counts to be adequate.

[25] In terms of s 2(1) of Act 57 of 1959 the maximum penalty for trespass is a fine of R2000 or two years' imprisonment or both. In assessing the severity of the murder and attempted murders I have taken into account the invasion of the Boltmans' home. The trespass itself probably lasted less than a minute. When one strips out the violence, the offence does not warrant imprisonment exceeding three months. But for the fact that the accused will in any event be subject to direct imprisonment on the other charges, the sentence for trespass would probably have

been suspended. Since the accused does not have resources, a fine would be pointless.

[26] By operation of law the determinate sentences will run concurrently with the life sentence. It is thus unnecessary to consider the extent to which any of the sentences should run concurrently with each other.

[27] In terms of s 299A of the Criminal Procedure Act 51 of 1977, I notify the members of Jayden's family who are present (being Joseph and Chantal Boltman) as follows:

- You have the right, subject to the directives issued by the Commissioner of Correctional Services under s 299A(4), to make representations when placement of the accused on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.
- If you intend to exercise this right, you must (i) inform the Commissioner of Correctional Services thereof in writing; (ii) provide the Commissioner with your postal and physical address in writing; and (iii) inform the Commissioner in writing of any change of address.
- Once you have done so, the Commissioner will be obliged, in terms of s 299A(3), to inform the parole board accordingly and the parole board will be obliged to inform you in writing when and to whom you may make representations or when and where any meeting will take place.

[28] The accused is sentenced as follows:

(i) count 1 (trespass) – three months' imprisonment;

(ii) count 2 (the attempted murder of Tasriek Lewin) – 11 years' imprisonment;

(iii) count 3 (the attempted murder of Joseph Boltman) – seven years' imprisonment;

(iv) count 4 (the murder of Jayden Boltman) – life imprisonment;

(v) count 5 (possession of a firearm) – five years' imprisonment;

(vi) count 6 (possession of seven rounds of ammunition) – three years' imprisonment.

ROGERS J

APPEARANCES

For the State	Mr L Badenhorst Office of Director of Public Prosecutions Western Cape
For First Accused	Mr Nel Instructed by Legal Aid Cape Town