



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

Case No: CC16/2016

THE STATE

v

BRENT HENRY

Accused 1

JUANE JACOBS

Accused 2

JUDGMENT ON SENTENCE: 19 MAY 2017

HENNEY, J:

INTRODUCTION

[1] In considering an appropriate sentence, a Court must have regard for, and take into consideration, the aims of punishment, which are deterrence, retribution, rehabilitation and prevention. Furthermore, a Court should not lose sight of the element of mercy during the process of sentencing - see **S v RABIE 1975 (4) SA 855 (A)** at **862 D – F**.

[2] An additional important factor that a Court has to take into account is the so-called triad¹, which every sentencing court must consider. These are the personal circumstances of the accused, the offence (or offences) which had been committed, as well as the interests of society. In considering the aforementioned factors, the Court should at all times strive to impose a balanced sentence without over or under emphasizing any of these circumstances at the expense of the other.

THE PERSONAL CIRCUMSTANCES OF ACCUSED 1

[3] He is 40 years old, unmarried and the father of 3 minor children, who are all of school going age – 16, 14 and 10 respectively. His eldest daughter stays with his mother. The other 2 children stay with their respective mothers. The accused was also gainfully employed and earned a salary of R10,000 per month. His highest level of education is grade 11, but he obtained various posts school diplomas and certificates. He is a first offender and stayed with his mother prior to the incident.

THE PERSONAL CIRCUMSTANCES OF ACCUSED 2

[4] He is 37 years of age, born and raised in Cape Town and later relocated to Johannesburg with his mother when he was 17. He currently stays in Johannesburg. He is married to two women: Zanooksha Ismail, in accordance with Muslim rights, for the past for 2 years, and to Natalie Jacobs for the past 6 years under civil law. He has no children with either of his wives. However, he has 3 children (aged 17, 8 and 3 years respectively) born out of relationships with other woman. He financially supports

¹ S v Zinn 1969 (2) SA 537 (A) at 540 G.

all 3 children and plays an active role in their lives. He attended Bracken Downs high school and completed grade 10. He continued with his further education at Roodepoort Technical College in 1997.

[5] He studied various courses in health and safety training, obtained an NT3 qualification and was at some stage employed at Third Millennium Safety Solutions as a health and safety manager. He was diagnosed with bipolar disorder and is also HIV-positive – currently he is still undergoing treatment for his medical conditions. Before his incarceration he was in the business of buying and selling cars and earned around R150000,00 per month.

[6] In mitigation of sentence accused 2 presented the evidence of Mrs. Ann Cawood, a social worker who compiled a report for the benefit of the court. According to her evidence the accused is capable of being rehabilitated and has shown insight into his culpability. She further testified that he has taken full responsibility for his choices and actions on the evening of the incident. According to her understanding, accused 2 had shown remorse.

[7] He called a witness, Lorianne Van Zyl, his cousin, who testified about his character. Further testimonials about his good character were also handed up during argument on mitigation of sentence. Mr. Booth further argued that accused 2's previous convictions should not be considered, either because it is not relevant or because the last conviction for a violent offence occurred in 2008, which is almost 10 years ago.

THE OFFENCE

[8] The crime committed by the two accused – murder – is of a very serious nature. The manner in which it was executed is of particular concern to this court. Although it was not planned and premeditated, the conduct of the accused was brazen and revolting and would have induced a sense of shock and disbelief in any civilized human being. The attack on the deceased was brutal and callous. The motivation for the attack seems to involve some incident that had happened at the night club.

[9] There is no evidence that the deceased was involved in any incident with the two accused. On the contrary, the evidence clearly shows that after accused 1 had seen the deceased in the taxi (while still at the night club) he had mistakenly identified the deceased as having been involved in the incident at the club. From the nightclub, they followed the taxi in which the deceased and the other witnesses were driving, to the first scene in White Road where the taxi driver was forced by accused 2 to bring the vehicle to a standstill.

[10] At that stage the accused were told, for the first time, that the deceased and the other witnesses had not been involved in any incident at the nightclub involving the two accused and that they were making a mistake. The witnesses were scared and managed to get away from them. They gave chase and cornered them in a cul-de-sac in Avoca Road. There the accused were again repeatedly told that they were making a mistake, but to no avail. Notwithstanding these pleas, the accused started with the brutal and vicious assault on the deceased.

[11] By that time, they must have had enough time to consider their actions. When accused 2 punched the deceased with his fist, causing him to land on the ground, the deceased did not offer any resistance and did not fight back. He was lying there helplessly. Once again the accused had an opportunity to reconsider their actions or to stop from further assaulting the deceased to the extent that they did.

[12] What makes this attack so brutal and abhorrent was the continuous and incessant assault on a person who could not defend himself. This was evident in the testimony of Sarah and John Cannon, Victoria Packer, and Melanie Steyn who were still very traumatized and were reduced to tears when they had to recall the brutality and viciousness of the incident. They found the conduct of the accused totally incomprehensible and were unable to understand how the accused could be so violent and cruel in the manner in which they assaulted the deceased. This incident will be something that they will never forget.

[13] The conduct of the accused can only be described as a cowardly and dastardly act. As the prosecutor rightly pointed out in a case where murder is committed with a firearm, death is almost instant, but in this case the incessant and continuous kicking and beating of the deceased, which endured for some time, must have been very painful and he must have suffered a lot throughout the ordeal. It was almost like torture. The severe injuries he suffered to his head, bears testimony to this fact.

Interests of Society

[14] Society demands that in cases like these the Court must protect its interests by imposing a stringent sentence. Ordinarily it is in cases like this where the interest of the accused takes a back-seat and the interest of society, as well as the seriousness of the offence, is brought to the forefront. There is no doubt in my mind that a sentence of direct imprisonment would be appropriate.

[15] It is for these reasons that Parliament has enacted the provisions of the Criminal Law (Sentencing) Amendment Act 105 of 1997 ("Prescribed Sentences Act"). In this particular case, the accused had been convicted of murder in furtherance of a common purpose. In such an instance the prescribed sentence is one of life imprisonment. The court is obliged to impose that sentence unless it can find that there are substantial and compelling circumstances that justify deviating from the prescribed sentence.

The absence or presence of substantial and compelling circumstances

[16] Before the court can come to such a conclusion, it has to weigh up all the facts and circumstances of the specific case. The court has to consider the cumulative effect of all the facts and circumstances and not consider those facts in isolation. Both Mr. Solomons as well as Mr. Booth submitted that the personal circumstances of the accused, together with the totality of the other facts, constitute substantial and compelling circumstances.

[17] In respect of accused 1, Mr. Solomons argued that the following constituted substantial and compelling circumstances:

- 1) he is a first offender;
- 2) has never before been incarcerated;
- 3) has never before been involved in criminal activities;
- 4) that he had a stable job for most of his life and earned a steady income of R10 000 per month;
- 5) is the father of 3 children that attend school;
- 6) has an elderly mother which he has to care for;
- 7) that alcohol played a role in the commission of the offence.

[18] In respect of accused 2, Mr. Booth submitted that the following facts and circumstances should be considered as substantial and compelling circumstances:

- 1) that accused 2, even though he has previous convictions, should also be considered as a first offender;
- 2) that he is married and the father of 3 children;
- 3) that he had a stable job and income, prior to his incarceration;
- 4) that he had been in custody awaiting trial since January 2016;
- 5) that he is not a healthy person and suffers from bipolar disorder as well as the fact that he is HIV-positive;
- 6) that he exhibited some form of remorse, by admitting that he slapped and kicked the deceased;
- 7) that something had happened earlier on the evening that gave rise to the

commission of this offence;

8) that he had had a troubled youth due to the fact that his parents were separated.

[19] Mr. Booth further argued the court should consider the evidence of Mrs. Cawood, the social worker, as well as the evidence of the other people who submitted testimonials about his good character. The most compelling of these circumstances highlighted by both Mr. Solomons and Mr. Booth in respect of both the accused is the fact that both of them have a good and stable family life and work record. A further factor which is common to both of the accused, is that they have minor dependent children, who will suffer if they should be sent to prison for a considerable period of time. This in itself, in my view, would be a strong mitigating factor. *Nugent JA*, in *S v Vilakazi*² said the following to this effect at para 58:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessary recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character."

² 2009 (1) SACR 552 (SCA) at 574.

[20] The ill health of a person in itself cannot serve as a circumstance to justify a lesser sentence than the prescribed one.

[21] Mr. Booth conceded in argument to this court that it cannot be used as a “get out of jail ticket”, but insisted that it can be taken into consideration as a substantial and compelling circumstance. This is a reality of the impact of the scourge of HIV/AIDS, from which millions of South Africans suffer. Courts are increasingly faced with the situation where offenders who had been diagnosed as HIV positive, commit serious offences. This disease, although life-threatening, in itself is not fatal, and it has been shown that it can be properly treated with medication. People live an almost normal life for years after having been diagnosed with this disease.

[22] It cannot always be a mitigating factor and in some instances it may be regarded as an aggravating factor, especially where a person who, knowing full well that he or she has contracted the disease, commits a crime where he or she puts another person at risk of contracting the disease also. It is for this very reason that Parliament has recognised that the prescribed sentence should be imposed on a person who had been infected by HIV and then commits the offence of rape whereby his victim may be infected with the disease.³

[23] The question that should be considered by the courts is whether this should be considered as a substantial and compelling circumstance to deviate from the prescribed

³ An offence of rape as contemplated in s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, committed by a person knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus.

sentence in a case where the offender has committed a very serious offence which calls for a specific period of imprisonment in terms of the provisions of the Prescribed Sentences Act.

[24] The question of the weight that a court should attach to the fact that the person suffers from ill-health has been dealt with by our courts in the past, when the court was confronted with the question whether the ill-health of a person should preclude it from imposing a sentence of direct imprisonment. Those considerations would also, in my view, be applicable in coming to the conclusion whether the ill-health of a person should be taken into consideration in determining whether there are substantial and compelling circumstances to deviate from the prescribed sentence.

[25] In **S v C 1996 (2) SACR 503 (T)** *Cameron J* (as he then was) had occasion to pronounce on this very issue where he made reference to a decision of *Ogilvie Thompson JA*, at page **511 G – H**:

"The general principle is that enunciated by Ogilvie Thompson JA in S v Berliner 1967 (2) 193 (A) at 199F-G: while a convicted person's health or life expectation may, depending on the circumstances, afford a good reason for not sentencing him to imprisonment, there is no general rule that ill health, or foreshortened life expectation, automatically relieves a criminal from being imprisoned."

[26] In this same matter, at page **512 A – D**, *Cameron J* also refers to a similar approach adopted in Australia where the South Australian Court of Criminal Appeals, per *King CJ* in **R v SMITH (1987) 44 SASR 587 (CCA SA)** held that:

"The state of health of an offender is always relevant to the consideration of the

appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the correctional services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking, ill health will be a factor tending to mitigate punishment only where it happens that imprisonment will be a greater burden on the offender by reason of his state of health, or where there is a serious risk of imprisonment having a gravely adverse effect on the offender's health."

[27] The same approach was adopted in **S v MAZIBUKO AND OTHERS 1997 (1) SACR 255 (W)** where a Court sentenced a young first offender who was a quadriplegic to 10 years imprisonment. This, after he had committed a series of very serious offences like robbery with aggravating circumstances, 2 counts of attempted murder, and possession of an unlicensed firearm and ammunition in contravention of the relevant statutory provisions applicable.

[28] It would not be in the interests of justice if a court should create the impression that an offender who committed a very serious offence would not be visited with the full might of the law because of the fact that he is suffering from HIV/AIDS, and therefore as a result of this, consider it as a substantial and compelling circumstance to deviate from the prescribed sentence. Such a condition cannot be used as an excuse to escape due punishment in circumstances where the prescribed sentence should have been imposed given the circumstances of the case and the seriousness of the offence. I am therefore not convinced that the fact that accused 2 suffers from HIV/AIDS and bipolar disorder, in itself, is enough justification to deviate from the prescribed

sentence.

[29] The next question to consider is whether the accused had shown any remorse. On the evidence as presented, in my view, both the accused have not taken responsibility for what they had done. Accused 1 in his evidence said that he was sorry for what happened to the deceased, but stopped short of telling the court that he has taken full responsibility for his actions. The same can be said in respect of accused 2. I do not think the evidence of Mrs. Cawood, the social worker who testified on his behalf, is very helpful in this regard. In the report at page 12 she makes the following remark: *"Mr. Jacobs shows appropriate remorse and deeply regrets the life changing choices he made of the 20th and 21st November 2015. He was able to verbalize insight into the severity of his actions and realizes he has to repay his debt to society."*

[30] This is a very vague and unsubstantiated comment. When she was asked what she meant by that, and when she was informed that the accused failed to take responsibility for his actions, she submitted to the court that due to the fact that accused 2 had slapped and kicked the deceased, he has taken full responsibility for his actions. According to her, based on her expertise and experience, this is true remorse. It is clear that Mrs. Cawood, who according to her evidence has testified in many criminal cases, has with respect, no understanding of what is meant by the concept of genuine remorse, as spelt out the many decisions of our courts.

[31] A further aspect which the court takes into consideration as an aggravating factor, was the attitude that accused 2, displayed prior to his arrest. Soon after this

incident had occurred, the police had difficulty in trying to ascertain his whereabouts. It seems that immediately after the incident he had gone back to Johannesburg. The brother of the deceased, Lee Schoombie ("Lee") thereafter tried to locate accused 2. He created a Facebook page entitled "Justice for Carl". During his interactions he had contact with some of the family members of accused 2, including his mother. A photo of accused 2 was also posted on Facebook to indicate that he was wanted for the murder of the deceased. An amount of R50 000,00 was also later raised as a reward for information leading to the arrest of accused 2.

[32] According to Lee, accused 2 also had a Facebook account. He had contact with the mother of accused 2, who it seems had communicated with him on Facebook about accused 2. She was, however, not willing to assist him or the police and tried to shield him from arrest. It is difficult to accept that accused 2 could not have been aware of the fact that the police were looking for him, given the fact that he had committed a very serious offence and that his mother was in communication with Lee on Facebook, enquiring about his whereabouts. The police, after receiving information from a source that he was in Johannesburg, only managed to arrest him about 3 months after the incident. This is once again a clear indication that accused 2 did not want to take responsibility for his actions and tried to evade arrest.

[33] In ***S v MATYITYI 2011 (1) SACR 40 (SCA)*** Ponnann JA had the following to say about this aspect, at para 13:

"There is, moreover, 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."

[34] This is not a victimless crime and the voice of the victim as presented to this court by Lee, should be given sufficient importance and weight. A further important fact in considering the voice of the victim is that, whatever sentence the court will impose, it will not bring the deceased back to life. The loss of the deceased, it seems, has had a devastating effect on the lives of his family. Lee did everything in his power to see that the two accused were brought to book. He was unrelenting in his effort and literally did not want the accused to get away with murder.

[35] It was difficult for the father of the deceased to attend this trial and to understand why the accused acted in such an inhumane and abhorrent manner towards the deceased and why it was necessary for them to kill him. According to Lee's evidence his mother is a totally broken person. He testified that as a result of this incident, she is constantly grief-stricken and described it as follows: "*My mum is alive*

but not living anymore.” The Schoombee family will take a long time to recover from the loss of their loved one, if ever.

The deceased was a talented young man in the prime of his life. He was a qualified engineer and also intended to study further. He would have been a great asset to our society. The loss of his life was totally unnecessary and undeserved.

[36] I am of the view that these facts do not constitute sufficient justification to deviate from the prescribed sentence. After a consideration of all these facts and circumstances, I impose the following sentence on the accused.

[37] In respect of Accused 1:

Count 1 - Murder of Carl Schoombie - **life imprisonment;**

Count 3 - Assault with intent to do grievous bodily injury in respect of John Cannon - **6 months imprisonment;**

Count 5 - Assault on Sarah Cannon – **60 days imprisonment;**

Counts 6-7 - Assault and Crimen Injuria on Victoria Packer. Both charges are taken together for the purpose of sentence - **60 days imprisonment;**

In respect of Accused 2:

Count 1- Murder of Carl Schoombie - **life imprisonment;**

The sentences in respect of counts 3 and 4, which are 2 separate assaults with the intent to do grievous bodily injury committed in respect of John Cannon - **3**

years imprisonment.

The court orders all the sentences in respect of both accused are to be served concurrently.

Both the accused are declared unfit to possess a firearm in terms of the provisions of section 103 of Firearms Control Act 60 of 2000.

HENNEY, J

Judge of the High Court