Republic of South Africa

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

Case No. CC20/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing on sentence (accused 1, 2 and 4 only): 5 February 2018
Judgment on sentence delivered: 7 February 2018

In the matter between:

THE STATE

and

NIZAAM JORDAAN	Accused 1
SHALOMODIEN DOLLIE	Accused 2
MANZAN MAART	Accused 3
ROZARIO LOTTERING	Accused 4
YUSRIE BENTING	Accused 5

JUDGMENT

BINNS-WARD J:

[1] Accused 3 and 5 were acquitted and discharged on all counts. This judgment concerns the sentence proceedings in respect of the three accused who were convicted on various of the charges brought in terms of the indictment. It also deals with the enquiry that I initiated in terms of s 342A of the Criminal Procedure Act 51 of 1977 into the mid-trial delay occasioned by a postponement that I reluctantly allowed on account of matters extraneous to the proceedings in this court.

[2] Accused 2 was found guilty of the attempted murder by shooting of Luqmaan Josephs on the evening of 24 December 2015, and accused 1 and 4 of the murder by shooting of Ashley Davids on the evening of 27 April 2016. Accused 2 and accused 1

were also convicted in relation to each of the aforementioned incidents of the unlawful possession of a firearm and ammunition in contravention of the Firearms Control Act 60 of 2000. It is convenient for sentence purposes to deal first with accused 2 and then with accused 1 and 4.

[3] Before doing so, however, it is appropriate to discuss a factor that is common to all three of the accused and of the matters in respect of which they were convicted. The offences in both incidents were manifestations of gang-related violence in the notoriously gang infested area of Manenberg in which the accused and their victims lived and had grown up. I must say at the outset that I am acutely conscious of the very real disadvantages to which young persons like the accused are subject in that environment. The circumstances are such that they and their peers are under significant temptation and enticement to become involved in gang membership and activity. This comes about not only because of pervasive poverty and unemployment, but also because of the prevailing social norms in the area, which seem to accept gang culture as part of the way of life. This is manifest by the way in which the various gangs that operate in the area have carved out territories within the suburb in which one or other of them holds sway and influence. It is also borne out by the evidence that such is the hold of gang culture in the area that there is little respect for the forces of law and order. The police are openly defied and disregarded on occasion. It is a place where life is treated cheaply, and killings and revenge killings are the order of the day. It is clear from the evidence that the unlawful possession of firearms and ammunition is commonplace in the area and that such munitions are regularly used to lethal effect.

[4] Recognition of these factors means that one's moral condemnation of the accused's involvement in the gangs and their criminal activities must be measured. They are, each of them, persons against whom the odds have been stacked from the outset, which in a material sense is an indictment of our far from perfect society. Recognising these factors, however, does not afford proper reason for the adoption by the court of an attitude of maudlin sympathy for them in regard to the very serious offences in which they involved themselves. They knew that what they were doing was criminal and they must be held appropriately accountable for their wrongdoing. Society in general, and the law abiding members of their own community, would be grievously let down if the court were not to mark their misdeeds with the gravity they

deserve. I also recognise that it takes courage for many of the civilian witnesses from that community to come to court and testify in such matters. The faith that such persons have shown in the criminal justice system should not be betrayed by a misguided show of excess sympathy or understanding for the situation of the accused.

[5] I mention these factors at the beginning of this judgment to highlight the difficult task imposed on the courts in deciding on sentences in these cases. Sentences that will strike an appropriate balance between the personal circumstances of the accused, the seriousness of the crimes of which they have been convicted and the legitimate expectations and legal interests of the community. The community in this regard means not only the people of Manenberg, but also society in general. There can be no hope for the creation of a society with a respect for law and human rights if violent crimes like murder and the associated offences of unlawful possession of firearms and ammunition are not heavily punished. Consciousness of the circumstances in which the accused became involved in their commission can serve as no more than a tempering effect when it comes to determining the measure of the substantial punishment that must be imposed on each of them.

[6] The accused are, each of them, young men, who ideally should be standing at the threshold of the most productive stage of their lives. Sadly, they have each undermined their prospects, limited as those were by their low levels of education and apparently relatively limited intellects, of becoming contributing members of society by joining criminal gangs and being drawn into their nefarious activities. Accused 1 has expressed no remorse for his actions, whilst accused 2 and 4 expressed regret for their actions only after they had been convicted. At least in accused 2's case he did not put up a false version during the trial, and rather adopted a position, which he was legally entitled to, of putting the state to the proof its case.

[7] I have had regard to the content of the probation officer's report that was put in in respect of accused 2. It confirms that he grew up in difficult circumstances. Factors that count in his favour are that he was in regular employment and is reported to have been an observant member of his Muslim faith, although it is difficult to square the latter with his abuse of alcohol and drugs. He contributed to the upkeep of his family and dependent child. These positive factors were insufficient however to keep him away from drugs and gangs. Indeed his underworld activities appear to have led to his estrangement from the child's mother and to her family's refusal to

accept tainted money from him for the support of the child. He did not give up his gang membership notwithstanding his exposure to gang violence and his near escape from death in that context and also the traumatic loss of a cousin who was close to him. Indeed, his evidence suggests that the commission of the offences of which he was convicted were related to an opportunity to exact revenge on the killers of his cousin. He acknowledges that an innocent victim was injured in the process.

[8] The probation officer's report suggests that the complainant, whom it will be recalled was shot in the ankle, has no grudge against the accused and that his family is content to accept the apology that they have been given by the accused's mother. It is reported that they have no wish for him to be incarcerated. That report has to be balanced against the court's observation of the obviously traumatising effect the shooting had on the complainant, a young boy in his teens. While generally maintaining a brave demeanour in the witness box, recalling the events of the night in question brought strong emotions to the fore and the court had to adjourn at one stage during his evidence in order to allow him to collect himself. It is evident that the complainant has been left to deal with the physical and emotional scars of the incident for years to come. It is fortunate, but entirely incidental, that his physical injuries were relatively superficial. He could just have easily been killed or permanently incapacitated.

[9] Although the state did not prove any previous convictions against accused 2, it appears from the probation officer's report that he has had previous brushes with the law, including a diversion out of the criminal justice system to undertake community service for possession of a dangerous weapon – apparently a knife. He has not shown an inclination to reform and a measure of scepticism is justified in regard to his present protestation that he has learned his lesson. One can only hope against hope that he will be true to his word.

[10] I agree with the submission by the probation officer that the only appropriate sentence for accused 2 in all the circumstances is one of direct imprisonment. In fixing the term of imprisonment to be imposed, I take into account that the accused has been in custody awaiting trial since June 2016, and also the cumulative effect of the sentences to be imposed separately in respect of the three offences of which he was convicted.

[11] The following sentences are imposed on accused 2 (Shalomodien Dollie):

1. On count 2, for the attempted murder of Luqmaan Josephs on 24 December 2015, five years' imprisonment.
2. On count 4, for contravening s 3(1) read with s 120(1)(a) of the Firearms Control Act 60 of 2000 (the unlawful possession of a firearm of make and calibre unknown on 24 December 2015), five years' imprisonment.
3. On count 5, for contravening s 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000 (the unlawful possession of at least one round of ammunition on 24 December 2015), two years' imprisonment.

It is directed that the sentence on count 5 and three years of the sentence on count 4 shall be served concurrently with that imposed in respect of count 2, giving an effective sentence of seven years' imprisonment in total.

[12] Accused 1 and 4 are subject to a prescribed minimum sentence of 15 years' imprisonment for murder unless the court is able to find the existence of substantial and compelling circumstances justifying the imposition of a lesser sentence. They both have a history of past brushes with the law, but their previous convictions were in respect of relatively minor offences. Their only significance for current purposes is their indication that the accused were not encouraged by past punishments to reform and lead clean lives. There is nothing exceptional about accused 1 and 4's personal circumstances or the circumstances of the commission of the offence such as to sustain a valid basis to depart from the prescribed sentence regime. In the conviction judgment I found that while premeditation had not been proven, this had been a borderline case. There was direct intention to kill. The action by accused 1 in emptying an entire magazine at the deceased and following him as he struggled to get away was brutal in the extreme. The deceased had offered the accused no provocation at all and appears to have been targeted for no other reason than his membership of an opposing gang. The attack against an evidently defenceless victim was a cowardly act. As also discussed in the conviction judgment, accused 4 made himself complicit in the assault by identifying the victim and reconnoitring the vicinity to ensure that they would not be counter-attacked. The evidence of Wasiela Josephs also suggests in the context of the other evidence adduced in the trial that

accused 4 must have been the person who accompanied accused 1 up the passageway between Jordan Street and Elbe Street and received the weapon from him, no doubt to be disposed of to be used for other gang purposes. The aggravating features of the case, including the use of a weapon capable of repeatedly firing as many as a dozen rounds, merit the imposition of severe punishment. For the count of murder a sentence materially in excess of the prescribed minimum of 15 years' imprisonment is indicated. Whilst the period that the accused have spent in custody awaiting trial does not qualify as substantial and compelling circumstances to deviate from the prescribed sentence regime, it will nevertheless be taken into account in determining the length of the sentences of imprisonment to be imposed.

[13] The following sentences are imposed on accused 1 (Nizaam Jordaan):

1. On count 7, for the murder of Ashley Davids on 27 April 2016, 20 years' imprisonment.
2. On count 9, for contravening s 3(1) read with s 120(1)(a) of the Firearms Control Act 60 of 2000 (the unlawful possession of a a firearm of make and calibre unknown on 27 April 2016), eight years' imprisonment.
3. On count 10, for contravening s 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000 (the unlawful possession of at least 12 rounds of ammunition on 27 April 2016), four years' imprisonment.

It is directed that the sentence imposed in respect of count 10 and four years of the sentence imposed in respect of count 9 shall be served concurrently with the sentence imposed in respect of count 7, giving an effective sentence of 24 years' imprisonment.

[14] The following sentence is imposed on accused 4 (Rozario Lottering):

On count 7, for the murder of Ashley Davids on 27 April 2016, 20 years' imprisonment.

[15] I turn now to the matter of the enquiry in terms of s 342A of the Criminal Procedure Act 51 of 1977 into the postponement that was necessary at the end of the evidence in the trial of the merits because of the unavailability, due to other commitments, of the legal representative for accused no. 1. The legal representative,

who was instructed by Legal Aid South Africa, informed the court that he was unavailable for the continuation of the case on the Monday following the completion of evidence because he was engaged in a part-heard matter in the Regional Court, which I understand also to have been funded by Legal Aid. I advised him at the time that his other commitments did not afford good reason to postpone the case and remanded the case to the following Monday for argument, as scheduled, leaving it to him to sort out the complication caused by his being double booked.

[16] I thereafter, as placed on record at the time, received representations in chambers from the Director of Public Prosecutions, who pointed out that the matter in the Regional Court involved a multi-accused matter in which witnesses had been subpoenaed from all around the country to testify in a complex white collar crime case. I was persuaded that the disruption that would be caused in the pending proceedings in the Regional Court would be material if the matter before me in the High Court were not postponed. I was led to believe that the dislocation of the matter in the Regional Court would be quite liable to lead to a failure of justice of grave proportions. Before deciding whether to revisit my initial refusal of a postponement on that account, I nevertheless had to take into consideration the position of the other counsel involved in the case before me. And also to weigh the length of any postponement that might ensue against the constitutional right of the accused before me, who were all in custody, to have their trial begin and conclude without unreasonable delay. In the latter regard, having by that stage heard all of the evidence, I had already formed a strong *prima facie* view that two of them would have to be acquitted, as in due course they were. Their continued detention was potentially most prejudicial if I were not to be persuaded by the argument I was yet to hear to convict them.

[17] Upon enquiry it became clear that some of the other counsel engaged in the matter before me had other commitments later in the month. These were commitments that they would have been able to attend to comfortably if the trial before me ran its ordinary course, but which could be prejudiced if the matter were to be postponed to suit the requirements of accused 1's legal representative. One of those matters in which the other counsel was involved was a long outstanding case in which the accused had already been in custody for a very considerable period of time. As it was, with the co-operation of counsel, arrangements were able to be made for

the trial to be postponed for just one week to enable accused 1's legal representative to attend to the matter in the Regional Court. This was achieved by agreement that matters in the trial before me would be taken only to verdict stage in November 2017, and resume, for sentencing purposes to the extent necessary in early 2018.

[18] The legal representative for accused 1 sought to explain his position on the basis that information on the criminal trial court roll had indicated that the current matter was anticipated to be completed on the Thursday before the matter in which he was engaged in the Regional Court was set down to resume. As I made clear at the time, that was not an acceptable excuse. Practitioners in this Division are expected to know that the court runs a continuous roll, with the implication that once a matter has commenced it is expected to run without interruption until it is completed. That much is clearly stated in the Practice Note, which also stipulates that counsel's convenience or engagement in other matters do not ordinarily afford good reason for any exception from the rule. The indicative periods on the court roll in respect of the anticipated length of criminal trials are just that. They do not imply that if the trial has not been completed within the indicated time an exception will be made to the practice of the continuous roll. Indeed, in my experience the time estimate, which reflects the prosecution's view of how long a trial is likely to run, is more often than not a material under-estimation of how long the trials actually last.

[19] In the current matter it should have been evident to accused 1's legal representative long before he made his disclosure of unavailability that the matter would not be completed within the estimated period. He should in the first place not have accepted instructions in two matters where there was no room for latitude. But having put himself in an invidious situation by doing that, he should have made alternative arrangements well ahead of time when it became evident that he would have a clash of diary commitments.

[20] I directed that the legal practitioner should file an affidavit explaining his role in the disruption of the trial in this court. He duly did so. Having considered the content of the affidavit, which contained an acknowledgement of his misdirection and an apology for the inconvenience it had caused the court, his colleagues for the prosecution and the defence and the accused, and having been assured by him from the bar that he did not submit an account for a fee in respect of his attendance at the abortive sitting of this court on Monday, the 13th of November, I decided to take no

steps against him. I wish to make it clear, however, that such indulgence will not be repeated.

[21] A dislocation of a trial of the sort that happened in this case not only prejudices the accused's rights, it also comes at a cost. The efficient allocation of judicial resources is undermined, and wasted costs in respect of state aided legal representation are occasioned. Should there be a recurrence I shall in future be inclined to seriously consider exercising the court's powers in terms of s 342A to make an order directing the offending legal practitioner to forfeit part of his or her fee and/or to pay the fees of any other legal practitioner that have been unnecessarily incurred in consequence of the dislocation.

[22] It also seems to me that the Legal Aid Board should be encouraged to take a more proactive role in its allocation of work. The Board should be able to determine when the briefs that it gives to practitioners are likely to result in diary clashes. One of the ways in which it could do this is by requiring practitioners to whom work is allocated to disclose their other commitments and to undertake that they have satisfied themselves that their other commitments are not likely to result in double booking. The fees that the Board unnecessarily incurred in respect of the wasted appearances of *four* other Legal Aid instructed counsel in this matter highlight the necessity that it earnestly consider taking a more proactive role in respect of these issues; not only as a contribution to the more efficient administration of justice, but also to achieve an improved allocation of its own limited resources.

[23] A copy of this judgment will be placed for publication on SAFLII and I shall also direct the Chief Registrar of the court to forward a copy for the attention of the head of the Cape Town office of Legal Aid South Africa.

A. G. BINNS-WARD

Judge of the High Court