NOT REPORTABLE/REPORTABLE/OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: CC 3/2018

THE STATE

And

SHAAN HORNE

SHANE ARENDS **Accused**

Coram: **Chetty J**

Heard: **13 August 2018**

Delivered: **16 August 2018**

JUDGMENT

Chetty J:

[1] The evidence adduced established that the area where the shooting occurred was controlled by the Dustlifes gang, and territorially, sacrosanct. Given the enmity between them and their adversaries, the Upstand Dogs, the foolhardiness of

intruding upon their turf, is self-evident. And yet, on the morning of 23 July 2016, the accused and their coterie brazenly entered forbidden territory. Their *raison de etré* is a matter peculiarly within their knowledge and remains suppressed. When the vehicle entered Avalon Crescent and stopped suddenly, accused no. 1 alighted, proceeded in the direction of the deceased and without further ado fired a shot at him. He must have been utterly bemused and the attempt to flee down the stairway triggered the firing of a second shot and his forward momentum no doubt caused him to fall and whilst prone on the ground, accused no. 1 stood above him and fired three shots into his head, returned to the vehicle and fled the scene. As adumbrated in my earlier judgment, the inference can properly be made that he had the direct intention to kill the deceased. The reason for this cold blooded murder befuddles the mind.

[2] Crimes of such ilk attract a mandatory sentence of 15 years imprisonment absent a finding that there are substantial and compelling circumstances which militate against its imposition. Counsel for accused no. 1, Mr *Bodlo*, fairly conceded that he was constrained from submitting that the requisite circumstances were present but nonetheless urged me to find that a sentence of 15 years was manifestly unjust. The submission advanced is untenable and requires no serious consideration. A finding that there are no substantial and compelling circumstances is dispositive of the enquiry. As Marais JA trenchantly reasoned in ***Malgas***[1]: -

"[21] It would be foolish of course, to refuse to acknowledge that there is an

[1] 2001 (1) SACR 469 (SCA)

abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.

[22] What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."

The goal directed nature of the crime and its method of execution refutes any suggestion that the ordained sentence is disproportionate.

[3] This case is yet another in the never ending and escalating orgy of violence which envelopes the northern areas of Port Elizabeth. The statistics adverted to by Constable *Xolile Lolo Owen Peta* (*Peta*) are shocking and attest to an unprecedented level of violence where entire communities are held ransom by young thugs. The accused's capture that morning was merely fortuitous and effected only by reason of the police's rapid response. Accused no. 2 was found in possession of the firearm and neither his plea of guilty nor his implication of accused no. 1 inures to his benefit. I have no doubt that his presence in the Polo was not as innocent as he sought to portray given the material conflict between his plea explanation and his *viva voce* evidence. Their journey from *Daniel's* home to Avalon Crescent was clearly an act of bravura with forethought, although its exact purpose remains unclear. On the available evidence however it is clear that accused no. 1 was on a frolic of his own when he ran after and shot the deceased.

[4] Both accused are in their mid-twenties, accused no. 1, 23 at the time of the commission of the offence and accused no. 2, 25. Accused no. 1 is a matriculant and although unmarried, the father of a 10 month old child, whom I am told, resides with its mother and himself as a family unit. Although not in fixed employment, he worked on a casual basis and earned R1 500. 00 per fortnight which he utilised for the upkeep of his family. His previous conviction is of no real moment. Accused no. 2, a first offender, contracted tuberculosis awaiting trial initially and its late detection has, I am told, severely compromised his health. He too was not in any fixed employment.

[5] In contradistinction, the deceased was the sole breadwinner for his family. His grandfather, Mr *John Africa*, attested to a victim impact assessment report (exhibit "R") wherein he detailed the grief, anguish and misfortune which has befallen them. The evidence adduced negated any notion that the deceased was affiliated to any particular gang and his death appears clearly to have occurred in a classic case of him being in the wrong place at the wrong time.

[6] I have however been impressed upon to impose a sentence in excess of the ordained sentence on accused no. 1, given his goal directed conduct. Although there is a paucity of information before me concerning his prospects for rehabilitation, his academic record justifies the inference that he has some prospect of reformation. The accused's gang affiliation furthermore does not necessarily justify a propensity for criminality. Marginalised and unemployed youth, growing up and living in sub-standard economic conditions, are easily assimilated into the gang culture, in most cases for their own self-preservation and I am unable to conclude that an increased sentence is indeed warranted.

[7] The unlawful possession of the firearm and ammunition are indeed serious offences, directly linked to the horrendous crime statistics adverted to by *Peta* and merit an appropriate sentence. In the result the accused are sentenced as follows –

Accused No. 1

Count 2 - 15 years imprisonment;

Count 3 - 5 years imprisonment;

Count 4 - 1 year imprisonment.

It is ordered that the sentences on counts 3 and 4 run concurrently with that imposed on count 2.

Accused No. 2

Count 3 - 5 years imprisonment;

Count 4 - 1 year imprisonment.

It is ordered that the sentence on count 4 run concurrently with that imposed on count 3.

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D. CHETTY

JUDGE OF THE HIGH COURT

Obo the State:	*Adv M. Sandan / Adv R. Ahmed* *National Director of Public Prosecutions, Uitenhage Road, North End Port Elizabeth* *Tel: (012) 842 1400*
Obo the Defence:	*Mr Bodlo / Adv. J Coertzen* *Legal Aid: South Africa, Uitenhage Road, North End, Port Elizabeth* *Tel: (041) 408 2800*