105/95

Case No 429/94
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE STATE APPELLANT

and

GUISEPPI DI BLASI RESPONDENT

CORAM: CORBETT CJ, E M GROSSKOPF et VIVIER JJA.

HEARD: 8 SEPTEMBER 1995.

DELIVERED: 21 SEPTEMBER 1995.

J U D G M E N T

VIVIER JA/

VIVIER JA:

This is an appeal against sentence in terms of sec 316 B of the Criminal Procedure Act 51 of 1977 ("the Act") by the Attorney-General of the Cape Provincial Division. In that Court the respondent, upon his plea of guilty, was convicted by Williamson J and assessors of the murder of his ex-wife Francesca Di Blasi ("the deceased") and of the illegal possession of a firearm and ammunition. On the murder charge he was sentenced to four years' imprisonment and on the other two charges, which were taken together for purposes of sentence, he was sentenced to a fine of R3 000-00 or six months' imprisonment. The Court *a quo* granted both the Attorney-General and the respondent leave to appeal to this Court against the sentence imposed on the murder charge but the respondent has not proceeded with his appeal. There is also before us an application by the appellant for condonation of

the late lodging of the requisite copies of the appeal record. This application was opposed by the respondent.

It is convenient to deal first with the application for condonation. The facts are that leave to appeal was granted to both parties on 24 September 1993. A few days later, on 29 September 1993, respondent gave notice that he was not proceeding with his appeal. In terms of sec 316 (5) (a) read with sec 316 B (2) of the Act, and further read with Rule 52 (1) (a) (i) of the Uniform Rules, the registrar of the Court appealed from was responsible for lodging with the registrar of this Court the requisite copies of the record. No time limit is prescribed for lodging the record. The registrar of the Court appealed from accordingly on 14 October 1993 requested Sneller Recordings (Pty) Ltd, the sole contractors for the preparation of appeal records, to prepare the record. The preparation of the record was completed on 16 June

1994 and it was delivered to the appellant's offices on 22 July 1994 and lodged with the registrar of this Court during August 1994. The record consists of ten volumes and runs to 714 pages. In an affidavit filed in support of the application for condonation Ms Windell from Sneller Recordings states that they did not immediately commence with the preparation of the record in view of a misunderstanding which arose when the respondent's appeal was withdrawn. It was only after enquiries were received from the appellant's office during February 1994 that the preparation of the record was proceeded with. The delay subsequent to 16 June 1994 and before the completed record was delivered to the appellant's offices is explained in an affidavit by counsel who appeared for the appellant both at the trial and on appeal. He states that due to the restructuring of the Department of Justice there was uncertainty between the registrar of the court appealed from

and the appellant as to who was responsible for the payment of the record and this resulted in the delay.

I have said earlier that in terms of the Act and the Rules the responsibility for lodging the appeal record in the present case rested with the registrar of the Court appealed from. I have also pointed out that no time limit is prescribed in this regard. In what follows I shall assume that the record had to be lodged within a reasonable time; that more than a reasonable time had elapsed before the record was lodged; and that there was an ultimate obligation on the appellant to ensure that the record was lodged so that the present application for condonation became necessary.

The general approach of this Court to applications of this kind is well-established. (See, eg, **Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie** 1969 (3) SA 360 (A) at 362 F-H; **S v Adonis** 1982 (4) SA 901 (A) at

908 H - 909 A and **Ferreira v Ntshingila** 1990 (4) SA 271 (A) at 281 D-F.) Relevant considerations include the degree of non-compliance, the explanation therefor, the prospects of success, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.

In the present case I do not regard the delay as inordinate, particularly as it seems to be clear that about four months were required for the record to be prepared. I find the reasons given for the delay reasonable and I accept them. Perhaps the appellant should have made enquiries earlier but I do not think that he was negligent in not doing so. Nor do I think that the appellant was, under the circumstances, unduly slow in bringing this application for condonation. The prospects of success apart, the other factors mentioned, either alone or cumulatively, are not of decisive

importance. I accordingly proceed to consider the appellant's prospects of success on appeal.

The deceased was shot and killed on Sunday morning 6 September 1992 in a street in Hout Bay near Cape Town. She had come to Hout Bay on holiday from Johannesburg a few weeks earlier. That morning she had just alighted from her car outside her flat when, according to the undisputed evidence of an eye-witness, the respondent, from whom she had been divorced earlier that year, came up to her with a fire-arm in his hand. She screamed and tried to run away across the street but the respondent ran after her and, from a distance of two to three paces, fired a shot at her which struck her in the back. She fell to the ground and he went right up to her, bent forward and at point blank range fired two more shots which hit her in the head. The post-mortem examination established the cause of death as gunshot wounds of

the head, abdomen and chest.

The background facts which led to the fatal shooting and which appear largely from the respondent's written statement handed in in terms of sec 112 (2) of the Act, may be summarised as follows. The respondent was born on 14 October 1944 in the town of Gela in Sicily and grew up in a conservative rural Italian community. By the time he met the deceased in 1971 he had obtained a Doctorate in Economics and was working for a tourist and travel company, having previously worked for a shipping agency. The deceased came from a more liberal background in Northern Italy. The respondent came to South Africa in November 1972 to take up employment as the manager of an international freight forwarding organisation. The deceased followed him in March 1973 and they were married in Johannesburg on 20 July 1973. The marriage appears to have

been a happy one until July 1976 when the deceased wrote to the respondent while he was overseas saying that she had decided to leave him. An eighteen month separation followed during which time she had a brief adulterous relationship with a family friend, Franco de Liperi, of which the respondent subsequently learned. He himself in his plea explanation admitted to having had "brief affairs with several women" during this period of separation. They were reconciled in the beginning of 1978 and thereafter lived first in Nairobi and from October 1980 in London. In January 1986 the respondent started a new shipping business in partnership with one Murri. The partnership broke up in March 1988 and the respondent lost all the money he had put in the business. In order to help him financially the deceased started working as an interior decorator and during 1990 she started her own interior decorating business. This was a huge success. She achieved

international acclaim as an artist and articles on her appeared in The Times in London, the New York Times and in a well-known Italian magazine.

During March 1991 the deceased informed the respondent that she no longer loved him and that she wanted a divorce. At that time he was on a six month visit to Kenya in connection with a new cruise business he had started in Mombasa and which was incurring heavy losses. He returned to London during April 1991. The following month she finally left the common home and moved into her own flat. The respondent would not accept that his marriage was over and in the months which followed he made desperate attempts to win her back. He states in his plea explanation that he was plunged into a state of depression and anger. He felt that it was totally unjust and inexcusable that the deceased should hurt him in this way for a second time.

On 19 August 1991 the deceased obtained an injunction in London against the respondent after he had on several occasions assaulted her and had also attempted to kill her. In his plea explanation the respondent says that when he heard about the injunction he was stunned. This was something he could never forgive and was a turning point for him. Shortly afterwards the divorce petition was served on him. The divorce order was granted on 10 June 1992 and was made final on 23 July 1992. By this time the deceased had moved to South Africa and the respondent heard that she was living in Johannesburg with one Loris Brunini of whose background and personality he strongly disapproved.

The respondent states in his plea explanation that he regarded the news that the deceased had instituted divorce proceedings against him as an absolute insult. It was the last straw. The

deceased had no right to divorce him and had brought shame to him and his family by doing so. She had been completely indifferent to his suffering and pain. He could not ignore the insults and humiliation and he decided to kill her and to end his own life. He wound up his business interests in London, proceeded to make all the necessary arrangements for his death and then flew to South Africa to seek her out and kill her.

In this country the respondent traced the deceased's whereabouts and then set about watching and following her in Johannesburg in order to confirm that she was living with Brunini. Once that had been established he tried to obtain a firearm but could not buy one as he was unable to get a licence. After about two months he went to Durban and with the help of an old friend of his, Peter Storm, managed to get his temporary visa extended to 8 September 1992. Back in Johannesburg he eventually

managed to buy a firearm illegally and then learned that the deceased had gone to Cape Town on holiday. He drove to Cape Town and traced her to where she was staying with Brunini in Hout Bay. From Monday 31 August 1992 to Saturday 5 September 1992 he watched and followed them but they were always together. He states that he did not want to kill Brunini but that he wanted to get the deceased alone. On Sunday morning 6 September 1992 he saw the deceased coming out of a supermarket alone and decided that his chance to kill her had finally come. He followed her and shot her in the street in front of the flat where she was staying. He states that he was determined to kill her, and in fact fired three shots at her head but missed once. He did not feel guilty killing her, but felt that the guilt was hers alone and that he was the victim, not she. The rest of the Sunday and the following day he drove aimlessly up and down the West Coast. At

one stage he threw the firearm into the sea as he did not want its owner to be traced. After hearing on the radio that the deceased was still alive he wrote her a suicide note saying, *inter alia*, that had he not been convinced that she was dead, he would have fired ten more shots at her. Eventually he walked to a deserted spot along the beach near Darling where he tried to commit suicide by swallowing a large number of sleeping pills. He lay there for a long time and eventually recovered sufficiently to walk to a nearby house for help.

After his arrest the respondent appeared in the Magistrate's Court at Wynberg on 11 September 1992 when he was referred to Valkenberg Hospital for observation in terms of secs 77 (1) and 78 (2) of the Act. The unanimous report of the panel of two psychiatrists, Drs Zabow and George, was that the respondent suffered from no psychotic or psychiatric illness and that he did not

lack criminal capacity due to mental illness or mental defect, although his conduct at the relevant time was influenced by his emotional state. The criminal capacity with which the report was concerned has been described in judgments of this Court as pathological or statutory criminal capacity (see, for example, **S v Laubscher** 1988 (1) SA 163 (A) at 167 B-F; **S v Smith** 1990 (1) SACR 130 (A) at 134 g-h and **S v Kalogoropoulos** 1993 (1) SACR 12(A) at 21 h-i).

While it was common cause at the trial that the respondent had the necessary criminal capacity to be held responsible for the killing of the deceased, the case put forward by the defence in mitigation of sentence was that he acted with diminished criminal responsibility as a result of non-pathological causes of a temporary nature namely a partial emotional and psychological disintegration or breakdown at the relevant time. It has been recognised by this

Court that it is possible for there to be non-pathological temporary diminished criminal responsibility which would be relevant to sentence. See **S v Laubscher, supra,** at 168 B-C; **S v Smith, supra,** at 135 f-g and **S v Shapiro** 1994 (1) SACR 112 (A) at 120 e-g.

On the issue of diminished criminal responsibility two experts testified on behalf of the respondent. Dr Venter, a clinical psychologist, had consulted with the respondent at Pollsmoor Prison for approximately 100 hours over a period of about five months prior to the trial and had spoken to many people in this country and overseas in order to learn more about the respondent's background, his personality, his relationship with the deceased and how he was affected by the breakdown of his marriage. His diagnosis was that of a major depressive disorder with narcissistic and obsessive, compulsive personality traits. He said that the

respondent had suffered a severe traumatic loss with the breakdown of his marriage which had caused him severe anger and depression and which, in turn, were exacerbated by his said personality traits, with the result that he became obsessed with the deceased and with thoughts of anger, bitterness, revenge and death. His judgment was affected by a combination of the emotional factors and this probably led to a temporary non-pathological emotional disintegration which affected his ability to realise the full implications of his actions and to resist the forces within him.

Dr Zabow, who saw the respondent during the statutory thirty days observation period in Valkenberg Hospital and thereafter on a regular basis in Pollsmoor Prison prior to the trial, testified that the respondent had been suffering from depression for more than a year prior to the shooting and that he was in a state of emotional upset which affected his behaviour and impaired his

judgment so that he did not act normally. He said that the killing was not a cold-blooded, callous act by a man whose wife had left him and who had decided, because of his cultural background and personality traits, to kill his wife. What had caused him to kill the deceased was rather a combination of the emotional factors and all the other factors relating to his background, personality and marital problems.

The respondent himself did not testify, apparently on the advice of Dr Venter, who considered that it would be harmful to the respondent's therapeutic process. Dr Venter said that the respondent had remained depressed, angry and without remorse. He still felt justified in doing what he had done and would do it again.

The Court *a quo* did not in terms find that the respondent acted with diminished criminal responsibility, although it was

contended that such a finding was implicit in the judgment. Be that as it may, in my view such a finding would not have been justified. By definition diminished criminal responsibility is the diminished capacity to appreciate the wrongfulness of the particular act in question, or to act in accordance with an appreciation of its wrongfulness (cf sec 78 (7) of the Act). It is for an accused person to lay a factual foundation for his defence that non-pathological causes resulted in diminished criminal responsibility, and the issue is one for the Court to decide. In coming to a decision the Court must have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused person's actions during the relevant period. In **S v Harris** 1965 (2) SA 340 (A) **Ogilvie Thompson JA** said in this regard at 365 B-C :

"[I]n the ultimate analysis, the crucial issue of appellant's

criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court - initially, the trial Court; and, on appeal, this Court - must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period."

See also **S v Laubscher, supra,** at 172 D; **S v Kalogoropoulos, supra,** at 21 i - 22 a; **S v Calitz** 1990 (1) SACR 119 (A) at 127 c-d and **S v Potgieter** 1994 (1) SACR 61 (A) at 72 h - 73 d where this Court emphasised the need to subject the evidence given by an accused person in support of a defence of non-pathological incapacity to careful scrutiny.

In the present case the respondent, as I have said, did not give evidence. His plea explanation was largely untested. This, in my view, reduces the weight to be attached to the expert

evidence which was based on the assumption that the appellant's version was truthful in all material respects. The objective facts show no sign of an inability to appreciate the wrongfulness of killing the deceased, or to act in accordance with such an appreciation. Instead they show, firstly, the respondent as a self-centred, dictatorial man with an exaggerated sense of self-importance and pride who considered his wife to have no right to divorce him and, when she did so, considered it an insult and as sufficient justification for killing her. The deceased did nothing to him save to divorce him because she wanted her freedom. His motivation to kill her was his hurt pride, humiliation and revenge, all because she had had the temerity to divorce him.

The objective facts show further that the murder was premeditated and carefully and systematically planned over a long period. The decision to kill the deceased was first taken when

the respondent heard about the divorce proceedings. This was at least three months before her death. Thereafter he came to South Africa with the sole intention to kill the deceased. To this end he stalked her for about two months in Johannesburg, purchased a fire-arm illegally, traced her to Hout Bay and followed and watched her there during the final week while he waited for an opportunity to kill her when she was alone. His single-minded, relentless pursuit of the deceased is well illustrated by the manner in which the respondent ascertained the deceased's address in Cape Town. He states in his plea explanation that he obtained her telephone number in the Cape Peninsula from Brunini's office in Johannesburg. He then drove to Cape Town and, using the telephone directory, narrowed the area of the number to Llandudno and Hout Bay. He then remembered that he had seen a sticker on her car with the name "Hout Bay" on it and he also reasoned

that because Brunini liked sailing they were more likely to stay in Hout Bay than in Llandudno. He drove to Hout Bay and looked for her car but could not find it. He then approached a man who was working on the telephone lines and drove him to the local telephone exchange where the address was secured. This, in my view, shows that the respondent was not so obsessed with his feelings that he had lost control of his logical and decision-making faculties. The respondent spent a long time going after the deceased, doing so unhurriedly and biding his time. This is not the conduct of a man who lacked self-control. During that period he had plenty of time for reflection and reconsideration.

The murder itself was a cold and calculated one. The respondent did not act in an uncontrolled or irrational manner in the final moments but in a cool, deliberate and merciless manner. His thoughts were clear and rational, as appears from the following

precise and detailed account which he was able to give of the shooting :

> "[W]hen I got out of the car, gun in hand, she looked straight into my eyes. She did not say anything. I did not say anything. We just looked at each other. I knew she knew that it was the end. She tried to run away across the road. I chased her and shot her in the back while she was still running. She fell on the ground. I walked to her and pointed the gun at her head because I was determined to kill her. I shot three times at her head."

Drs Zabow and Venter both suggested that the respondent had not finally made up his mind to kill the deceased prior to seeing her in Hout Bay with Brunini. The respondent, however, does not himself say so. According to him his decision to kill her was taken before he came to South Africa, and this is supported by the objective facts considered above.

In all the circumstances of the case I am satisfied that the

respondent's ability to act in accordance with an appreciation of wrongfulness was not weakened. But even assuming that it was, it was clearly not weakened to any substantial degree and not to the extent that it can be said that his moral blameworthiness was materially reduced. It cannot therefore be said that he acted with diminished criminal responsibility. **Rumpff CJ** put the test for diminished criminal responsibility as follows in **S v Mnyanda** 1976 (2) SA 751 (A) at 766 G-H :

> "By die vasstelling of 'n persoon toerekenbaar gereken moet word of nie, en of daar verminderde toerekenbaarheid is of nie, moet soos reeds gemeld, die wilsbeheervermoë van so 'n persoon oorweeg word aan die hand van sodanige getuienis as wat beskikbaar is, insluitende die psigiatriese of kliniese-sielkundige getuienis. Soos reeds gesê, is die blote feit dat 'n beskuldigde klinies as 'n psigopaat beskou word, nie 'n grond waarop 'n beskuldigde as verminderd toerekenbaar bevind moet word nie. Alleen dan wanneer ten opsigte van 'n bepaalde misdaad bevind word dat die psigopatiese steuring van so 'n graad was dat die wilsbeheervermoë tot so 'n mate

> verswak was dat hy volgens 'n morele beoordeling, minder verwytbaar is as wanneer hy nie so 'n verswakking van wilsbeheervermoë sou gehad het nie, bestaan daar 'n verminderde toerekenbaarheid."

The learned Chief Justice was here dealing with the concept of diminished criminal responsibility of a psychopath with reference to sec 78 (7) of a draft Bill which was in identical terms to the present sec 78 (7). His remarks apply equally to the present case. The respondent's feelings of humiliation, anger and bitterness and his desire for revenge because of the divorce, cannot, in the circumstances of the present case, serve to reduce his moral blameworthiness for the killing of the deceased.

Where the learned trial Judge erred in the exercise of his discretion relating to sentence was that he had insufficient regard to the respondent's moral blameworthiness as well as the interests of

society and the crime. For most of the judgment on sentence he was concerned with the effect which the break-up of the marriage with the deceased had on the respondent. The learned Judge expressed strong feelings of sympathy and compassion for the respondent. So, for example, he said at the commencement of the judgment :

> "Behind the bare facts of a deliberate killing ..... lies a story of heartache and obsessive love which evokes much compassion."

and again towards the end of the judgment :

> "[M]y human inclination is one of compassion and sympathy for the accused. He has suffered grievously and the agonies of heart and longing must have been terrible indeed."

The learned trial Judge did refer briefly to the enormity of the crime and the interests of society but, significantly, he only did so when he was considering a plea by the defence that a sentence of

correctional supervision in terms of sec 276 (1) (h) of the Act be imposed. It does not appear that, after he had decided against a sentence of correctional supervision, the nature of the crime and the interests of society received any further recognition in the sentence imposed by the learned Judge. Instead he emphasised that the respondent was a broken man, that there was no need for a preventive sentence and that no punishment could achieve the respondent's reformation and rehabilitation.

In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment namely deterrent, preventive, reformative and retributive. See **S v Rabie** 1975 (4) SA 855 (A) at 862 A-B and **S v Khumalo and Others** 1984 (3) SA 327 (A) at 330 D. Although the element of retribution is today considered to be of lesser importance (**Khumalo**'s case, **supra**, at 330 E) it cannot be ignored. In **R v**

Karg 1961 (1) SA 231 (A) **Schreiner JA** said the following in this regard at 236 A-C :

> "While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

Deterrence has remained the most important object of punishment (**Khumalo's** case, **supra**, at 330 E). The interests of society in the deterrent aspect of a sentence was stated as follows

by **Rumpff CJ** in **S v Du Toit** 1979 (3) SA 846 (A) at 857 D-E :

> "Die belang van die gemeenskap by 'n straf wat opgelê word, is veelledig. In sommige gevalle tree die belang na vore wanneer die gemeenskap beskerm moet word teen die gedrag van 'n bepaalde individu. In ander gevalle verdien die belang oorweging wanneer die orde en vrede in die gemeenskap ter sprake kom. In ander gevalle weer tree die belang na vore wanneer lede van die gemeenskap afgeskrik moet word. In die tyd waarin ons leef, is die misdade waaraan appellant skuldig bevind is van so 'n aard dat die gemeenskap ter plaatse en ook te lande nie anders as besonder hewig geskok kon gewees het nie en 'n straf ter afskrikking moet gevolglik sterk oorweeg word."

In my view the learned trial Judge did not give due consideration to the aspects of deterrence and retribution. The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The

punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct. In my view the sentence imposed by the learned Judge does neither, and I consider it to be shockingly inappropriate.

Counsel for the respondent submitted that the sentence imposed by the learned trial Judge was in line with the sentences imposed in a number of other cases where the facts were similar. He referred in this regard to **S v Campher** 1987 (1) SA 940 (A); **S v Laubscher, supra**; **S v Calitz, supra; S v Smith, supra; S v Wiid** 1990 (1) SACR 561 (A); **S v Potgieter, supra**; **S v Ingram** 1995 (1) SACR 1 (A) and **S v Kensley** 1995 (1) SACR 646 (A). As **Nicholas AJA** pointed out in **S v Fraser** 1987 (2) SA 859 (A) at 863 C-D, it is an idle exercise to match the colours of the case at hand and the colours of

other cases with the object of arriving at an appropriate sentence. "[E]ach case should be dealt with on its own facts, connected with the crime and the criminal" (per **Schreiner JA** in **R v Karg, supra,** at 236 G-H). It suffices to say that the cases referred to are all clearly distinguishable and are of no assistance in arriving at a proper sentence in the present case. In each of the cases relied upon the accused's moral blameworthiness was much less than that of the respondent in the present case.

I have already said that the learned Judge *a quo* not only failed to give due consideration to the aspects of deterrence and retribution but that the sentence which he imposed is disturbingly inappropriate. It follows that the application for condonation should be granted.

At the same time the result of the appeal is that the sentence must be set aside and a new sentence imposed (**S v Rabie**

1975 (4) SA 855 (A) at 857 D - F). For the reasons stated, and giving due consideration to the mitigating factors namely the respondent's depressed state of mind and the fact that he was emotionally upset, I am of the view that a substantial period of imprisonment is called for. In my view justice will be done if a sentence of fifteen years' imprisonment is imposed on the murder charge.

The following order is made :

1. The application for condonation of the late lodging of the record is granted. No order as to costs is made on the application;

2. The appeal succeeds. The sentence imposed by the trial Court on the murder charge is set aside and a sentence of fifteen years' imprisonment is substituted. In terms of sec 282 (b) of the Act this sentence is

antedated to the date on which sentence was imposed by the Court *a quo* ie 23 September 1993.

W. VIVIER JA.

CORBETT CJ)

E M GROSSKOPF JA) Concurred.