

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

SS76/2005

DATE:

14 SEPTEMBER 2005

5 In the matter of:

THE STATE

versus

1. DENVER ADAMS
2. NIGEL SMITH
- 10 3. JONATHAN MERINO
4. RIAAN OOSTHUIZEN
5. DEON COETZEE
6. RALPH GOSMENT

15

S E N T E N C E

MEER, J:

- 20 The accused were charged in the Regional Court, Cape Town, of the murder of Lionel Petersen. The crime was committed in Kleinvlei near Cape Town on 20 May 2000. At the time accused 1 was aged 20; accused 3 was 15 years and eight months; accused 4 was 21; accused 5 was 18; accused 6 was

18 and accused 7 was 21. All the accused pleaded not guilty but were ultimately convicted as charged.

The matter comes before me for sentence in terms of section
5 52(1)(b) of the Criminal Law Amendment Act, 105 of 1997. In a separate judgment I pronounced myself satisfied that the proceedings in the Regional Court were in accordance with justice and I confirmed the judgment of the Regional Court in terms of section 52(3)(a) of the Act.

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Section 51(1)(b) of the Act provides that where a matter is referred to the High Court for sentence after the accused concerned have been convicted of an offence referred to in Part 1 of Schedule 2, in this case the offence of murder, the
15 High Court must sentence the accused to life imprisonment. The Court may, however, impose a lesser sentence than life imprisonment if the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed.

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This, however, does not apply in respect of an accused who was below the age of 16 at the time of the commission of the offence. Of all the accused, it is only accused 3, Nigel Smith, who was below the age of 16. The minimum sentence is
25 therefore not applicable in respect of accused 3. It is,

however, applicable of the other accused. Against this backdrop of the legislation I set out to consider the factual background of the offence and of the circumstances pertaining to each of the accused.

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Factual background

On the afternoon of 20 May 2000, the accused who were found by the Regional Court to be members of the gang, the "Hos Baba" Gang, acting in concert and with a common purpose, brutally attacked the deceased, Lionel Petersen, in Melton Road, Kleinvlei. They stabbed and hacked at him repeatedly with knives, pangas and other sharp weapons, as a consequence whereof, he died. The accused were convicted on the basis of *dolus directus*. A medical report indicates the cause of death as follows:

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Die oorsaak van dood was hoofbesering met veelvuldige trauma aan die liggaam en die gevolge daarvan".

20 Personal circumstances of the accused

The accused are young men of disadvantaged backgrounds who come from the Kleinvlei/Eersterivier area. They are friends and moved around together in the area. None of the accused has a previous conviction. All the accused, save for

accused 7, have been in custody for two years. Accused 7 has been in custody for four years and seven months. The accused were convicted on 17 September 2003.

5 I now turn to consider the personal circumstances in respect of each of the accused.

Accused 1 is currently 25 years old. He was 20 years old at the time of the murder. He is the second eldest of seven
10 children and lived with his parents and siblings in Eersterivier until his arrest. His father, Daniel Adams, informed the Court that accused 1 left school in Standard 8 for financial reasons. Thereafter he worked for four years for a building contractor earning R800 a fortnight which he contributed to his family.
15 Accused 1's father described him as a good son. He could not say whether his son had been a member of a gang.

Personal circumstances of accused 3. Accused 3 is presently 20 years and 10 months old. At the time of the murder he was
20 a few months short of his 16th birthday. He is the sixth of his parents' nine children. He lived with his parents and siblings in Kleinvlei at the time of the murder. A welfare report indicates that accused 3 comes from a stable background and a close-knit, God-fearing family, one that is actively involved
25 in their church. Accused 3 left school in Standard 6 in 2000

because of learning problems. The Welfare report states that due to financial difficulties he was not sent to a technical school to study further. After leaving school, according to the report, accused 3 became something of a lay-about and became difficult at home, demanding money and keeping late nights. He also began smoking Mandrax. Accused 3 denied this even though the report indicates this information was obtained from him and his father.

10 For some of the time accused 3 worked on a casual basis as a "handlanger" on building sites earning about R300 per week. He gave his wages to his family. Accused 3 was arrested a month after leaving school. Accused 3 in testimony denied being a member of the Hosh Baba gang but admitted to being associated with the other accused for about five years. He continued to deny his involvement in the murder and therefore showed no remorse. Accused 3's mother, Caroline Smith, testified that she had no knowledge of her son's involvement in the murder, nor in a gang. She described him as a quiet and obedient child.

Personal circumstances of accused 4. Accused 4 is currently 26 years old. He was 21 at the time of the murder. He has a daughter aged 6 who lives with her mother who is accused

number 3's sister. Until his arrest, accused 4 lived with his mother, a single parent, in Eersteriver.

Accused 4 matriculated in 1998, where after he worked as a
5 packer earning R450 a week until 2000. He supported his child. Accused 4 denied being a member of the Hosh Baba gang but said he associated with members thereof. The gang, according to him, was a group which engaged in social activities. Accused 4 continues to deny his involvement in the
10 murder and his remorse was confined to an expression of sympathy that the deceased had lost his life.

Personal circumstances of accused 5. Accused 5 is currently 23 years old. He was 18 at the time of the murder. He is the
15 eldest of five children. His mother is a widow who works as a general cleaner. Accused 5 left school in 1998 when he was in Standard 6 after his father's death. He was forced to go out and work, which he did, for a carpenter earning R350 a week. His mother testified that he gave her his wages each week.
20 She described him as a good son saying she had no knowledge of his involvement in a gang. His mother denied her son's involvement in the murder.

Accused 5 himself in testimony continued to deny his
25 involvement in the murder and explained he could not show

remorse for something he had not done. He also denied being a member of a gang.

Personal circumstances of accused 6. Accused 6 is currently
5 23 years old. He was 18 at the time of the murder. He
matriculated in 1999, where after he began working as a
casual labourer for a hawker. Accused 6's intention was to
save his earnings for further studies. This unfortunately did
not materialise because after a short spell studying in
10 Worcester he was forced to return home to Eersterivier in 2000
due to lack of funds. Three months after returning to
Eersterivier he was arrested for this offence.

Accused 6 lived with his mother and stepfather. He said he
15 was a church-goer. Accused 6 too continues to deny his
involvement in the murder and consequently did not display
remorse save to express sympathy to the family of the
deceased. Accused 6 denied being a member of the gang.
According to him the Hof Bader gang was no more than a
20 social club.

A family friend, Ms Machelm who has known accused 6 since
childhood, testified about his good character. She too
emphasized that he was a church-goer.

Personal circumstances of accused 7. Accused 7 is currently 26 years old. He was 21 at the time of the murder. He is married and has two children aged six and four. He is one of seven children and was brought up by his mother, a single
5 parent.

Accused 7 was forced to leave school at the age of approximately 14 due to financial difficulties. He was in Standard 4 at the time. Since leaving school, accused 7 has
10 worked at various jobs. At the age of 19 he married his wife, then aged 17. At the time of the commission of the offence, accused 7 earned approximately R1 500 a month. He and his family lived with his mother and he supported them.

15 Accused 7's wife, Elrisa Gasment testified that he was a good father and husband. Since his arrest she and her children have moved in with her mother. They depend upon her financially. But for a short period of contract work, Ms Gasment has not been able to obtain employment since
20 accused 7's arrest. Her children, she said, miss their father.

Accused 7 took pains to emphasise the plight of his two young children who had been deprived of their father since his incarceration and asked this to be considered in mitigation of
25 sentence. He continues to deny any involvement in the murder

of the deceased and consequently displayed no remorse. He too denied being a member of a gang.

Argument. Arguing in mitigation of sentence for the accused, 5 Ms Abrahams, for accused 1, 3 and 4, and Ms Carter for accused 5, 6 and 7, submitted that there were substantial and compelling circumstances to depart from the minimum sentence. The youthfulness of the accused, the facts that they were first offenders and the fact that there were prospects for 10 rehabilitation.

Ms Marshall for the State called for the imposition of the minimum sentence. In so doing, she highlighted the brutality of the gang-inflicted murder in broad daylight, in full view of 15 members of the public and highlighted the blatant disregard for the law on the part of the accused. With regard to accused 3 she asked for a long period of imprisonment.

Accused, murder is the most heinous of all crimes and one 20 which sadly occurs all too frequently in the violent society in which we live. The alarming number of murders which occur as a consequence of gang-related violence have converted many neighbourhoods in this city into virtual war zones, war zones in which young men like yourselves engage in spine- 25 chilling brutality which defy comprehension and result in tragic

death like that of the deceased, Lionel Petersen. The frequency of such horrendous deeds and their prevalence in our society warrants the severest of punishment.

5 I have carefully considered the aggravating and mitigating circumstances in respect of each one of you and it is clear that a substantial sentence of imprisonment is warranted. The minimum sentence of life imprisonment as has been stated is applicable to all of you, save for accused 3, who was not yet
10 16 at the time of the murder. I shall commence with accused 3.

Accused 3: I have carefully considered the mitigating factors presented in evidence and argument. In sentencing you I am mindful of the
15 fact that you are a first offender. I am mindful of the fact that you have already spent a period of two years in prison. I have come to the conclusion that in order to strike a proper balance between the interests of society and the interests of yourself, an
20 appropriate sentence would be as follows:

Accused 3 you are sentenced to 14 years' imprisonment for the murder of Lionel Petersen.

Each of you faces life imprisonment. I have carefully
25 considered all the aggravating and mitigating circumstances.

Notwithstanding the horror of your crime, I have decided not to sentence you to a term of life imprisonment for the murder you have been convicted of. You are all first offenders from disadvantaged backgrounds. You are also young men. There is no evidence to suggest that there is no prospect for your rehabilitation in the interests of your families and your financial responsibilities to them. As was said in S v Nkosi a sentence of life imprisonment is considered in exceptional circumstances for youthful offenders.

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I am mindful also of the periods you have already spent in jail. This period is the same for accused 1, 4, 5 and 6 whom I shall therefore sentence separately from accused 7.

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Accused 1, 4, 5 and 6 on the charge of the murder Lionel Petersen you are sentenced to 14 years' imprisonment.

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Accused 7 you have spent longer than the other accused in jail. The Court takes that into consideration in sentencing you. On the charge of the murder of Lionel Petersen you are sentenced to 12 years' imprisonment.

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A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line and a short vertical stroke.

MEER, J