



IN THE HIGH COURT OF SOUTH AFRICA
[THE NORTHERN CAPE DIVISION]

Unrevised

CASE NUMBER: KS 31/2014

THE STATE

AND

EDGAR GAOITSIWE MERE

ACCUSED

THE SENTENCE

Date of the hearing : 18 November 2014

Date of the sentence: 21 November 2014

Phatshoane J:

1. The accused, aged 29, was convicted on 2 counts: attempted murder and murder read with the provisions of s 51(2) of the Criminal Law Amendment Act, 105 of 1997. In his plea explanation in terms of s 112(2) of the Criminal Procedure Act, 51 of 1977, he states that at the time of the incidents he was employed by the South African Police Service (SAPS) as a constable stationed at the Warrenton Police Station. On 13 June 2014 at approximately 06h00 in the afternoon he reported for duty and was posted with constable Letebele to the crime prevention and/or visible policing unit. The accused was also the acting Community Service Centre commander. His assignment of the night and morning in issue required of him to go out on patrols.
2. The accused states that at approximately 12h00 midnight on 13 June 2014 he went out on patrol duty. He explained that when doing visible policing patrols they regularly visit taverns and the like places where alcohol is sold because more often than not incidents of crime are bound occur at these places. On his way home to pick up his dinner he stopped at a tavern to buy cigarettes. He

parked the police vehicle in front of the tavern and exited the vehicle accompanied by a lady he had earlier offered a lift to home. They entered the tavern. Whilst inside a person by the name of Jonas called him and informed him that a certain male person, whom he pointed out to the accused, wanted to fight with him and showed the accused where he had been hit by this person. He later learned that this person was Mr Alister Spaigen, the complainant in the count of attempted murder.

3. The accused explained that he stood between Jonas and Alister in order to calm the situation and to prevent them from fighting. During his intervention Jonas hit Alister with a fist on the mouth. A fight ensued between the two and in the course of it Alister's friend joined the fray. The accused says that he took Alister out of the tavern in an attempt to stop the fight. Whilst outside, near the devil's fork fence surrounding the tavern, he observed another male person armed with a "panga". This man attempted to hit him with the "panga" but the accused managed to ward off the attack and the "panga" hit the devil's fork instead. He later realized that the attacker was the deceased, Mr Lionel Mandjies. The accused stated that at that juncture he ran out of the tavern premises towards the police vehicle. Jonas also exited the tavern and came towards his direction. The accused saw that Jonas had been further assaulted and was bleeding from his head.
 4. The fight escalated and numerous people exited the tavern and approached them. The angry mob started to hurl insults at the accused stating that "the police think that they can do whatever they like". The accused intimates that in an attempt to prevent any further violence from breaking out he took out his "pepper spray" and sprayed in the direction of the crowd. He says this ignited much fury from the mob which was clearly intending to assault him. He intimates that he climbed into the police vehicle through the left back door because he was prevented from entering the driver's side by the angry crowd. Inside the vehicle he climbed over the back seat to the driver's seat. Two unknown male persons had also entered the vehicle. One of them, on the passenger side, attempted to push him out of the vehicle whereas the one in the back grabbed him from behind, hit him with a fist and pulled him by his clothing.
 5. The accused says that he could not drive away as the vehicle was surrounded.
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He alighted and saw Alister, the deceased and another friend of theirs. Alister was armed with a panga whilst the deceased had a spade. The deceased threw the spade at him which hit the back of his bullet proof vest. The accused drew his firearm and discharged two warning shots into the ground. He noticed the deceased running towards some houses situated close to the tavern. He then found an opportunity to climb into the vehicle and drove away. He drove a short distance in order to turn around and to leave Warrenvale but could not turn the vehicle near the tavern as there were other vehicles blocking his way. He reversed the vehicle into the driveway of one of the houses and observed that the mob had followed him and was again standing next to the vehicle hitting it with their hands and insulting him.

6. He admitted that at that stage he could drive away as there was nothing preventing him from doing so. Nevertheless, he felt seriously provoked by the conduct of Alister, the deceased and their friend as well as the other people. He further explained that he became extremely angry and provoked because the initial attack on him and the conduct of the people were undeserved. He alighted from the vehicle and retaliated by insulting the mob. He further states that there were people that came from the neighbourhood who attempted to calm down the situation.
 7. The accused states that the deceased approached him unarmed where he stood but in anger he (the accused) pushed him away. He saw that Alister who was a distance away was unarmed. He explained that he momentarily lost his temper and self-control and recklessly discharged two shots towards Alister and the deceased. He witnessed the deceased running away and he (the accused) entered the vehicle and departed the scene for the police station.
 8. The accused states that there was no justification for his conduct when he shot Alister and the deceased because there was no attack on him or any imminent threat at that stage and could have driven away. However, he says he felt humiliated and provoked which enraged him to the extent of losing his temper.
 9. The accused intimates that at the police station he reported to Inspector Motsoaneng that he had shot people near the tavern. Motsoaneng requested him to hand over to him his service pistol. He complied with his instruction. He surrendered to his arrest and fully co-operated with the Independent Police Investigative Directorate who investigated the matter. He states that he later
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learnt that he had shot and injured Alister in his leg and the deceased in his chest which caused his death.

10. The accused admit that on 14 June 2014 at approximately 02h00, early morning, he intentionally discharged his service pistol towards Alister thereby shooting and injuring him. He states that at the time of discharging his firearm towards Alister he foresaw the reasonable possibility that he could either seriously injure or inflict a fatal wound on him but he acted indifferently and in reckless disregard of this possibility and proceeded to shoot him.
 11. The accused admits that on 14 June 2014 at approximately 02h00 in the early hours, he intentionally discharged his firearm towards the deceased thereby fatally injuring him. He says that at the time of shooting the deceased he foresaw the reasonable possibility that he could seriously injure and even fatally wound him. He acted indifferently and in reckless disregard of that possibility and proceeded to discharge his firearm. He admits that the deceased died as a result of the injury he inflicted on him.
 12. The State accepted the plea as tendered and on the basis of his plea the accused was convicted of attempted murder (Count 1) and murder (Count 2).
 13. In considering an appropriate sentence the Court should have regard to the crime, the offender, and the interest of the society and impose a sentence which would attempt to balance the nature of the offence and circumstances under which the offence was committed, the character of the offender, his/her circumstances and the impact of the crime on the victim and the community, its welfare and concern. See *S v Zinn* 1969 (2) SA 537 (A) at 540G and *S v Banda and Others* 1991 (2) SA 352 (B) at 355A –C.
 14. The accused testified in mitigation of the sentence. His mother died when he was in Grade 2 at school while his father passed away when he was in Grade 7. He was raised by his grandmother. He has a sibling and other extended family members. He is unmarried but is engaged to be married to Ms Nozipho Gela. He has 6 children aged 12; 7; two 4 year olds; 1 year old and 1 month old baby. Three of these children were born of the relationship between the accused and Ms Gela whereas the other three were born from his previous relationships. He is maintaining all his children.
 15. The accused matriculated in 2003. In 2004, at the age of 19, he became a reservist in SAPS. He was permanently employed by SAPS in 2006. He liked
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being a police officer to protect his community and country against crime. He stated that in the 10 years of service with the SAPS he has never been subjected to a disciplinary hearing. He intimates that following the commission of the offences he resigned from SAPS because his deeds hurt him and he did not want to work with firearms.

16. The accused states that he pleaded guilty because he is saddened by the fact that he took someone else's life. As a police officer he made contributions to the community related projects and has now disappointed and hurt the people he served; that knew him well and cared for him. He wishes that what he did could have happened to him instead and says he is genuinely sorry for his actions. He says that he understands the severity of the punishment that he is likely to face. He accepts his fate and says that all he can ask for is forgiveness from the family of the deceased and Alister. He pleads that there be no hatred because it would not happen again.
 17. The accused testified that he was diagnosed with some pancreatic decease. This ailment does not affect his day to day activities.
 18. Adv V. Nel, for the accused, argued that the accused reported for duty without any malice. He contended that the accused was extremely provoked and when his anger got the better of him, he committed the offences on the spur of the moment. That with intention being in the form of *dolus eventualis*, the murder was not foremost in the mind of the accused. Counsel further contended that the accused lacked any propensity to commit further crimes and is a good candidate for rehabilitation.
 19. The deceased was 18 years of age when he met his untimely death. He stayed with his mother and was due to start employment on 17 June 2014; three days after his death. Dr Lemainè Fouchè conducted the post-mortem examination on the body of the deceased. The contents of her report were admitted by the accused and handed in evidence by consent. Dr Fouchè's report reflected that the deceased had an entrance and exit wound on the left lower arm as well as a re-entry wound on the left lateral chest. He also had a defect through the 7th rib on the left lateral chest wall with damage to the diaphragm, the stomach and the heart and pericardium. She recorded the cause of death as gunshot to the arm.
 20. The deceased was robbed of his life at a very young age and this situation is
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irreversible. His death must have left a void in his family. In *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) at 57 para 144 the Court made the following pronouncement:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”

21. Alister was 14 years old when the accused shot him. On the J88 medical report compiled by Dr Moses, which was also handed in evidence by consent, Alister had a wound on the anterior aspect of the right thigh which was haemorrhaging. He also had a circular wound on the lateral aspect of the right thigh which was not actively bleeding. He was treated for a day at the hospital and discharged. Alister's wounds are completely healed.
 22. The accused committed serious offences. Alister and the deceased were unarmed at the time he shot them. In the accused's own words he attended a Police Training College and graduated. With his 10 years of service within the SAPS, as a crime preventer, he should be skilled enough to know where to draw a line even if provoked. He discharged his official firearm injuring and killing unarmed members of the public he was trained and employed to protect. He ought to have known how to control his temper more so because he says people from the neighbourhood came to the scene to calm the situation. These are serious aggravating circumstances deserving severe punishment.
 23. The offence of murder committed *in casu* should be read in conjunction with the provision of s 51(2) of the Criminal Law Amendment Act, 105 of 1997, as it attracts the prescribed sentence absent a finding of substantial and compelling circumstances. Both the defence and the State counsel are *ad idem* that there are substantial and compelling circumstances justifying a departure from the imposition of the prescribed minimum sentence of 15 years imprisonment. The defence was of the view that a punishment far less than the 15 years imprisonment with a suspended portion thereof will fit the crime. The State submitted that 10 years effective imprisonment will meet this case.
 24. The accused has no record of any previous conviction. He confessed his transgressions in detail and placed the relevant facts before the Court. He also cooperated with the police. Through his plea of guilty he curtailed what could
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have been a lengthy trial. I am swayed that with the genuine contrition he displayed there is hope for him for his rehabilitation and his eventual reintegration into the society. The accused's six very young children stand to suffer due to his folly. It holds true that on that fateful day violence erupted in an unpremeditated manner with devastating consequences at the hands of the accused. The evidence elicited show that the accused was subjected to insults and provocation. These factors aggregately considered constitute substantial and compelling circumstances and are persuasive enough to justify a departure from the imposition of the prescribed minimum sentence.

25. The society demands that the serious offences be suitably punished. It is also required that mitigating circumstances of the accused be taken into consideration and that the accused's particular position be given thorough consideration. See *S v Holder* 1979 (2) SA 70 (A) at 81A - B. Miller J states the following in *S v Mkize* 1973 (3) SA 284 (N) at 286G:

"While the public is entitled to protection against any one individual, one cannot sacrifice the individual entirely in offering that protection to it. I think the most the Court can do consistently with justice is to protect the public for as long a period as seems commensurate with the accused's deserts".

26. In the circumstances the following sentences are imposed:
1. On count 1, the charge of attempted murder: The accused is sentenced to 5 (five) years imprisonment.
 2. On count 2, the charge of murder: The accused is sentenced to 9 (nine) years imprisonment.
 3. The sentence of attempted murder is to run concurrently with the sentence of nine years imprisonment for murder.

MV PHATSHOANE J

Appearing for the state:	Adv R Makhaga instructed by Director of Public Prosecutions, Kimberley
Appearing for the accused:	Adv V. Nel instructed by Justice Centre, Kimberley