

**IN THE EASTERN CAPE HIGH COURT
(BHISHO)**

CASE NO: CC 2/2012

THE STATE

versus

HERSCHELL KLEINBOOI

Accused

SENTENCE

Y EBRAHIM J:

Introduction

1]The accused, HERSCHELL KLEINBOOI, has been convicted of the crime of murder and I must now impose sentence.

The triad

2]In determining an appropriate sentence the Court takes account of the personal circumstances of the accused, the nature of the crime, and the interests of society.¹

The Court will also, depending on the circumstances of the case, endeavour to exercise a measure of mercy.²

Personal circumstances of the accused

¹ *S v Zinn* 1969 (2) SA 537 (AD) and *S v Rabie* 1975 (4) SA 855 (AD)

² *S v Rabie* (*supra*)

3]Mr Kleinbooi you exercised your right not to testify or call any witnesses in mitigation of sentence. Mr van Breda conveyed your personal circumstances to the Court. Your mother left you at the age of 9 months and thereafter your grandfather reared you. Your father had no hand in your upbringing. You are now 28 years old with no dependants but assist with the rearing of your sister's child. Since 2005, after re-uniting with your father who suffers from Aids, you have been caring for him. In 2002 you matriculated and in 2006 joined the S A Police Services. After a period of initial training you underwent practical training for 6 months before being posted to Tamara police station. On 9 June 2007 you married the deceased, who was also a member of the police services and stationed similarly at Tamara police station.

Nature of the crime

4]I need hardly emphasise the seriousness of the crime of murder. Every person's right to life, a right that you continue to enjoy despite your unlawful conduct, is entrenched in our Constitution, Act 108 of 1996. You deprived the deceased, someone as young as yourself and whom you professed to love, of her enjoyment to life. She was pregnant at the time and probably looking forward to motherhood and the challenge of raising a child. I have no doubt that her parents must have been excited at having a grandchild but your actions have denied them this. They must now face life without their daughter and the loss of an unborn grandchild. An added shock for them is the fact that their son-in-law, whom they welcomed into their home, is the one responsible for this tragic state of affairs. It is not difficult to imagine the severe psychological trauma this has caused them. They will have to live with the disappointment and grief caused by your actions. The deceased's death will also have affected other family members and friends. There is now a void in their lives that may never be filled.

Interests of society

5]In considering the interests of society I am confronted with the fact that violent crime remains a serious problem in our society. What is of great concern is the increasing tendency to ignore lawful remedies available to deal with conflicts. Individuals are taking the law into their own hands and resorting to violent means to resolve disputes. The slightest disagreement flares up into violent, and often deadly, confrontation. The news media reports virtually daily on incidents of such a nature. We appear to be blind to the damage inflicted on us by the violence that prevailed in our society prior to the coming into being of the present political system. Violence as a mean of resolving conflict, whether it is a domestic dispute or of some other kind, has no place in a democratic society. The sooner each person realises that respect for the sanctity of life is fundamental to a civilised society the greater the prospect of transforming our society into a more peaceful one and, hopefully, free of crime. High levels of crime invariably result in the public demanding that ever more severe sentences be imposed on perpetrators of crime. However, while a Court should be alive to the interests of society and its duty to protect law-abiding citizens it cannot succumb to every demand that harsher penalties be applied.

Purposes of sentence

6]The purposes of sentence are deterrent, preventative, reformatory and retributive.³ A sentence must deter others from committing similar offences and crime in general. In regard to retribution, a court takes account of society's moral outrage at the nature of a particular crime and its frequency. While the Court is mindful of providing an accused with the opportunity for rehabilitation this must be balanced against the fact that the seriousness of the offence demands a lengthy term of imprisonment. If a sentence is unduly lenient public confidence in the justice system may be undermined.

³ *R v Swanepoel* 1945 (AD)

Determination of an appropriate sentence

7]In the written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 in amplification of your plea of guilty you stated in paragraph 4: *'My plea of guilty to the crime is on the basis of diminished responsibility as a result of certain traumatic experiences leading to a condition that disrupted my logical thinking as set out herein.'* The State accepted this occurred and your conviction for murder was on the basis that you acted in a state of diminished responsibility. This is common cause._

8]However, no matter how upset you were about the deceased's alleged previous infidelity, or the suspicion that you might not be the father of the child she was expecting, it did not warrant the extreme solution of killing her. Numerous peaceful and lawful methods were available for dealing with your marital problems. An aggravating factor in your case is that as a police officer you were fully aware of the consequences of criminal conduct. You were sworn to uphold the law and well knew that resorting to violence to resolve problems was not a solution.

9]Mr van Breda referred to a number of cases in which diminished responsibility was taken into account in determining sentence. These are: *S v Smith* 1990 (1) SACR 130 (A); *S v Shapiro* 1994 (1) SACR 112 (A); *S v Di Blasi* 1996 (1) SACR 1 (A); *S v Pederson* 1998 (2) SACR 383 (NPD); *S v D D Schwarz*, an unreported judgment of the Supreme Court of Appeal delivered on 29 November 1999 (Case No. 69/99); *S v Litchfield* an unreported judgment of the High Court of South Africa (East London Circuit Local Division) delivered on 16 April 2007 (Case No. CC 118/06); *DPP Transvaal v Venter* 2009 (1) SACR 165 (SCA); *S v Mnisi* 2009 (2) SACR 227 (SCA); *S v Marx* 2009 (2) SACR 562 (E); *DPP v Mngoma* 2010 (1) SACR 427 (SCA) and *S v Romer* 2011 (2) SACR 153 (SCA).

10]Mr van Breda contended that an appropriate sentence in the circumstances of this case is a period of imprisonment of not more than five years. He submitted that this Court should not follow the rationale in the judgment of the majority in the case of *DPP Transvaal v Venter (supra)*, namely that of Mlambo JA (with which Nugent JA had concurred), but rather what Cloete JA had stated in his minority judgment. According to Mr van Breda the issue of diminished responsibility, as espoused by Cloete JA, was the correct approach to follow.

11]The submission that this Court is not bound by the decision of the majority and the reasoning employed but is free to follow the minority judgment is quite clearly without legal merit. In our law this Court is bound to follow the majority decision of the Supreme Court of Appeal and not the minority. Having said that, there is no suggestion in the majority judgment that due cognisance should not be given to diminished criminal responsibility on the part of the accused. The point of difference between the two judgments was clearly set out by Nugent JA in his concurring judgment at paragraphs [64] to [66], and it was this:

‘[64] I do not understand Mlambo JA to suggest that the criminal responsibility of the respondent was undiminished at the time he committed the crimes. I think it is perfectly clear that the respondent was in a state of distress that contributed to his conduct. Had that not been the case I would have sentenced him to life imprisonment.

[65] The difference between my colleagues seems to me to lie rather in the degree to which each considers the respondent’s powers of restraint and self-control to have been diminished. For what has come to be referred to as diminished criminal responsibility is not a definite condition. It is a state of mind varying in degree that might be brought about by a variety of circumstances. The circumstances that produce that state of mind—the effects of alcohol, jealousy, distress, provocation, and the like—have always been matters to be taken account of in mitigation and I do not think anything is altered when they are brought together under a label. My colleague Cloete JA views those circumstances in this case as having substantially reduced the respondent’s powers of restraint and self-control—my colleague Mlambo JA views them as being considerably less than substantial—and it seems to me that that is where the difference between them lies.’

[66] My colleague Cloete JA is of the view that we have a choice of only two courses in this case. Either we must accept his view of the matter or the matter must be referred back to the court below for further evidence. But of course my colleague is not correct. There is a

third option that is always available to a court, which is for members of the court to each proceed in the ordinary way to reach their independent conclusions notwithstanding that they differ, and in that way the process of justice will take its ordinary course.'

12]I turn to submissions of the state. Mrs De Kock has stressed that violence was far too rife and readily employed as a solution to problems. During the month of August attention had been focussed on violence perpetrated on women and children. The family of the deceased were heart-broken at the fact that the deceased had killed her. They accepted the accused and had shown him the love he never received from his own parents. Mrs De Kock contended that the accused's act of murdering the deceased had been a selfish one and the life of an unborn child had been taken away. Even though the state accepted that the accused acted with diminished responsibility a sentence of imprisonment for five years is inappropriate. The fact that the accused had been in custody for such a long time awaiting trial was not due to any delay on the part of the state but entirely of the accused's own making. Accordingly, the state considered a sentence of imprisonment for a period of between eight to ten years as appropriate._

13]Where an accused is convicted of murder that is not premeditated and acted with diminished responsibility the sentence that the Court imposes is, in most instances, less severe than might otherwise be the case. It is evident that due weight has to be accorded to the fact that there was diminished responsibility on the part of the accused. I am giving due attention to the approaches adopted by the Court in all the cases referred to by Mr van Breda.

14]I recognise that the State abandoned reliance on the provisions of s 51(1) of Criminal Law Amendment Act No. 105 of 1997 regarding a prescribed minimum sentence for murder which is not premeditated. However, I cannot ignore that the legislature ordained a sentence of imprisonment for fifteen years for such a crime.

15]It goes without saying that I accept you acted with diminished responsibility. I am taking into account, in mitigation, that you have been in custody for over two years and four months. Further, that you are remorseful for your actions. The fact that you pleaded guilty is not a strong mitigating factor but rather a neutral one as the shooting took place in the presence of other people. Had you decided to dispute guilt their evidence would have established without any difficulty that you fired the fatal shots. I also accept that the issue of deterrence is not of much, if any, consideration in your case. I am mindful further of the fact that you are still relatively young and, most probably, a good candidate for rehabilitation. You will have enough time in prison to work on improving the emotional factors that played a part in your commission of this offence.

Sentence

16]In the result, after weighing up all the relevant factors I consider the following sentence appropriate:

The accused is sentenced to a term of imprisonment for eight (8) years.

Y EBRAHIM
ACTING DEPUTY JUDGE PRESIDENT

5 SEPTEMBER 2012