

SOUTH AFRICA / JUDGMENT

Moosa and Others v S (SS138/2005)

[2009] ZAWCHC 149 (4 September 2009)

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COURT

Western Cape High Court, Cape Town

BEFORE

Donen

CASE / FILE NUMBER

SS138/2005

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH CAPE TOWN)

CASE NUMER: SS138/2005

DATE: 4 SEPTEMBER 2009

In the matter between:

THE STATE

and

1. MARCO MOOSA
2. KASHIEF NAUDE
3. GARRETH SOLOMONS

SENTENCE

DONEN, AJ:

The accused Marco Moosa, Kashief Naude and Garreth Solomons have each been convicted on four counts of murder and one count of attempted

murder. In addition, Mr Moosa and Mr Solomons were convicted of possession, without a valid licence, of the three firearms used to commit the four murders and attempted murder, and of possession of ammunition without valid possession of a firearm which could fire such ammunition.

Mandatory minimum sentences, in terms of the provisions of sections 51(1) and 51(3) of Act 105 of 1997, read with Part I of Schedule 2 thereof, are applicable to the convictions for murder in that the offences were committed by the three accused in the execution or furtherance of a common purpose or conspiracy. The Court is bound by this legislation to sentence the accused to imprisonment for life, unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. For the attempted murder a broad range of sentences may be passed upon the accused. These are set out in section 276(1) of the Criminal Procedure Act. The relevant provisions of the Firearms Control Act provide for a maximum period of imprisonment of 15 years for each of the offences upon which accused 1 and 3 were convicted.

The traditional factors taken into account in imposing an appropriate sentence, are contained in the so called triad. This involves

considering the nature and seriousness of the crime, the personal circumstances of the accused and the interests of society. See *S v Zinn* 1969(2) SA 537 (A) at 540G and *S v Rabie* 1975(4) SA 855 (A) at 862G. Sometimes it is also said that punishment must be blended with a measure of mercy. See in that

regard *S v Sparks* 1972(3) SA 396 (A) at 41 OA. The Court must also bear in mind that the main purposes of punishment are deterrence, prevention,

reform and retribution. See *R v Swanepoel* 1945 444 AD at 455. In view of the extent of violence and serious crime in South Africa, the Supreme Court of Appeal has placed the accent on retribution and deterrence. See *S v Mhlakaza & Another* 1997(1) SACR 515 (SCA) at 519c-h.

I shall firstly examine the crimes of murder. In the judgment on conviction, I remarked that the charges arose from what may appropriately be described as a massacre of innocents. Nothing that has been presented to the Court since then has done anything to alter this conclusion. The three accused have elected to insulate their crimes within a wall of silence. They have a right of silence. However, by exercising that right in the manner that they have elected to do, and by failing to testify or to take the Court into their confidence in any way, the Court has been denied the opportunity of fully answering the question, "Why did they do it?." That question is dominant in getting to understand the influences on the accused, and generally to discover their true degree of moral reprehensibility. See *S v Martin* 1996(1) SACR 172 (W) at 176i-177c.

The partial answer to the question above must flow from the facts presented to the Court by the witnesses Mr Carriem Orrie, Ms Liesel

van Heerden and Mr Jason Skippers; namely that tension had existed between Mr Moosa (accused 1), on the one hand and Leon van Heerden,

the deceased, on the other; and that accused 3 had become involved in this. Leon may have been suspected of having a relationship with the friend of Mr Solomons at the time, Ms Faranaaz Naude. The distrust and displeasure of Mr Solomons, according to the evidence, was encouraged by Mr Moosa.

On the night before he was murdered, according to the witness, John van Schalkwyk, Leon appeared to be very nervous and was shaking

uncontrollably. He was apparently the principal target of accused 1 and 3. The only explanation for the murders of Beverley Van Heerden, Henry Martin, Lucius McKenzie (and the attempted murder of Liesel van Heerden), is that they were there (at the Van Heerden home), that the accused were able to kill them with the fire power at their disposal and that they attempted to do so, so as to eliminate every witness to the execution of Leon.

Having regard to what was apparently a prefabricated alibi to be put up by Ms Naude, it is likely that every occupant of the house, whose testimony could frustrate this alibi, was shot. Mr Moosa abused Mrs Van Heerden's friendship with him in order to gain entry into the house for himself and accused 3. In doing so he identified himself to Mrs Van Heerden in a manner which allowed Liesel Van Heerden to hear his voice, and identify him. Mrs Van Heerden was shot in both her knees, probably in order to disable her. A fatal shot was fired through her right temple. She lived long enough to recognise the danger to the life of her son, Leon, and to scream his name before she died. Leon and Lucius McKenzie were shot in their beds. No doubt that was where the accused expected to find Leon. The terror that was inflicted on the victims is incapable of imagining.

Counsel for accused 3 correctly described the offences as horrific. About 39 shots were fired inside the Van Heerden house. Of these, 25 hit the four deceased and others hit Liesel van Heerden. In the absence of a compelling explanation, the reduction of moral guilt of accused 1 and 3, who were in the house, and accused 2, who waited in the getaway car, is inconceivable. The crimes were committed without conscience. No remorse has been demonstrated by any of the accused. Save that it has been readily conceded on behalf of Mr Solomons that life sentences are appropriate for the murders he committed, the Court has been required to speculate about the detail and circumstances surrounding these crimes. No direct evidence has been led on behalf of any of the accused. Consequently, and as a result of what I have said above, no responsible conclusion can be drawn about the prospects of rehabilitation of the three accused.

On the evidence before the Court, the participation of accused 2 was limited to driving the getaway car - knowingly - to and from the scene. The sheer fire power that awoke witnesses residing in the neighbouring houses to the Van Heerden home, must have left him in no doubt as to the intensity of the assault that was taking place within the house. The evidence before the Court indicates only that accused 2 associated himself with what he knew would and did take place. The Court is bound by section 51 of Act 105 of 1977 to avoid a speculative hypothesis favourable to accused 2. In that regard see *S v Malqas* 2001(1) SACR 469 (SCA) paragraph [25] at 481 f to 482 f.

In that matter the Court examined the proper interpretation of the provisions that created the mandatory minimum sentence. I quote the passages in the judgment which are relevant for present purposes.

"A Section 51 has limited, but not eliminated the courts' discretion in imposing sentence in respect of the offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the

particularly prescribed period of imprisonment) as the sentence that should ordinarily, and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in questions are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses, favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders, are to be excluded.

E The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in paragraph D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in a sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with

appeals against sentence as the sole criterion.

I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment, and that the sentence to be imposed in lieu of the prescribed sentence should be assessed, paying due regard to the bench mark which the Legislature has provided."

The approach above was confirmed by the Constitutional Court in *S v Dodo* 2001(1) SACR 594 (CC) paragraph [26] at 608.

I now proceed to deal with the personal circumstances of accused 1, Mr Moosa. From the bar, Mr Van der Berg informed me that accused 1 would lead no oral evidence. Certain documents were tendered, other facts were put before the

Court and certain submissions were made. Mr Moosa was born on 16 March 1982. He was 22 years of age when the offences were committed.

He has no previous convictions. According to a medical report of Dr S J Erasmus, dated 20 May 2009, Mr Moosa is a T10 complete paraplegic as a result of a gunshot injury to his spinal cord that he suffered on 25 June 2005, among other multiple gunshot injuries.

T10 paraplegia means that from his navel down Mr Moosa is paralysed and he has no sensation. He is thus paralysed in his legs. He cannot walk. He is a wheelchair user. He has no control over his bowel and bladder, and he is on an indwelling catheter. His bowel actions have to be induced by medication every two to three days. He also suffers from mild hypertension. His blood pressure should be checked regularly and his medication adapted. He requires medication on a daily basis. He requires supplies in order to deal with his condition, inter alia, leg bags, bed bags and linen savers. To prevent pressure sores, he needs to sleep on a suitably soft mattress and to turn himself regularly.

The report of a social worker, Ms Leonora Hood, was admitted in evidence. Her conclusion was that, should the Court consider imprisonment, the Department of Correctional Services would be capable of accommodating Mr Moosa. Her report is dated 26 May 2009. According to the report, Mr Moosa's parents were divorced in 1988 during his teenage years. His mother attempted to provide him with a stable home environment. During 2007 his father approached accused 1 and his siblings and asked for forgiveness. Accused 1 renewed his relationship with his father, who passed on during 2008. This was a traumatic experience for accused 1 and his two siblings.

The family are members of the New Apostolic Church. According to his mother accused 1 had been active in youth activities in the church community. He matriculated at Bishop Lavis High School. He was employed by Swiss Port at Cape Town International Airport, where he was responsible for loading baggage onto aircraft. He was promoted after six months and worked in client services. He then obtained a position with British Com Air in their client services department. He was employed there for three years, but lost his employment when he was arrested in this matter. I pause to add that Mr Van der Berg informed the Court that Mr Moosa earned a substantial salary for one so young.

Ms Hood's report goes on to state that according to the accused, he began to experiment with Tik (Crystal Meth) after he met his

co-accused. According to Mrs Moosa, she did not know her son's co-accused. He met them through his girlfriend, Delia Hare. During

his consultation with Ms Hood, accused 1 persisted in alleging that Mr Solomons was a member of the Laughing Boys Gang. Mr Moosa denied being a member of a gang himself. He reported that he was shot as part of an attack on his life. He was still in danger and he did not dare to be outside. He feared for his life. Ms Hood established that Mr Moosa's mother, his maternal grandfather and his aunt act as his carers. This function is very demanding, particularly for Mrs Moosa.

In so far as his crimes were concerned, it is apparent to me that Mr Moosa attempted to mislead Ms Hood. Under the heading "Huidige

Oortreding", it is noted that accused 1 told Ms Hood that he and his co-accused had gone to the Van Heerden house to fetch Leon, so that they could socialise and use drugs. This was a refined version of what his counsel put to Ms Liesel van Heerden during

cross-examination. In so far as contrition is concerned, Mr Moosa also told Ms Hood that he was sorry about what had happened and that he wished he could turn back the clock. However, the next remark that is recorded in the report is that there was an attack on his life and he was, therefore, a paraplegic at the time of consultation. His show of remorse appears to relate to his own situation rather than the lives of his victims.

In passing I note that Mr Van der Berg admitted that the shooting of Mr Moosa and Ms Hare may have been related to the commission of the crimes. "This cannot be discounted", he said. Before making a recommendation, Ms Hood visited Pollsmoor Prison and Brandvlei Prison. At Pollsmoor she visited the hospital where she established that there were 56 patients, of whom ten were in wheelchairs. There was one quadriplegic in the hospital. He seemed to be neat and clean and well looked after. He was undergoing long term imprisonment. He was interviewed and confirmed that he was well looked after. The hospital also accommodated a patient who was a paraplegic and had been there for three years. The hospital employed 14 nurses in all. They were assisted by warders, who had helped to turn the patient in order to prevent bedsores as well as to provide for his daily care.

The medical requirements at the hospital are obtained from 2 Military Hospital, Wynberg and Groote Schuur hospitals. The prison hospital also has a chemist. Ms Hood interviewed Mr Gertse, the head of nursing at Pollsmoor. He later testified before this Court. He materially confirmed Ms Hood's findings and observations in relation to the facilities for disabled persons at Pollsmoor. A doctor is in daily attendance. Adequate nursing facilities are available. An orthopaedic bed will be provided to Mr Moosa. The hospital is being reconstructed so as to permit proper wheelchair access to the toilet and washing facilities. Facilities exist for bathing persons in Mr Moosa's condition, for sports and recreation.

The State subpoenaed - and the Court made available to counsel for Mr Moosa - not only Mr Gertse, but also the following correctional

services health officers: Mr Jabonsinga, the health manager at Pollsmoor, Mr Anthony Josephs, the regional manager of healthcare in the Western Cape and Ms Bezuidenhout, a clinical nurse. Mr Van der Berg elected not to call any of these witnesses to testify. I am satisfied that, in the circumstances, Pollsmoor Prison can accommodate accused 1.

In passing I deal with the legal duty of the Department of Correctional Services in regard to the custody of prisoners in Mr Moosa's

condition. The Correctional Services Act, 111 of 1998, states in its headnote that its purpose is to provide for a correctional system in which all prisoners are held under conditions of human dignity. The preamble expressly states that the Act has the object of changing the law governing the correctional system and giving effect to the Bill of Rights in the Constitution.

Section 12(1) of this Act, provides as follows:

"(1) The Department must provide, within its available resources, adequate healthcare services based on the principles of primary healthcare, in order to allow every prisoner to lead a healthy life."

Section 12(2) provides, inter alia, that every prisoner has the right to adequate medical treatment, and that this must be provided by a medical officer, medical practitioners or by a specialist or health care institution or person or institution identified by such medical officer.

Significantly, section 16(3) of the Act provides as follows:

"The Department must take measures, in terms of planning, policy and infrastructure to accommodate prisoners with disabilities in order to enable such prisoners, where practicable, to fully exercise the rights and to enjoy the amenities to which every prisoner is entitled."

Should the Department of Correctional Services not meet the requirements of the Act to which I have referred, Mr Moosa, as a disabled sentenced person, would be able to approach the Court for the proper relief.

I now turn to the personal circumstances of accused 2, Mr Naude. These were set out in a probation officer's report, dated 1 June 2009, that had been requested by accused 2 and that was admitted by consent. The probation officer, Mr E Mosoki, recommended that Mr Naude be sentenced in terms of section 276(1)(b) of the Criminal Procedure Act. The section in question authorises imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1) of the Act.

Mr Naude was born on 29 October 1982; that is, he was 21 years of age when the offences were committed. He has no previous convictions.

According to the report, his highest qualification was Grade 10 and the last school he attended was Athlone Technical College. His religion is recorded as Muslim. The Court was told from the bar that accused 2 had been regularly employed after leaving formal education. A letter was handed in, stating that employment is still available to Mr Naude. The report goes on to state that he was raised by his mother and his adopted father. The latter passed on during 1999 when the accused was 17 years old. He had no contact with his biological father. He grew up in a nurtured environment. His mother had observed that he was taking drugs and smoking Tik, by the time he was 19 years old. He denied that he was in need of help and told her that he had everything under control. However, he told the probation officer that he smoked Tik throughout the day and that he was addicted to it. Counsel informed the Court that Mr Naude had not used Tik after being incarcerated following conviction in this matter, although the drug was accessible in prison.

The report continues by stating that, according to Mr Naude's mother, accused 2 was easily influenced by his co-accused to drive them to the place where the offences took place. Accused 2 told the probation officer that accused 1 had requested him to drive to Bishop Lavis, where he had remained in the vehicle. Accused 2 had played music and when accused 1 and 3 returned from the Van Heerden house, neither of them mentioned that they had murdered anybody. That is, he persisted with the exculpatory version that he had once given to the police. As appears from the judgment on the merits, accused 2 nevertheless saw fit to attempt to exclude these apparently exculpatory statements from admission at the trial.

The personal circumstances of Mr Solomons, accused 3, were expressed by his counsel. According to his SAP 69, he was born on 13 September

1979. He was accordingly 24 years of age at the time of the offences. Counsel informed the Court that Mr Solomons has been married for four years. He has four children, a six year old, two five year old girls and a two year old boy; from different mothers, who are unemployed. He is the sole breadwinner of his family. He completed Grade 10 at Trafalgar High. He enrolled for a business course at Protea College, but did not complete it. His parents are divorced. He had two brothers. One died of natural causes. The other died after being shot. He has two sisters, of whom one - named Avril - was referred to in the evidence of Mr Orrie as a supplier - to him - of heroin. Accused 3 was convicted, according to the SAP 69, of attempted murder on 4 March 1996, for which he received a five year prison sentence. On 3 March 1999 he was sentenced to 18 months imprisonment for housebreaking.

I now deal with the interests of society. The community must be able to sense that the courts are seriously striving to maintain peaceful and safe living conditions. See *S v B* 1985(2) SA 120 (A). Should the courts fail in this regard, the community are likely to lose their respect for the law, the courts and the process of the courts. If justice falls into disrepute, affected persons may take the law into their own hands. See *R v Karg* 1961(1) SA 231 (A) at 236B-C.

In the Western Cape, this is not a mere abstract principle applying to punishment. The activities highlighted by evidence in this matter have a lot in common with circumstances in other matters that have ended up before the Western Cape High Court, often inconclusively.

Sometimes the perceptions of the community have played a role. Notable among these are events that took place on 4 August 1996 in Salt River, when a prominent gang-land figure, Mr Rashaad Staggie, was murdered by a mob. The murder was observed by millions of people throughout the world on televised video material. The State was constrained to rely primarily on this material for purposes of prosecution. Members of the community, who were present at the scene and had witnessed the murder, were unwilling to come forward and testify as to what they had seen. As a result, on 6 March 2002, this Court (under case number C1 28/2000) gave judgment and found three of the five accused guilty of public violence only.

The administration of justice in the present matter has been more fortunate. Due to the thoroughness of the police and the prosecution,

as well as the co-operation of members of the community, the Court was able to perform its functions effectively. I should note, in passing, that Mr Orrie testified that accused 3 was the leader of a gang known as The Laughing Boys in Hanover Park and that accused 3 had supplied him with drugs. In the eyes of certain family members of the victims, the crimes were drug and gang related. A tragic letter written by Ms Helen McKenzie, the mother of the late Lucius McKenzie, was admitted, together with two photographs of the young man, while he was still living and in a state of vitality. I need only quote one paragraph:

"Die aantal jong mense betrokke by die saak, hetsy in die getuiebank of in die beskuldigdebank of in die graf, is 'n bewys van die aanslag op ons jeug. Dis 'n bewys van die moordende gevolg wat die vrylike verskaffing van dwelms op ons samelewing het. Edelagbare, potensiele jong mense sterf daagliks aan die hand van dwelmsmokkelaars en bendeleiers. Dit gaan my verstand te bowe hoe sulke gewetenlose leiers, base, dikwels in ons howe vrygespreek word van die wreedste dade dankbaar, om dan maar met hul bedrywighede voort te gaan, terwyl onskuldige slagoffers se lewens ontwig word."

This letter is dated 30 March 2009. The mother of an innocent victim in this case clearly perceives this matter to be gang and drug related. During the course of this trial similar suggestions have been made by the prosecution.

The Constitutional Court expressed the following view in the judgment that brought about the abolition of the death sentence in South Africa: -

"Law is brought into disrepute if the justice system is ineffective and criminals are not punished. But if the justice system is effective and criminals are apprehended, brought to trial and in serious cases subjected to severe sentences, the law will not fall into disrepute."

(Per Chaskalson P in *S v Makwanyane & Another* 1995(3) SALR 391 (CC) paragraph [124] at 444.)

In the present matter two members of the public, Mr Orrie (at a considerable risk to his own safety), and Ms Rugaya Solomons assisted

the Court and the community to achieve justice. The investigating officer, Inspector Isaacs (in anticipation of the determination to combat crime that has recently been expressed by the Minister of Police and the newly appointed Commissioner), went to considerable

lengths to track down Mr Orrie after the trial had commenced; and to persuade him to assist the administration of justice with his testimony; and to enter a witness protection scheme.

This is an exceptionally serious case. The South African Police Service, the National Prosecuting Authority and members of the community have each played their role in apprehending the accused, bringing them to trial and helping to establish their guilt. The Court must now perform its function and duty in circumstances that warrant very severe sentences. This is necessary for justice to be done. 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 the Court imposes. I pause to add that righteous anger, however, should not cloud judgment. (I again refer to the case of *R v Karg* supra at 236B.)

By agreement, letters were handed in to the Court that had been written by Ms McKenzie, Ms Carmen Martin (the daughter of the late Henry Martin) and Ms Helen Pienaar (the mother of the deceased Mrs Beverley van Heerden and grandmother of Leon). They show how the deeds of the accused destroyed family lives. Ms Hood's report confirms these tragic consequences.

In making the remarks above, I remain mindful of the statement that has been made by the President of the Constitutional Court; to the effect that, relevant though public opinion may be, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. (See *Makwanyane's* case, paragraph [88] at page 431.)

Notwithstanding what I have said above, the accused have a right not to be punished in a cruel, inhuman or degrading way. (See section 12(1)(e) of the Constitution.) They have a right to have their dignity respected and protected. (See section 10 thereof.) In my view the sentences which I intend to impose will not violate these rights. The sentences are intended, nevertheless, to give effect - in this case - to certain considerations mentioned by Vivier, JA in the matter of *S v De Blasi* (1996(1) SACR 1 (A) at 10 e to g), in relation to the duty of a criminal trial court of first instance viz.:

"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 just retribution for the crime, but should also deter others from similar conduct."

I now proceed to deal with the circumstances which counsel for accused 1 and accused 2 have relied on, cumulatively, to justify departures from the sentences prescribed for the four murders. In the case of Mr Solomons, accused 3, counsel conceded that such circumstances have not been established.

Accused 1 is a first offender. He was relatively youthful, 22 years of age, when the crimes were committed. He was successful in his work and he was gainfully employed. Furthermore, he is currently a paraplegic. He had been taking drugs before the shooting.

However, when I consider that 25 shots were fired into the bodies of the four deceased, after accused 1 and accused 3 had entered the Van Heerden's home, that accused 1 admitted entering the house armed with a firearm (after gaining entry by abusing his victim's trust), and that he made it possible for accused 3 to enter, I can reach no conclusion other than that such youthful innocence of a first offender as Mr Moosa may ever have possessed, had already dissipated by the time he entered the house. No evidence has been presented to the Court showing that his youthful innocence re-emerged thereafter, or that it may ever do so. Every indication in the evidence suggests that Mr Moosa's entry to the house was pre-planned with shooting in mind. Four murders were carried out. Mr Moosa then proceeded to his work place at Cape Town International Airport, and within 2 hours of his crimes he showed surprise and feigned sadness when he was informed of the shooting. Mr Moosa has shown no genuine remorse.

I have already stated that the Department of Correctional Services has a duty to provide such facilities to persons in the condition of Mr Moosa as will permit them to undergo their punishment without discrimination, due to disability, and with adequate health care. The evidence shows that Pollsmoor Prison has the necessary facilities. I point out that this is not the first case in which a person in Mr Moosa's condition has stood in peril of undergoing a long period of mandatory imprisonment. In a judgment delivered by Bozalek, J in this division on 26 August 2008, a 42 year old paraplegic, who was confined to a wheelchair, and who was also a diabetic and dependent on insulin, was sentenced to four terms of imprisonment of 20 years each under the provisions of Act 105 of 1997. See *S v De Vries & Others*. (CPD Case number 67/2005, unreported.)

Although the courts have, in some reported cases, taken account of paraplegia and quadriplegia in mitigating sentence, the condition of the accused in those cases appear to have been perceived as moral retribution exacted on behalf of society; that is, their conditions were caused during the apprehension of the accused or in the course of commission of the offence. See in this regard *S v De Vries* 1995(1) SACR 662 (T) and *S v Mazibuko & Others* 1997(1) SACR 255 (W).

On the evidence before this court and from the statements of his counsel, as well as cross-examination on his behalf, Mr Moosa's

injuries appear to have been the result of retribution exacted by gangland figures; and this may be connected in some way to perceived

betrayal of accused 3 after Mr Moosa's arrest. I make no finding in this regard against accused 3; but I cannot ignore this explanation

in considering Mr Moosa's condition.

In accordance with the view I have expressed above, and after consideration of the cases which I have mentioned, I must re-emphasise that the proper administration of justice cannot be carried out if the Court abdicates its powers of punishment. It is the function of the Court to punish convicted criminals. This function should not be usurped by vigilantes or the vendettas of criminal gangs. The authority to punish criminals is vested in the courts alone.

In support of accused 2, Mr Brand relied on the cumulative effect of Mr Naude's relative youthfulness at the time of the offence, the absence of previous convictions, his heavy use of drugs shortly before the commission of the offence, and his limited participation in the perpetration of the murders. The problem with Mr Naude's claim is that his approach to this matter has rendered it impossible for the Court to establish the exact degree of his involvement. He has been of no assistance in this regard. He has persisted in telling the official (and social worker) who was requested to assist him in regard to sentence, that he was unaware of the shooting when it occurred; and that when he drove the perpetrators away from the scene of the crime, they did not tell him that they had committed a massacre.

During a trial-within-a-trial, accused 2 attempted to exclude the admission of similar exculpatory statements, inter alia, on the grounds that he was under the influence of drugs. He was discredited by the Court after he had testified as to the alleged

effect of drugs on his admissions to the police. He has shown no remorse whatsoever. However, the evidence before the Court shows not only that accused 1 and 3 were the principal figures in the perpetration of the crimes, but also that they were powerful figures

and manipulative. They were the persons who were in a tense relationship with Leon van Heerden, and had been for some time before

his death. They, and not accused 2, were described by Mr Orrie as possessing three firearms some three months before the crimes were committed. They had smoked Tik and had played with firearms, together with Mr Orrie and with Leon van Heerden. (In the words of Mr Orrie, "like a toy for a boy".) They were the strong characters.

Despite his incredible claim of innocence, the mother of accused 2 has nevertheless suggested to the probation officer that accused 2 had a soft character and that he was at the scene of the crime because he was influenced by his co-accused to drive them there. (It is likely too, that his sister, Faranaaz Naude, was similarly influenced to provide an alibi for accused 3.)

In all the circumstances, I am not satisfied that substantial and compelling circumstances exist in the case of the crimes of murder

committed by accused 1 and 3. In regard to accused 2, his reduced involvement and the likely influence of his co-accused thereon,

justify the imposition of a sentence other than that prescribed. However, after applying the considerations relating to punishment

that I have referred to above, his moral culpability in relation to this massacre and the complete absence of any remorse on his part demand a very severe sentence on the four counts of murder.

Although accused 2, according to the evidence, was unknown to most of the occupants of the house, he must take responsibility for each assault with a fire-arm on each and every victim, because he assisted in bringing them about by driving the getaway car. No evidence has been presented to the Court that leads me to draw a contrary conclusion in this regard.

I now deal with the attempted murder of Liesel van Heerden. Her survival, and that of her infant, were probably due to the fact that accused 3 stopped firing at her after she pretended to be dead: and because the shots that hit her did not affect vital organs. For the purpose of punishment, the attempt on her life is hardly distinguishable from the murders I have described above. To the

extent that there is a difference, this space -this difference between her life and her death - is consumed by certain aggravating

circumstances associated with the crime.

The uncontested evidence of Liesel van Heerden was that she suffered 25 bullet wound injuries and that a nerve in her right arm was damaged. The consequences of the shooting are dealt with in Ms Hood's report. I shall quote them, but confine myself to the effects on her infant and Liesel's role as a mother:

" H a a r baba is met 'n serebraal gestremdheid gebore. Sy noem dat sy tydens die voorval so baie bloed verloor het, dat dit haar ongebore baba se suurstofinname

bemvloed het. Me Van Heerden het haar kind na haar oorlede moeder, Beverley, vernoem. Die kind is ongeveer vyf jaar oud en is sy in 'n rolstoel. Beverley is baie klein vir haar ouderdom en het sy intensiewe sorg nodig. Me Van Heerden is tans by die vader van haar

kinders woonagtig en deel hulle die huis met sy familielede. Die huis is oorbevolk en nie geskik vir 'n kind met die tipe gestremdheid nie daar daar geen beweeg ruimte is nie. Me Van Heerden is tans werkloos en sien sy na haar gestremde

dogter en een maand oue baba om.

Sy noem dat sy in ontvangs is van 'n staatstoelae vir haar kind maar kan sy dit nie bekostig om haar kind in 'n dagsorg vir gestremde kinders te sit nie. Haar dogter dra tans doeke en sukkel sy ook finansiëel daar sy 'n tweede baba het. Volgens me Van Heerden kan sy ook nie die baba borsvoed nie, daar haar melkkliere raakgeskiet was ten tye van die voorval. Sy verlang haar moeder intensief daar daar niemand is wat haar ondersteun nie. Sy noem dat sy terwyl sy in polisiebeskerming

was berading ontvang het, maar net sy steeds erge nagmerries oor die voorval. Me Van Heerden het deur die hele onderhoud bitterlikgehuil.

Sy noem dat sy nie die beskuldigdes kan vergewe vir dit wat hulle aan haar en haar kind gedoen het nie."

The evidence of the shooting shows that, after she had already been hit by bullets that had pierced the closed door of her bedroom, the door was opened; and that she then had to beg for her life. Her pleas were ignored. She was shot at until she fell: and then she was shot in the back. Counsel for Mr Solomons admitted that the shooting of Liesel was particularly serious.

Liesel van Heerden was 15 years old at the time and she was pregnant. She was a child. Physically she was a mother. Every dimension of Liesel van Heerden's childhood, motherhood and dignity was violated. The value accorded to the right of human dignity, stands alongside the right to life under the Constitution. Together they are the source of all other personal rights contained in the Bill of Rights. (See Makwanyane's case *supra*, paragraph

[144] at 451.) The accused showed callous contempt for the life, dignity, privacy and personal security of Liesel van Heerden. The accused, and persons who think as they did, must be taught that these rights of women in South Africa may never ever be compromised, negotiated or even tested. The sentences passed for her attempted murder must vindicate - do justice to - these violated rights of Ms van Heerden.

Finally, I should emphasise that the murders and the attempted murder were in no small measure made possible by the unlawful possession of the three firearms and the ammunition fired in the Van Heerden house. The evidence suggests that accused 3 already possessed three firearms, including a Glock pistol, some three months before the shootings. Accused 1 possessed a firearm on the day before the shooting and abandoned it after the shooting. Three firearms (one of them displaying the characteristics of a Glock pistol) were discharged in the Van Heerden house. Possession of this kind must be deterred.

In all of the above circumstances, the accused are sentenced as follows. Accused 1, Marco Moosa, is sentenced to the following terms of imprisonment. Count 1, for the murder of Beverley Rene van Heerden, to IMPRISONMENT FOR LIFE. Count 2, for the murder of Henry Martin, to IMPRISONMENT FOR LIFE. Count 3, for the murder of Leon John van Heerden, to IMPRISONMENT FOR LIFE. Count 4, for the murder of

Lucius McKenzie, to IMPRISONMENT FOR LIFE. Count 5, for the attempted murder of Liesel van Heerden, to IMPRISONMENT FOR LIFE. Count 6, for possession of a firearm without a licence, to 3 (THREE) YEARS IMPRISONMENT. Count 7, for possession of ammunition without lawful possession of a weapon from which such ammunition

could be fired, to 3 (THREE) IMPRISONMENT. All these sentences will run concurrently.

Accused 2, Kashief Naude, is sentenced to the following terms

of imprisonment. Count 1, IMPRISONMENT FOR 20

(TWENTY) YEARS. Count 2, IMPRISONMENT FOR 20

(TWENTY) YEARS. Count 3, IMPRISONMENT FOR 20

(TWENTY) YEARS. Count 4, IMPRISONMENT FOR 20

(TWENTY) YEARS. Count 5, IMPRISONMENT FOR 20(TWENTY) YEARS. These sentences will run concurrently.

Accused 3, Garreth Solomons, is sentenced to the following terms of imprisonment. Count 1, IMPRISONMENT FOR LIFE. Count 2, IMPRISONMENT

FOR LIFE. Count 3, IMPRISONMENT FOR LIFE. Count 4, IMPRISONMENT FOR LIFE. Count 5, IMPRISONMENT FOR LIFE. Count 6, IMPRISONMENT FOR 5 (FIVE) YEARS. Count 7, IMPRISONMENT FOR 5 (FIVE) YEARS. All the sentences will run concurrently.

DONEN, AJ

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