

SOUTH AFRICA / JUDGMENT

S v Bashford (CC54/94) [2015] ZAGPPHC 146 (13 March 2015)

[2015] ZAGPPHC 146**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mudau TP

CASE / FILE NUMBER

CC54/94

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, (PRETORIA)****CASE NO: CC54/94****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****DATE:**

13 MARCH 2015

In

the matter between:

THE

STATE

And

BASHFORD,

ANDRE ROBERT

GEORGE.....ACCUSED

JUDGMENT**ON SENTENCE****MUDAU AJ,**

- [1] The accused in this matter initially appeared with a co-accused (Norris) on a number of charges that include, murder as well as robbery with aggravating circumstances. After a change of a not guilty plea to that of guilty, the accused was convicted on his plea by this court (Els J) on 13 March 1995 for murder as well as theft. The plea had been amplified by a statement and his confession regarding the crimes charged to a magistrate.
- [2] Consequently, a separation of trial was ordered by the trial court between the two accused. After relevant evidence was presented, the accused was in terms of s 286A of the Criminal Procedure Act 51 of 1977 ("the Act"), declared a dangerous criminal. In this instance, the trial court had found that the accused showed anti-social personality traits and that, he represents a danger to the physical or mental well-being of other persons. Further that, there was a need to protect the community against him. The s 286A declaration had been preceded by an enquiry followed by a unanimous finding by a team of psychiatrists in support of the declaration. Following upon this declaration, the accused was in terms of s286B of the Act sentenced to undergo imprisonment for an indefinite period subject to a direction that he brought before court on 12 March 2015.
- [3] S286B, in so far as relevant, read as follows:
- "286B. Imprisonment for indefinite period. –*
- (1) The court which declares a person a dangerous criminal shall –
- (a) sentence such person to undergo imprisonment for an indefinite period; and
- (b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.
- (2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)(b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1)(b) be brought before the court which sentenced him in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.
- (3)
- (a)-(c)
- (4)
- (a) Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were

considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply mutatis mutandis during such reconsideration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional Services Act, 1959 (Act No. 8 of 1959).

(b) After a court has considered a sentence in terms of this section, it may –

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;

(ii) convert the sentence into correctional supervision on the conditions it deems fit; or

(iii) release the person unconditionally or on such conditions as it deems fit.

(5)-

(7)"

[4] This court therefore has three options In terms of s 286B (4) when a prisoner is brought for a reconsideration of the sentence: it may confirm the sentence for an indefinite period, in which case it must fix a period upon the expiration of which the prisoner must again be brought to court, it may convert the sentence into correctional supervision or it may release the prisoner unconditionally or on such conditions as it deems fit. In essence, the law provides for the confirmation, conversion or termination of the sentence but not for a new sentence to be imposed.

[5] The Correctional Services Act No 8 of 1959 has since been repealed and replaced by The Correctional Services Act 111 of 1998. Therefore, reference in s 286B (4) (a) to s 5C of the Correctional Services Act 8 of 1959, can safely be construed as a reference to ss74 and 75 (1)

(b) of the Correctional Services Act 111 of 1998 (Moetjie v The State and another 2009 (1) SACR 95 (T) at [10]).

[6] In this matter, the trial judge has since, sadly, passed on. The proviso to s286B (2) with reference to “the court” is the equivalent of S 275 of the Act which provides as follows:

“(1) ...

(2) Whenever-

(a) a judge is required to sentence an accused convicted by him or her of any offence; or

- (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of an accused, and that judge is for any reason not available, any other judge of the provincial or local division concerned may, after consideration of the evidence recorded and in the presence of the accused, sentence the accused or, as the case may be, take such other steps as the former judge could lawfully have taken in the proceedings in question if he or she had been available”.
- [7] For purposes of the reconsideration of sentence as contemplated in s 286B (4) (a) of the Act, I have the benefit of the record of proceedings as well as the judgment regarding this matter, albeit without the exhibits and the photos. The accused is before court. The facts leading to the accused’s conviction briefly stated are essentially as follows. The accused and his co-accused were at the time, on bail for a separate charge of housebreaking and theft in respect of which, they decided not to stand trial. The accused was homeless but was for a period of at least 2 weeks before the murder and theft, given free lodging; food; and other concomitant benefits by the deceased. The deceased lived in a small holding.
- [8] The deceased’s smallholding, it would seem, was a popular drinking place for young people. The attack on the deceased was pre-planned. When the deceased was alone with the accused and his companion (Norris), he was assaulted and thereafter, his feet and hands were tied up with neckties. The assault on the deceased continued during the course of which, he was stabbed several times, hit severely with 2 knobkerries all over his body and head, by the accused. The knobkerries were used by the deceased as ornaments in his house. During the course of the attack the knobkerries which, were being used as weapons in turn, broke. The accused went to the garage from where he fetched a steel pipe with which, he continued to attack the deceased all over his body and head. The attack was so severe that the body seem mutilated; the head was crushed to extent that one of the eyeballs was disgorged and was missing. The victim, who offered no real resistance, was ruthlessly killed in cold blood, but also died a painful death. The accused and his companion stole the deceased’s car, cash and other valuables after the murder and thereafter fled from the scene only to be arrested months later.
- [9] From the pre-sentencing reports submitted then, and from the report of the parole board which, I am bound to consider, it is clear that the accused had a troubled background. His biological parents abused alcohol. The accused and his elder brother were given up for adoption. He was raised by his adoptive parents as their only child. He was subjected to abuse in his adoptive home from an early age. He had behavioural problems from the early stages of his life and started smoking marijuana by the age of 12. Between the ages of 12 and 13 he started abusing alcohol. By the age of 15, he was already abusing drugs such as Mandrax. At that stage already, his parents were divorced. It was during the same period that his girlfriend, whom he married, became pregnant then with their 1st child. But the time he was arrested, he was already a divorced father of 2 minor children. The fact that he was 19 years of age at the time of the commission of crimes as well as the fact that alcohol and drugs played a role persuaded the trial judge not to consider a death sentence applicable

at the time.

[10] The accused has been incarcerated for approximately 23 years since his arrest. During this period, he gained skills in wood carving, cabinetmaking, and computer skills. During the latter part of his incarceration, the accused attended a number of rehabilitation

programmes and courses viz- anger management, self-development, drugs and alcohol programmes. To this end Ms Dreyer, the clinical psychologist, wrote in a report to the parole board about the accused that:

“He had a positive attitude throughout the program and incorporated well. He made the following contributions in the group and gave valuable feedback to other group members. He never behaved disrespectfully was the facilitator or other group members and responded well when he was challenged about certain personal issues and behavioural patterns during the group process.”

Ms Dreyer also reported that:

“... Many positive changes were evident in his personal life. His relationship with his daughters has played a major role in his rehabilitation

process and has brought a sense of meaning and responsibility to his life. This could probably be viewed as his biggest protective factor which might reduce probability of engaging in further offending behaviour and increase his likelihood to be more resilient to presented risk.”

[11] A written report was also attached in which, an incident is referred to, where the accused saved the life of a uniformed correctional

service official who was being attacked by another offender, by disarming the latter.

[12] The state and the defence in this matter, support a consideration of a non-custodial sentence consistent with the recommendation by the parole board. Under the circumstances therefore, I am satisfied that regard being had to the totality of the facts regarding this matter, circumstances permit to reconsider the question of sentence of an indefinite period imposed 20 years ago on the accused. It would seem in his favour that lot of positive developments have since occurred in his personal life which would help him reintegrate with his immediate family members and the greater society. This court was told that, the accused's brother, who lives at an address in Bronkhorstspuit, Gauteng, is willing to take the accused in for better employment opportunities in view of his newly found skills.

[13] The right approach to the reconsideration of sentence in the circumstances must yield to an appropriate balance which, is also

what is referred to in the Zinn triad (S v Zinn 1969

(2) SA 537 (A) consisting of the accused, the offence as well as the interest of the community. Whereas there is merit in not extending the accused's indefinite sentence by another period, his unconditional release regard being had to the seriousness of the crimes and other relevant factors is out of the question. Consideration has to be given not only to his conduct,

but also his adaption, training, mental state and possible relapse into crime. In my view, the accused is under the circumstances a suitable candidate to be subjected to community corrections. Community corrections objectives are clearly set out in s 50(1) (a) of the Correctional Services Act as follows:

The objectives of community corrections are-

- (i) to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;
- (ii) to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;
- (iii) to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
- (iv) to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.

[14] In *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC) at Para 54 Sachs J stated:

‘The sentencing courts must themselves identify the specifics of the correctional supervision sentence, but not necessarily the manner in which it is to be implemented. In *Govender* it was held that while the court should clearly indicate the duration and extent of the specific components of the sentence, it was not desirable for it to specify the manner in which the sentence is to be carried out. It was held that the court must retain effective control over the sentence without compromising flexibility. This appears to be a sound principle.’(cf *DPP, KZN v P* 2006(1) SACR 243 (SCA).

[15] In the premises the following order regarding the conversion of sentence is made:

1. That the accused undergo a period of three years of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 comprising of the following community corrections:
 - (a) House arrest for the full duration of the period of correctional supervision at the given fixed address (no 107 Durley Plot,

Bronkhorstspuit) or such other place as might be determined by the Commissioner for Correctional Services on written application by the accused and on terms to be determined by the Commissioner of Correctional Services, but which shall provide that the accused shall be confined to his place of abode for no less than eight hours on any day in which they are engaged in employment and for no less than 12 hours on any day in which they are not so engaged.

- (b) 200 hours of community service to be undertaken at the rate of not less than 8 hours of service per calendar month during the period of correctional supervision. Subject to the foregoing, the nature of the community service and the place and times during which it shall be undertaken shall be determined by the Commissioner of Correctional Services.
- (c) His conscientiously, and to the satisfaction of the Commissioner of Correctional Services, seeking employment during the period of correctional supervision. In the event that the accused is for any time during the period of correctional supervision unemployed he shall submit at the end of each month to a correctional official designated by the Commissioner of Correctional Services a report detailing the steps he has taken to seek employment vouched by such supporting documentation as the Commissioner or the designated official may require. The Commissioner's attention is directed to the provisions of s 61(2) of the Correctional Services Act 111 of 1998, which require the Commissioner to assist in the attempt to find employment.
- (d) Participation in such treatment, development and support programmes as may be determined by the Commissioner of Correctional Services. The accused is directed to submit to a complete assessment by a social worker of the Department of Correctional Services to facilitate the determination of the programmes in which he should participate.
- (e) Restriction to the Bronkhorstspuit magisterial district, Gauteng, and such other magisterial(s) district as the Commissioner of Correctional Services may on written application by the accused determine for the purposes of facilitating the accused's engagement in employment, or for compassionate reasons.
- (f) Refrains for the whole of the period of correctional supervision from the use of alcohol or illegal drugs.
- (g) Prohibition during the whole of the period of correctional supervision from attendance at any place such as a tavern, pub or shebeen where alcoholic beverages are served.
- (h) Monitoring by the Department of Correctional Services, including electronic tagging if so determined by the Commissioner, in order to ensure compliance with the conditions of correctional supervision.
- (i) The obligation to inform the Commissioner of Correctional Services in advance of any change of residential and/or work address.
- (j) In the event of any breach by the accused of any of these conditions, the correctional officer is directed to immediately report such breach on affidavit to the Director of Public Prosecutions who may then apply for the necessary relief.

MUDAU TP

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 12 MARCH 2015

DATE OF JUDGMENT: 13 MARCH 2015

APPEARANCES:

FOR THE STATE: ADV L WILLIAMS

FOR THE ACCUSED: H ALBERTS

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