RCB216/06

SENTENCE

Accused number 1, 4, 5 and 9 from the original charge sheet on case number RCB216 of 2006, today then before court for purposes or sentence. That then on the only charge on which they were eventually convicted that on 7 October 2011 (sic) being the murder of the deceased in this matter then, Zoliswa Nkonyana.

Now it seems to be common cause and conceded to by the state during the address that the accused were all under the age of 18 years at the time of the commission of this offence in 2006. Given the circumstances and in light of the recent judgment, a Supreme Court of Appeals judgment handed down by Judge Cameron in conjunction with the contradictory nature of the charge sheet in this matter, we can accept that the minimum sentence legislation is not applicable in respect of the accused before court. Sentencing particularly in cases involving youthful offenders is probably the most difficult to address when it comes to... in criminal matters particularly. When it comes to sentencing of youthful offenders, the court must not only look to the ordinary factors when considering sentence but needs to go a step further, taking into account several other aspect, which I will cover during my consideration of sentencing.

The three criteria which has been argued by all counsel before court, that then being the seriousness and the nature of

the offence, the personal circumstances of the accused before court as well as community interest and the interest of victims or families of victims are the primary and, let me call it, the ordinary considerations which the court must have when considering sentence. There has been argument in this court that murder is so commonplace that the circumstances of murders should not necessarily vary when it comes to sentencing considerations due to the fact that it is almost a daily occurrence, particularly in this jurisdiction. This court certainly takes the taking of a human life in a very serious light and the consequences and penalties ought to be commensurate with the facts involved in each and every case. My considerations in all cases and in this case, on the charge or murder, is that the sentence ought to be harsh enough to be a deterrent, not only to accused persons facing these sentences, but also to the community at large that it be a deterring factor for the commission of this kind of offence. But by that same token, it needs to be gentle enough to encourage rehabilitation only where rehabilitation is possible.

Now the harshness of the sentence, when considering the harshness of the sentence, we need to look at the facts which have been proven by the state. Here we are dealing with the murder of a young woman aged 19 who was bludgeoned without any mercy or after-thought, just a short distance from her home. We are talking about the murder of a

young woman who just by virtue of her own beliefs and life choices, her life was taken away. We are talking about a small-framed girl, according to the post mortem report, no more than 51 kilograms in weight, who on her own would have been no threat to these four accused before court. Yet the behaviour of the four accused before court was of such a violent and brutal nature that the community does not condone this kind of conduct and this court certainly will not endorse this kind of conduct.

Arguments have been levied, which the court deems necessary to answer, that there was no specific finding during the judgment that the motive for the murder of Zoliswa Nkonyana was influenced by any kind of homophobic ideas or ideology. Now just to shed some light on this issue, motive for murder is certainly not an element for the state to prove its case before court. Motive for the commission of an offence is not an element, very often the facts of the case is what sheds light on what motive may or may not have been. Specific reference throughout the trial, which was also noted n this court's judgment, made reference to the preceding events to the murder, and that then the only indication of what the motive of this murder may have been. In fact, in many a criminal matter, the motive for commission of offences never come to light, it never forms part of the body of evidence and often people are left dumbfounded as to why a particular crime

is committed.

This case is different because the pre ceding events to the commission of this offence is a clear indicator as to what that motive was. I am satisfied that the motive behind the murder of Zoliswa Nkonyana was driven by hatred, it was driven by intolerance of her difference, and the sequence of the events preceding her murder certainly confirms and supports this contention. Having said that, the motive being known to all before court, that in itself becomes an aggravating factor and it is only at this stage in the criminal proceedings that the court can really take cognisance of the weight that the motive would have had prior to the murder.

The second primary consideration which the court must have is community interest and the interest of the family of the deceased. The community is clearly outraged by the manner in which this murder was committed. This is not only evident from the quite obviously over-crowded court room but it is also evident from the extensive media interest as well as the interest groups who have attended court regularly to express their discontent with the state of affairs. The court has also had the opportunity to peruse and study the contents of the victim impacts report which was compiled by Mr T Gweke(?) from the Department of Social Development, which was compiled regarding the circumstances and the effects on the family of the deceased, and it is here that we learn for the first

time that Zoliswa was in fact an only child to her mother and her step-father. The court has also had the opportunity to consider the report compiled by Ms Jill Ray Henderson who is associated with the Triangle Project, who confirmed the contents of her report during ... (inaudible) of her evidence, in aggravation of sentence. The report comprehensively sets out the profound impact which the deceased's death had on one of the state witnesses, Pendiswa Mkala, the girlfriend of Zoliswa, who also witnessed her murder in February of 2006. Her report also gives the court a great insight into the problems which are faced by many lesbian, gay, bi-sexual, trans gender and inter-sex persons living within our communities, and certainly sheds a light on the degree of intolerance which many people have to suffer under often, in the closest of communities.

Thirdly the court has also take cognisance of the personal circumstances of all of the accused before court. In respect of all four of the accused, the court had the opportunity to study not only reports compiled by the correctional services officer, Mr Mfanekiso but also probation officer's reports, social worker's reports, compiled by various social workers in the employ of the Department of Social Development. Now the contents of the probation officer's report particularly, in respect of all the accused, is substantiated and corroborated by the evidence which was

produced regarding the personal circumstances of the accused in the light of the families testimony. It is very clear that the accused all come from stable and good homes. All the accused, as they are seated there, have families who still care for them, they have families who support them and who want the best for them and the court is not blind to the fact that the parents of these four young men, in their own way, suffer their sense of loss, given the severe sentences which they face today. And it is only from the mouths of the accused's relatives that this court has some sense of the family of the accused showing some degree of empathy for the deceased's family. But what is alarming is that the accused be silent when it comes to any kind of remorse for their actions of empathy for the family of the deceased.

And ultimately, life in general is about choice. The deceased did not have the freedom to be able to live out her choice freely and without any encumbrances. Similarly, the accused before court has exercised their choice regarding their conduct in February of 2006 and in doing so they also chose the consequences which comes with that choice.

Now all four of the accused, Mr Lubabalo Ntlabathi, at the time of the commission of the offence, was aged 16 years; accused number 4, Mr Sithelo Mase, aged 16 at the time of the commission of the offence; accused 5, Mr Luanda Lonzi, aged 17 at the time of the commission of the offence; and accused

number 9, Mr Mbubelo Ndamba, also aged 17 at the time of the offence, now face severe sentencing as a result of their actions. The correctional supervision officer, Mr Mfanekiso, has in his report confirmed that Mr Ntlabathi and Mr Ndamba, to his mind, would be suitable candidates for correctional supervision, based on the fact that they have family support. With regards to Mr Mase and Mr Lonzi, he has not recommended that correctional supervision be considered as a sentence in light of the fact that both Mr Mase and Mr Lonzi have pending cases – criminal cases – in other courts.

Throughout this trial, this court – not by virtue of the state but by virtue of the defence – it came to light that inclusive of Mr Ntlabathi and Mr Ndamba, they have had previous clashes with the law even though there are no previous convictions, and that at the tender ages of 16 and 17. Now the state has proven no previous convictions against all of the accused and this is also a factor which this court is incumbent to take into account. What is worrying is that all of the accused may very well have clean records but they do not sit here with a clean slate. Having said that I am mindful to not consider any of those pending matters as previous convictions. Now it is trite that the accused must be sentenced with regard... in relation to the age that they were at the time of the commission of the offence. In other words, this cannot sentence them as adult men, I need to sentence

and consider sentence as if they were young offenders as at the time of the commission of the offence. And so the sentencing considerations needs to go a step further and it is somewhat different to sentencing adult persons.

Now there have been several delays in this, getting this matter to trial and conclusion. The accused pleaded to this charge on 27 August 2008. They were convicted three years later on 7 October 2011 and today, 1 February 2012, they face sentence. Sø essentially, excluding the proceedings prior to their plea, they have essentially waited nearly five years for this matter to conclude. Now it may very well be that a large percentage of the delays was caused by the defence, the accused certainly cannot be punished for those delays. And so to those ends I must consider the delay in their favour. It seems to have been accepted by the state that all the accused were schooling at the time of the arrest. It also seems to be common cause that at the commencement of these proceedings in the District court, that accused 1 and accused 9 was refused bail. It seems clear from the record that accused 4 and 5 originally were granted bail and subsequent thereto accused 4, Mr Mase's bail was forfeited to the state due to failure to attend court in these proceedings, and accused 5, Mr Lonzi's bail was withdrawn on the date of his conviction on 7 October last year, by this court.

Now upon perusal of the lengthy court record that the

charge sheet, there seems to have been some indication by counsel for accused 1 and 9 that bail applications were going to b brought on new facts at some stage. It was noted on the record at some stage that this application would have been brought as a result of the lengthy delays in the matter. Both accused 1 and 9 were certainly entitled at the time to bring those applications, but it is not clear from the record for what reasons those applications on new facts, in fact never came to fruition. And so based on their failure to bring their bail applications on new facts, and in the absence of any reasons being apparent from the record, accused 1and 9 remained in custody for reasons unknown to this court.

A further aspect which is trite which was also argued by defence counsel, is that this court must consider the time which the accused have spent in custody awaiting trial, when imposing sentence, and I certainly have done so. Now when it comes to sentencing itself gentlemen, it is not purely about punishment. Sentence is also about instilling some sense of retribution, consideration must be given to rehabilitation and sentencing must also have the elements of deterrents part and parcel thereof. Retribution is a difficult one, it is often argued – and we have heard these words flung about during address – it is often misconstrued as revenge, and that is certainly not my understanding or the academic understanding of what retribution is when it comes to punishment. Zoliswa Nkonyana

will never be returned to her family but just so, the accused ought to pay the price for their actions. And all that this court can do is to attempt – and I say attempt – this court can attempt to restore some sense of justice within the community. When it comes to deterrents, sentencing is not only about the accused in court. Sentencing must also scream out a loud message to would-be offenders, and the message must be clear that crime, particularly violent crime, will not be rewarded by courts. The third aspect which this court considers here is that of rehabilitation. Now during defence address, this concept was essentially on the lips of all counsel. This court is certainly not blinded to the fact that all persons... it is possible for any person to rehabilitate but in order for rehabilitation to have its desired effect, there are certain prerequisites. My view is that for rehabilitation to be effective, there must be a realisation of the wrongfulness of one's actions; there must be an acceptance of responsibility for one's actions; and there must be an overt expression and willingness to make right the wrong. Without the acceptance of responsibility, to my mind, rehabilitation is lip service, it cannot work. Now acceptance of responsibility and acknowledgement of wrongfulness is the one element throughout mitigation of sentence, which has been absent. None of the accused has expressed any sense of remorse for their actions and from that fact this court must conclude that

re-offending cannot be excluded.

Now an aspect which was raised by the state during their aggravation of sentence, was this focus of the diverse society in which we live, and when one lives in a diverse society, it certainly requires a greater sense of tolerance. Our Constitution, our supreme law, grants us all the right to choose, the right to life. Often these rights clash and courts need to weight them up in consideration of just sentences. Now in this case the deceased exercised her right to live openly as a lesbian woman in this community. That was her choice. It is quite clear that the accused before court did not agree with her choice, that is another right which all persons are entitled to, we do not all have to agree. People are entitled to their own opinions but in this case the accused, having their entitlement to their opinion, acted out that opinion in a particularly brutal, public... in a brutal and public way and therein exercised their choice, their choice of intolerance. And, but for that action, the accused are quite entitled to disagree with others' life choices. This court has a duty to enforce the ideology that violent intolerance of difference, whether it be based on race, whether it be based on sex, whether it be based on religion, it will not go unpunished and it will not go rewarded.

And so having had regard of all of those factors, it brings me to the sentencing options. When it comes to the

punishment of youthful offenders, the court needs to start at the least invasive means of sentence – or of punishment rather. When considering any form of suspended sentence, I am of the view that it does not weight up with the facts of this case and it would be grossly disproportionate to the nature of the offence. And so to those ends, a wholly suspended sentence is not appropriate. The court has needed to consider correctional supervision in terms of Section 276(1)(h) as well as sentencing in terms of Section 276(1)(i), as possible sentencing options. In considering this type of sentence, the overwhelming worry and the overwhelming factor which counts against this kind of sentencing, is the element of the lack of remorse on the side of the accused. Correctional supervision type sentences pre-suppose that there must be some sort of acceptance of responsibility because it is only after there is acceptance of responsibility that there can be positive re-integration within the community. And so to those ends, I cannot consider correctional supervision in terms of both of those sub-sections in this case. This court's view is that direct imprisonment is the only appropriate sentence. Whilst the court has had regard for the latest Supreme Court of Appeals judgments referred to by all counsel concerned, including the state – and I am in agreement that direct imprisonment should be only utilised as a last resort – I am satisfied that we have reached that point. The accused were youthful, aged 16 and

17 at the time of the commission of the offence; they are entitled to be sentenced as youthful offenders even now, five years down the line, but there seems to be an overwhelming sense of wanting to find shelter and some sort of protection under the sentencing provisions, based on age alone. I am ever mindful that the accused, given their youth at the time and the fact that they acted in a group, I consider that peer pressure certainly played a role here. I further consider that alcohol may have played a role in their actions, even though it was not evidenced in the full body of evidence placed before me, and I must accept that very often when people act in a group and they act in consent(?), they often lose a bit of their true selves. And I accept that very often young children commit heinous offences, which stem from their immaturity and their error in judgment and their unformed character. But having said that, that in itself is not sufficient.

Now during address, the court requested that counsel address me regarding the Child Justice Act 75 of 2008. Now whilst the transitional arrangements as set out in Section (98)(1) of the Child Justice Act, specifically excludes the Child Justice Act to this offence, I have had considerations for sentencing options as set out in the Child Justice Act in Section 69. Now just to shed more light on this aspect, I will read from Section (98)(1) of Act 75 of 2008, and it reads:

"All criminal proceedings in which children are

accused of having committed an offence, which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act had not been passed."

And so to those ends, the accused before court cannot be treated within the parameters necessarily, as set out in the Child Justice Act. Even so, if I consider the considerations set out in Section 69 of the same Act, I am, event to those ends, satisfied that all sentencing options to the exclusion of non-custodial sentencing, has been exercised and considered fully.

And so gentlemen, the only appropriate sentence, as I have indicated earlier, is that of direct imprisonment. After consideration of the length of time that you have been in custody, the fact that you are all first offenders before court, the fact that you have family support, weighed up with the aggravating factors set out by the state, you are all **SENTENCED TO A TERM OF EIGHTEEN (18) YEARS IMPRISONMENT OF WHICH FOUR (4) YEARS IS SUSPENDED FOR A PERIOD OF FIVE (5) YEARS** on condition that you are not convicted of murder committed during that period of suspension.

Do you all understand your sentence? You may answer.

ACCUSED: I have not heard, your Worship.

COURT: You may repeat it Ms Mtetwa.

INTERPRETER: I have not clearly heard.

COURT: You may repeat that Ms Mtetwa. With regards to Section 103 of the Firearms Control Act 60 of the year 2000, it is incumbent on this court to make an order regarding your competency to obtain a valid firearms license in the future. The Act goes further to say that the duty is on your shoulders to place factors before this court, not to declare you unfit to obtain a valid firearms license in the future. Now with regards to accused number 1 and 5, no submissions have been placed before me and I therefore have no discretion on the matter, and you are declared unfit to make application for a valid firearms license in the future. With regards to accused 4 and 9, your counsel has addressed me regarding your reasons for not wanting to be declared unfit in terms of the Firearms Control Act. I am of the view that the reasons that you have forwarded is insufficient for me to deter from the wording of the Act, and you too are declared unfit to obtain a valid firearms license in the future.

All the accused before court are represented by seasoned counsel, can you confirm for the record that you have explained to your clients their right of appeal regarding conviction and sentence? I will start with Mr Jumba.

MR JUMBA: (Inaudible).

COURT: If you have not Mr Jumba, I am happy to do it.

RCB216/06

Gentlemen, you have all been convicted on this charge, you have been sentenced today, you all have the right to appeal this court's decision on both your conviction and your sentence, if you are not satisfied that justice has been done in this matter. Having said that, your application for leave to appeal needs to reach the Clerk of the Court based here at Khayelitsha, within 14 days from today. For purposes of that application for leave to appeal, you also have the right to counsel. In other words, if you cannot afford the services of private counsel to assist you with that application, you still have the right to apply for Legal Aid to assist you with your application for leave to appeal. But 14 days is the timeframe within which your application needs to be lodged. Thank you, you may stand down, I will adjourn.

COURT ADJOURNS (at 10:57)