IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO : **CC113/13**

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG Applicant

and

OSCAR LEONARD CARL PISTORIUS Respondent

RESPONDENT'S OPPOSITION TO THE STATE'S APPLICATION FOR LEAVE TO APPEAL IN TERMS OF SECTION 316B(1) OF THE CRIMINAL PROCEDURE ACT, ACT 51 OF 1977

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1. The State applies for leave to appeal the sentence imposed on the conviction of culpable homicide on the basis that, *"there is a reasonable prospect that another Court may come to a different finding with regards to the sentence imposed by this Court and may in fact over turn the sentences imposed."*[1]

2. The approach to sentence on appeal is very different, and the following principles apply:

   2.1 Sentencing is pre-eminently a matter for the discretion of the trial

[1] Paragraph 2.9 of the State's application

Court[2];

2.2 The Court of appeal does not have an overriding discretion to interfere with the sentence imposed by the trial Court unless the sentence imposed is vitiated by irregularity or misdirection or is disturbingly inappropriate.[3]

2.3 Interference with a sentence on appeal is not justified in the absence of a material misdirection or irregularity, or the sentence imposed is so shockingly inappropriate as to create a sense of shock.[4]

2.4 Even if a Court of appeal were of the opinion that it might have come to a different conclusion on sentence, the Court of appeal would not be entitled to substitute its own discretion for that of the trial Court and to overrule the trial Court's decision upon a matter which was within the discretion of the trial Court.[5]

2.5 A misdirection that would justify interference should not be trivial, but should be of such a nature and degree of seriousness that it shows that the trial Court did not exercise its discretion at all or exercised it improperly or unreasonably.[6]

3. The State has failed to show any material misdirection which could warrant leave to appeal. The State has also not made out any case that the sentence

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[2] ***S v Pillay*** 1977 (4) SA 531 (A) at 534 H- 535 A; ***S v Fazzie and Others*** 1964 (4) SA 673 (A)
[3] ***S v Nkosi and Another*** 2011 (2) SACR 482 SCA par 34
[4] ***S v Moosajee*** 2000 (1) SACR 615 SCA par 8
[5] ***S v Leon*** 1996 (1) SACR 671 (A) at 675
[6] ***S v Barnard*** 2004 (1) SACR 191 (SCA) par 9

imposed was shockingly inappropriate. This will be dealt with hereunder with *ad seriatim* reference to the paragraphs in the State's application.

4. For purposes of considering whether or not to grant leave, it is respectfully submitted that the test applicable to appeals namely that a Court may have proper regard to events that occurred subsequent to the passing of sentence, as long as the subsequent events are not in dispute, applies.[7]

5. It cannot be in dispute that the parents of the Deceased, and also through their legal representative Advocate De Bruyn SC, expressed their satisfaction with the sentence. It is a material factor.

AD PARAGRAPH 2.1 THEREOF

6. The statement by the State that the sentence imposed is for the murder of Reeva Steenkamp is inappropriate and incorrect. The Accused was sentenced for 5 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977 ("the Act") on the charge of culpable homicide, and not murder.[8]

AD PARAGRAPH 2.2 THEREOF

7. The State incorrectly submits that the Honourable trial Judge failed to sufficiently consider factors referred to in paragraph 2.2 of the State's application. It will be demonstrated hereunder that the Honourable Judge

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[7] ***S v Barnard*** 2004 (1) SACR 191 SCA par 19; ***S v Cassiem and Another*** 1993 (2) SACR 642 (A); ***S v Marx*** 1989 (1) SA 222 (A) of 226B

[8] Record 3822 lines 8-10 of the sentencing record

properly and sufficiently considered all the factors referred to by the State:

7.1 First and second bullet point in paragraph 2.2: The State contends that the Honourable trial Judge did not sufficiently consider *"where the accused acted with gross negligence.. which bordered on dolus eventualis"*. This was sufficiently and properly dealt with by the Honourable Judge at Record 3809 lines 21-22 where the Honourable Judge found that *"Counsel for the state correctly referred to negligence in this matter as gross negligence that bordered on dolus eventualis."*

7.2 Bullet points 3 and 4 in paragraph 2.2: The State contends that the Honourable trial Judge did not sufficiently consider *"where the accused fired not one but four shots... using a lethal weapon, a firearm loaded with Black Talon ammunition"*. This was sufficiently and properly dealt with by the Honourable Judge at Record 3810 lines 4-5, where the Honourable Judge found that, *"using a lethal weapon, a loaded firearm, the accused fired not one but four shots into the toilet door."*

7.3 Bullet point 5 in paragraph 2.2: The State contends that the Honourable trial Judge did not sufficiently consider the fact that it was *"through a locked door into a small toilet cubicle, from which there was no room to escape"*. This was dealt with sufficiently and properly by the Honourable Judge at Record 3810 lines 8-10 where the Honourable Court found, *"that the toilet was a small*

cubicle and that there was no room for escape for the person behind the door."

7.4 Bullet point 6 at paragraph 2.2: The State contends that the Honourable trial Judge did not sufficiently consider that the act was committed *"by an accused trained in the use of firearms."* This was dealt with sufficiently and properly by the Honourable Judge at Record 3810 lines 10-11 where the Honourable Court found that, *"what is also significant is that the accused had been trained in the use of and in the handling of firearms."*

8. The Honourable Court, in fact, found that all of the above factors were very aggravating.[9] In arriving at a finding on the appropriate sentence the Honourable Judge found that, *"I have considered all the evidence placed before me and all the submissions and the arguments by counsel."*[10]

9. The State's submission that the Honourable trial Judge failed to sufficiently consider the factors listed above are, with respect, incorrect.

AD PARAGRAPH 2.3 THEREOF

10. The State's submission in this paragraph is, with respect, incorrect. In the exercise of her judicial discretion the Honourable Judge dealt with the seriousness of the offence, the personal circumstances of the Accused and the interest of society. The Honourable Judge referred to *S v RO and*

[9] Record 3810 lines 11-12
[10] Record 3821 lines 8-9

Another[11] where it was held that, *sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."*[12]

11. There is no basis for the State's submission that the Honourable trial Judge over-emphasised the personal circumstances of the Accused. Nothing in the judgment on sentencing is indicative of the fact that the Honourable trial Judge over-emphasised the Accused's personal circumstances. On the contrary, the Honourable Judge found that, *"From the evidence led during the course and during the course of argument in mitigation, it became clear that the concern was not just about the disability of the accused as someone without legs, but it was also about the fact that he needed treatment, not only for his physical disability, but also to deal with the trauma and the depression that he suffers from. Mr Modise assured this court that there was a medical team whose job it was to attend to inmates who needed medical attention."*[13] The Honourable Judge further found that, *"There was therefore no reason to think that the accused might be forced either to terminate any of the treatment that he was currently receiving or that he might be forced to terminate his relationship with his own doctors. The Department of Correctional Services deals with a number of inmates with a variety of disabilities and vulnerabilities, and from*

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[11] 2000 (2) SACR 248 (SCA)
[12] Record 3798 lines 11-19
[13] Record 3807 lines 13-21

the evidence it seemed that it is coping reasonably well. I have no reason therefore to believe that the accused would present the Department of Correctional Services with an insurmountable challenge."[14] In addition to this, the Honourable Judge found that, *"I might add that it would be a sad day for this country if an impression were to be created that there was one law for the poor and disadvantaged and another for the rich and famous..."*[15]

12. Moreover, the Honourable Judge, in fact, found that there was an over-emphasis on the vulnerability of the Accused and that this created a feeling of uneasiness on her part. Whilst she agreed that the Accused was vulnerable, she found that he also had excellent coping skills.[16]

AD PARAGRAPH 2.4 THEREOF

13. It is respectfully submitted that the State is incorrect in this regard. The consequences of the Accused's actions were sufficiently and properly taken into account by the trial Judge, as is evident from the following pages of the judgment on sentence: Page 3802 lines 24-25; Page 3803 lines 1-8; Page 3813 lines 4-17; Page 3814 lines 8-10; Page 3821 lines 11-13.

AD PARAGRAPH 2.5 THEREOF

14. The Honourable Judge did not overemphasise the purpose of rehabilitation at the cost of retribution. The following passages in the Honourable Court's

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[14] Record 3807 line 25 and Record 3808 lines 1-8
[15] Record 3808 lines 18-20
[16] Record 3808 lines 24-25 and 3809 lines 1-2

judgment refute this contention by the State:

14.1 *"I am also duty-bound to take into consideration the main purposes of punishment; namely retribution, deterrence, prevention and rehabilitation. All these must be accorded due weight in any sentence."*[17]

14.2 *"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."*[18]

14.3 *"South Africa has a Constitution which applies to everyone and which protects everyone, including those who transgress the laws. As a country we have moved from dark ages- that is the era of 'an eye for an eye' to a modern era of balancing all the relevant factors. Retribution, which however from the legal point of view is not the same as vengeance, has inter alia yielded ground to other purposes of punishment."*[19]

14.4 *"While the deterrent effect of punishment has remained as important*

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[17] Record 3798 lines 5-8
[18] Record 3798 lines 11-19 quoted from **S v RO and Another 2000 (2) SACR 248 (SCA)**
[19] Record 3812 lines 4-10

as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing, but the element of retribution, historically important, is by no means absent from the modern approach. 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 courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."[20]

14.5 *"For a very good reason an appropriate sentence should neither be too light, nor too severe. The former might cause the public to lose confidence in the justice system and people might be tempted to take the law into their own hands. On the other hand, the latter might break the accused and the result might be just the opposite of what the punishment set out to do, which ultimately is to rehabilitate the accused and to give him an opportunity, where possible, to become a useful member of society once more."*[21]

14.6 *I have considered all the evidence placed before me and all the submissions and arguments by counsel. I have weighed all the relevant factors, the purposes of punishment and all forms of*

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[20] Record 3812 lines11-25 and 3813 lines 1-3 quoted from **R V Karg 1961 (1) SA 231 (A) at 236A-C**
[21] Record 3820 line 25 and 3821 lines 1-7

punishment, including restorative justice principles. I have also taken into account the seriousness of the offence which led to the death of the deceased, the personal circumstances of the accused and the interests of society. I have taken the particular circumstances of the accused at the time of the offence into account."[22]

14.7 *"Having regard to the circumstances in the matter, I am of the view that a non-custodial sentence would send a wrong message to the community. On the other hand, a long sentence would also not be appropriate either as it would lack the element of mercy. A sentence cannot be said to be appropriate without the feelings of mercy for the accused and hope for his reformation. (See S v Mhlongo 1994(1) SACR 584 (A) at 588J-589B). I am mindful, however, of the fact that true mercy has nothing to do with weakness or modelling sympathy for the criminal, but it is an element of justice. (See S v V 1972 (3) SA 611 (A) at 614)."*[23]

AD PARAGRAPH 2.6 THEREOF

15. The State has no basis for the submission made in this paragraph and it is contrary to the judgment of sentence.

AD PARAGRAPH 2.7 AND 2.8 THEREOF

16. There is no merit in this contention by the State.

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[22] Record 3821 lines 8-15
[23] Record 3821 lines 16-25

AD PARAGRAPH 2.9 THEREOF

17. The correct test has been dealt with above.

CONCLUSION

18. It is respectfully requested that the application for leave to appeal be dismissed and that the State be ordered to pay the costs of the Accused in opposing the application, to be taxed according to the scale in civil cases of the High Court as is envisaged in Section 316B(3).

B ROUX SC
Village Chambers
Sandown Village
Sandton
12 November 2014

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: CC113/2013

In the matter between:-

THE DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG Applicant

and

OSCAR LEONARD CARL PISTORIUS Respondent

FILING SHEET

Presented for service and filing:

2) Respondent's Opposition to the State's Application for the Reservation of Questions of Law in terms of Section 319 of the Criminal Procedure Act, Act 51 of 1977.

Dated at **ILLOVO** on this the 17th day of **November 2014**.

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TO:
THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

AND TO:
THE DEPUTY JUDGE PRESIDENT OF ABOVE HONOURABLE COURT
PRETORIA

AND TO:
THE DEPUTY DIRECTORS OF PUBLIC PROSECUTIONS
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