



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE

SIGNATURE

CASE NUMBER: 271/2014

In the matter of

THE STATE

V

THABO MOLAHI PERCY

ACCUSED

JUDGMENT

DOSIO AJ:

SENTENCE

- [1] The accused pleaded guilty to all four counts. Count one is the crime of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with the provisions of section 51(2) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended ("Criminal Law Amendment Act"). Count two is the crime of murder read with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act. Count three is unlawful possession of an unlicensed firearm, which is

a contravention of section 3 of the Firearms Control Act 60 of 2000 ("Firearm Control Act"). Count four is unlawful possession of ammunition, which is a contravention of section 90 of the Firearm Control Act.

[2] For purposes of sentence this court has taken into consideration the accused's personal circumstances, the seriousness of the offences and the interests of the community. The court has borne in mind the main purposes of sentence which is deterrence, retribution, reformation and prevention.

[3] The personal circumstances of the accused are;

The accused is thirty-five (35) years old and was born on the 5th of September 1980. Although he is not married he has ten (10) children. The children are aged 10, 8, 7, 6, 6, 4, 3, 2, and 2 respectively.

Prior to his arrest he did not have any permanent job, but he was doing certain temporary work at the Virgin Active Club at Maponya Mall. The accused is suffering from an undisclosed chronic illness.

[4] In respect to the seriousness of the offences this court would like to state as follows:

[5] In respect to count 1

The complainants namely Daphne Nosimanga and Mamosotho Itumeleng Morgen were threatened by the accused brandishing a firearm. In addition the accused fired one shot into the air. They were female persons who were accosted and robbed of a motor vehicle and a blackberry cell phone. It is clear this robbery was planned as the accused admitted that they were searching for a motor vehicle to rob as they had already secured a buyer. The crime was driven by greed and not need. It was executed in an organised manner.

[6] This country has witnessed an ever-increasing wave of violence. Robbery with aggravating circumstances is ever-prevalent. Innocent and defenceless victims continue to fall prey to these types of offences. Most people live with the fear that sooner or later they will become a victim of an armed robbery.

[7] In respect to count 2

During this robbery there was cross-fire in which one of the co-accused, namely Leslie Masoga was killed.

[8] Murder is the most serious of crimes. Even though it is the life of a co-accused that was lost, the fact that it happened as a result of a robbery is serious.

[9] In respect to count 3

The calibre of the firearm that accused had in his possession was unknown to the State and it is clear the accused had no licence for the firearm.

[10] On a more frequent basis, crimes in this country are committed using illegal firearms. In fact the proliferation of illegal firearms throughout the country has contributed to the high incidents of violent crime. The frequent use of illegal firearms in the commission of violent offences has contributed to the fear that members of the community live with. They fear driving and stopping their cars in remote places as they may become victims of crime. The behaviour of the accused and others like him, impacts negatively on the quality of freedom of all living in South Africa.

The possession of unlicensed firearms continues and it is important that this court send a clear message to potential offenders that this conduct will not be tolerated by the courts.

[11] In respect to count 4

What makes this offence serious is that the accused was in possession of a loaded firearm which was used during the commission of the offence on count 1 and he was prepared to use it if necessary.

[12] In respect to the interests of the community, this court has taken note of the fact that the community observes the sentences that courts impose and the community expect that the criminal law be enforced and that offenders be punished. The community must receive some recognition in the sentences the courts impose, otherwise the community will take the law into their own hands. If a proper sentence is imposed it may deter others from committing these crimes. Due to the fact that murder and armed robbery have reached high levels, the community craves the assistance of the courts.

- [13] The robbery on count one is one as intended in terms of section 1 of the Criminal Procedure Act. The provisions of the Criminal Law Amendment Act with specific reference to section 51 (2) dictates that notwithstanding any other law but subject to subsection (3) and (6), an accused who has been convicted of a Part two of Schedule 2 offence, which includes robbery with aggravating circumstances, shall in the case of a first offender be sentenced to a period of imprisonment for a period of not less than 15 years.
- [14] The murder on count two was committed whilst the accused and his co-accused committed the crime of robbery on count 1. In addition, there was a group of persons acting in the execution or furtherance of a common purpose, namely to rob. The degree and culpability of the accused is extremely high. The provisions of the Criminal Law Amendment Act with specific reference to section 51 (1) dictates that if an accused has been convicted of an offence referred to in part 1 of schedule 2, he shall be sentenced to life imprisonment.
- [15] In respect to count three, the firearm in accused one's possession is unknown, there is no evidence that the firearm found in accused's possession was a semi-automatic firearm, accordingly he will be sentenced in terms of the provisions of the Firearms Control Act, which dictates that if an accused is convicted of a contravention of section 3 he may be sentenced to fifteen (15) years imprisonment.
- [16] In respect to count four the Firearm Control Act dictates that if an accused is convicted of a contravention of section 90, he may be sentenced to fifteen (15) years imprisonment.
- [17] Section 51 (3) of the Criminal Law Amendment Act states that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.
- [18] As stated by the learned Marais JA in the case of *S v Malgas* 2001 (1) SACR 469 SCA, paragraph 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 an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

- [19] Counsel for the accused requested this court to take into consideration that the accused has pleaded guilty and has shown signs of remorse and that he is prepared to plead guilty against his co-accused.
- [20] Counsel for the accused requested this court to consider the following as substantial and compelling circumstances, namely;
- i. That the accused will be used as a State witness in respect to the remaining accused.
 - i. He is 35 years old and has been in custody for a year and five months.
 - ii. He was badly injured at the scene of the offence.
- [21] The court has notwithstanding the application of the prescribed minimum sentences, considered other sentencing options. This court does not find that a fine, a suspended sentence or correctional supervision is appropriate in these circumstances.
- [22] This court cannot only consider the accused's personal circumstances, but must also consider the interests of the community as well as prevention and deterrence. To focus on the well-being of the accused to the detriment of the interests of the community would result in a distorted and warped sentence. The accused is a danger to the community.
- [23] The accused has pleaded guilty and the Counsel for the State submitted the accused will be used as a State witness against the remaining accused. In addition, this court notes that the accused made a confession so he had no option but to plead guilty.
- [24] The frequency in which these heinous crimes are committed, is reflective of the fact that sentences imposed by courts are not having the desired effect. Counsel for the State argued that a term of imprisonment of fifteen (15) years on count one is appropriate, however that there are substantial and compelling circumstances on count 2 which dictates that this Court can depart from the minimum prescribed sentence of life imprisonment.

- [25] Apart from the plea of guilty, there is no explanation to this court what the circumstances were why the accused participated in attacking these two innocent members of the public and robbed them.
- [26] The fact that the accused is 34 years old. He is not a first offender. He has a previous conviction of rape committed in 1997. There are no substantial and compelling circumstance to depart from the minimum prescribed sentence of 15 years imprisonment on count 1. However, the fact that the deceased who was killed on count 2 was a co-accused and the fact that the accused is going to testify against the other accused is a substantial and compelling circumstance to depart from the prescribed minimum sentence of life imprisonment on count 2.
- [27] In respect to count two, irrespective of the fact that the accused did not fire the shot that killed the deceased, the accused still reconciled himself with the fact that the deceased could get killed should a cross-fire arise.
- [28] The accused has spent one year and five months in prison.
- [29] The cumulative effect of sentences has been considered by this court. All these offences arise from the single intent of robbing the complainants on count one. Accordingly this court will order the concurrent running of sentences as the offences are inextricably linked in terms of locality and time.
- [30] In the result the following order is made:

Count 1

Accused is sentenced to fifteen (15) years imprisonment

Count 2

Accused one is sentenced to fifteen (15) years imprisonment

Count 3

Accused is sentenced to eight (8) years imprisonment

Count 4

Accused is sentenced to four (4) years imprisonment

- [31] In terms of section 280(2) of the Criminal Procedure Act, the court orders that the sentence of fifteen (15) years imprisonment imposed on count two (2) , the eight (8) years imprisonment imposed on count three (3) and the four (4) years imprisonment imposed on count four (4) will all run concurrently with the sentence of fifteen (15) years imprisonment imposed on count one (1).
- [32] In terms of section 103 (1) (g) of the Firearms Control Act the accused is declared unfit to possess a firearm.

D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the State	Adv Maharaj
On behalf of the Accused	Adv Buthelezi
Date Heard:	21 April 2016
Handed down Sentence:	21 April 2016