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

**CASE NO: 049/2016**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

**07/06/2016**
DATE

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SIGNATURE

In the matter between:

**THE STATE**

And

**WILLIAM JABULANE MATJEKE**

***Summary***

*Sentence – Murder and Robbery with aggravating circumstances. Sec 51 (1) and 51 (2) of Act 105 of 1997 applicable – Premeditated murder – Substantial and compelling circumstances – Role of alcohol whether serving as mitigating or aggravating for sentence.*

The accused was convicted of murder and robbery with aggravating circumstances. Evidence indicated that he had consumed alcohol before and during the commission of the crimes resulting in him killing the wrong person to the one he wanted to kill in revenge. Sec 51 (1) of Act 105 of 1997 is applicable in that murder was premeditated. The deceased, a colleague to the accused with whom they had good working relations, was mistaken for a gunman who had fired shots at the accused moments earlier. Alcohol concentration in his blood was 0.05 gram per 100 ml.

Held, that, substantial and compelling circumstances can be found in traditional mitigating factors. If the imposition of prescribed sentences is disproportionate to crime, criminal and legitimate needs of society; that on its own constitutes substantial and compelling circumstance justifying a lesser sentence than life imprisonment. *Held*, further, that alcohol consumption can in certain circumstances serve as mitigating circumstances. A cumulative sentence of 20 years imprisonment was imposed.

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## SENTENCE

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RATSHIBVUMO AJ:

1. Mr. Matjeke (the accused), was convicted by this court of the crimes of murder and robbery with aggravating circumstances. The court will now proceed to hand down the sentence. It is the court's unpleasant and difficult task to impose the sentence on the accused, but it has to be done.

2. The imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced

process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused. That measure is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn*[1] described as a 'triad consisting of the crime, the offender and the interests of society'.

3. A sentencing court does not always have an untrammelled discretion to determine sentence – a clean slate on which to work. In certain cases – and this applies to all the charges the accused was convicted of –prescribed sentences are provided for by the Criminal Law Amendment Act 105 of 1997 (the so called "Minimum Sentences Act"). Section 51 of Minimum Sentences Act provides,

    1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
    2) "Notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in-

        (a) Part II of Schedule 2, in the case of-

            (i) a first offender, to imprisonment for a period not less than 15 years."

Murder is listed in Part I of Schedule 2 when (a) it is planned or premeditated and *in casu*, the court found premeditation on the part of the accused. Robbery with aggravating circumstances is equally listed in Part II of Schedule 2.

[1] 1969 (2) SA 537 (A), at 540G-H

4. In line with the *Zinn* decision, in determining an appropriate sentence, the court has taken into consideration the accused's personal circumstances, interests of the society, the crime and the circumstances surrounding its commission. Although these interests may be conflicting in nature, it is expected of this court to keep a fine balance between them, and it must endeavour not to over or to under emphasize anyone of them. The court is also called upon to exercise a measure of mercy when imposing a sentence – *S v Rabie*[2].

5. The offender: Personal circumstances: The accused is an adult male aged 33 years old. He is a father of two kids aged, 11 and 6 years old who are all school-going. He is a first offender. He resides with his fiancée, Mary who was in his company when the crimes he was convicted of were committed. She is currently pregnant and is due to deliver by today. This could mean the day he is sentenced; the accused also became a father. What a bitter-sweet moment.

6. The society' interests: The interests of the community overlap to an extent with what has been mentioned above. The society deserves to live in a better world than the one forced on it by the likes of the accused. Had the accused as a taxi driver treated members of the public with the respect they deserve at the shooting scene, this would not have happened. Those people had a right to choose not to be passengers in the accused's motor vehicle especially seeing that it would have been overloaded. The accused chose a confrontational way to force them in. That triggered the shooting by one of them which set the wheel rolling to this end.

[2] 1975 (4) SA 855 (AD).

7. The crime: The crimes the accused was convicted of are very serious. The way the murder was committed suggests that the accused does not value the sanctity of life. The deceased died a painful and unnecessary death. We do not know for sure if the deceased was already dead by the time the accused decided to drive away from the scene. He could have taken efforts to search for a person he had knocked down, seeing, no matter how much guilt he apportioned to him, it was a human being; but he chose not to. Had he done so, as statutorily obliged, he would have noticed that he meted out his revenge on a wrong person. He would also have had enough opportunity to observe if there was still any life in him so as to seek medical help.

8. The accused also had enough time to repent from his plans to avenge and kill, but he chose not to, even as his fiancée and other occupants of the motor vehicle tried to persuade him not to. Had the accused been caring enough and concerned over people injured in his motor vehicle, it was appropriate for him to seek medical help than expose them to further risk when he took them back into the battle. For these reasons, the decision to drive back was irrational.

9. The court cannot overlook the role of alcohol consumption in this regard. There is enough evidence to suggest that the accused was not sober as testified by W/O Mabotja. There is however no evidence suggesting that such consumption diminished the accused's criminal capacity. It however remains anybody's guess as to whether, had he been sober he would have allowed the hikers a right not to board his motor vehicle, whether he would have listened to his fiancée's plea amongst others, not to go back, and whether he would have recognised the deceased as his colleague who was a passenger in his motor vehicle.

10. While alcohol consumption can serve as aggravating circumstances in certain cases,[3] it certainly serves as a mitigating factor in circumstances such as of this case.[4] The court cannot overlook that the accused's motor vehicle was shot at, albeit at his initiatives. He had passengers who were injured in his motor vehicle and in a moment, decided it was time to avenge the shooting. Alcohol content in his blood shows it was higher that the statutory limit pertaining to a motor vehicle driver. The fact that it played a limited role cannot be questioned.

11. As indicated above, sec 51 (1) applies to a charge of premeditated murder whereas sec 51 (2) applies to robbery with aggravating circumstances. The approach of the courts to sentence when the Minimum Sentences Act is applicable is now well developed. It was emphasised in *S v Malgas*[5], that when sentencing offenders for crimes specified in the Minimum Sentences Act, a court is required to 'approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed …'. Even though the Minimum Sentences Act has placed emphasis on 'the objective gravity of the type of crime and the public's need for effective sanctions against its discretion to deviate from the prescribed sentence was granted to courts 'in recognition of the easily foreseeable injustices which would result from obliging them to pass the specified sentences come what may.' Where imposition of prescribed sentence would be disproportionate to crime, criminal and legitimate needs

[3] *S v Ndhlovu* (2) 1965 (SA) 692 (A).
[4] *S v Johnson* 1969 (1) SA 201 (A), *S v Alam* 2006 (2) SACR 613 (Ck).
[5] 2001 (1) SACR 469 (SCA) para 8.

of society; that on its own constitutes substantial and compelling circumstance justifying a lesser sentence.[6]

12. Equally, in *Malgas*[7], it was held that it is impermissible to deviate from the prescribed sentence 'lightly and for flimsy reasons which could not withstand scrutiny' but, this apart, all factors relevant to determining sentence remain relevant when the Act applies and a sentencing court must look to the 'ultimate cumulative impact' of all of these factors in order to determine whether a departure from the prescribed sentence is justified. The court of appeal held that when a court is convinced that the imposition of the prescribed sentence would be unjust or 'disproportionate to the crime, the criminal and the legitimate needs of society' that in itself constitutes substantial and compelling circumstances.[8]

13. *Malgas* was considered by Nugent JA in *S v Vilakazi*[9]. At paragraph 14 he observed that it is 'only by approaching sentencing under the Act in the manner that was laid down in *S v Malgas* … that incongruous and disproportionate sentences are capable of being avoided' and that by 'avoiding sentences that are disproportionate a court necessarily safe-guards against the risk … that sentences will be imposed in some cases that are so disproportionate as to be unconstitutional'. The learned judge of appeal went on to set out a criteria on how a court should approach the imposition of sentence when the Minimum Sentences Act applies, stating, at paragraph 15:

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[6] *S v Vilakazi*2009 (1) SACR 552 (SCA), *S v Raath* 2009 (2) SACR 46 (C) & *S v Madikane* 2011 (2) SACR 11 (ECG).

[7] *Supra* at para 9

[8] *S v Malgas* (supra) at para 22. See also *S v Fatyi* 2001 (1) SACR 485 (SCA), para 5

[9] 2009 (1) SACR 552 (SCA)

> 'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in the context … "consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender". If a court is indeed satisfied that a lesser sentence is called for in the particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence.'

It is clear from the above therefore that the Minimum Sentences Act does not take away the duty of the courts to impose a sentence that incorporates the purposes of sentence.

14. It is therefore imperative to consider the purposes of sentences before determining if the imposition of the prescribed sentences would be disproportionate to the offender, the crime and legitimate needs of the society. The purposes of sentence are deterrent, preventative, reformative and retributive – see R *v Swanepoel* 1945 (AD) 444. A sentence must deter others from committing similar offences as well as crime in general. If deserved, the court also has to provide the accused with an opportunity for rehabilitation. In determining if the same is warranted, the court has to weigh this need against the seriousness of the crime. Again, the court does not have to consider all the sentencing options available irrespective of the crime committed.

15. In *S v Swart* 2004 (2) SACR 370 (SCA) at 378B-C the Supreme Court of Appeal said the following: "In our law retribution and deterrence are

proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be accorded equal weight but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."

16. The defence addressed the court listing the following factors as substantial and compelling reasons justifying deviation from the prescribed sentences: The accused is a first offender. There was an intake of alcohol on his part and it may have influenced him to an extent. His motor vehicle was shot at and two of his passengers were struck with bullets. The accused surrendered himself to the police and did not conceal that he was a driver. The accused visited the family of the deceased and apologised. His kids will be affected if he is given life imprisonment.

17. There is no dispute that at some stage the accused did apologise to the deceased's family. While such a deed is appreciated, it however falls short of displaying remorse on his part especially looking at the remorse criteria set out in *S v Matyityi*[10]. For he failed to verbalise the remorse before the court, to demonstrate what made him commit the crime and what has happed since, that sees him regret the deed.

18. Initially, the State counsel countered this submitting that alcohol consumption does not serve as a mitigating factor for sentencing purposes. After he was allowed time to refer and comment on certain authorities, he

[10] 2011 (1) SACR 40 (SCA) para 9-14.

conceded that alcohol consumption can indeed serve as a mitigating factor since there were numerous authorities to that effect. He however fell short of admitting that it should serve as a mitigating factor in this case.

19. This stance is surprising given the fact that there is no dispute that the accused had consumed alcohol; W/O testified that he did not appear to be sober; he drove back in order to confront the man who shot at him and even as he reported the matter to the police, he seemed to genuinely believe that the man he had knocked down with the car was the gunman who had fired shots at him. He enjoyed good collegial relationship with the deceased whom he even exempted from paying a taxi fare that night.

20. The court is satisfied that there are substantial and compelling circumstances that justify deviation from the prescribed sentences of life imprisonment in respect of count 1 and 15 years imprisonment in respect of count 3. Following are the circumstances that justify such deviation: The accused had consumed alcohol which obviously influenced him to an extent. His motor vehicle was shot at and two of his passengers were struck with bullets, albeit at his initiatives. The accused surrendered himself to the police and did not conceal that he was a driver. The prescribed sentences are disproportionate to the offender, the crime and legitimate needs of the society.

21. Having considered all the aspects above, the following sentence is imposed:

    1. Count 1: 20 (twenty) years imprisonment.

    2. Count 3: 10 (ten) years imprisonment.

3. The sentence in count 3 is to run concurrently with the sentence in count 1. The cumulative sentence is 20 (twenty) years imprisonment.

22. No order made in terms of section 103 Act 60 of 2000 (accused is automatically unfit to possess a firearm).

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**T.V. RATSHIBVUMO**
**ACTING JUDGE OF THE HIGH COURT**

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| **Date of sentence:** | **07 June 2016** |
| **For the State:** | **Adv. Mkhari** |
| **Instructed by:** | **Director of Public Prosecutions Johannesburg** |
| **For the Accused:** | **Adv. Mncwango** |
| **Instructed by:** | **Legal Aid South Africa Johannesburg** |