



**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 : SS 77/2017

In the matter between:

THE STATE

and

MICHAEL CHARLES KHUMALO
BONGANE HONEST NGWENYA

ACCUSED 1
ACCUSED 2

JUDGMENT-SENTENCE

DOSIO AJ

SENTENCE

[1] The accused have been found guilty of 4 counts. Count 1 is the crime of murder read with

the provisions of section 51(1) and Part 1 of schedule 2 of Act 105 of 1997. Count 2 is also a charge of murder read with the provisions of section 51(1) and Part 1 of schedule 2 of Act 105 of 1997. Count 3 is a charge of a contravention of section 3 of the Firearms Control Act 60 of 2000 ("Act 60 of 2000"). Count 4 is a contravention of section 90 of Act 60 of 2000 for possession of unlawful ammunition.

- [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.

PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [3] The personal circumstances of the accused are as follows;

Accused 1

Accused 1 is 33 years old and completed grade 5. He is single and has no children. His parents passed away when he was very young and he was raised by his aunt who passed away in 2009. He was employed as a painter and was earning R2000 per month. He has been in custody for 1 year and 5 months. He has no previous convictions. The defence counsel asked this court to consider the fact that he made formal admissions, admitting his involvement in counts 2, 3 and 4 and showing remorse, that this should be regarded as substantial and compelling circumstances not to impose life imprisonment.

Accused 2

Accused 2 is 29 years old and although he is unmarried he has a live in girlfriend. They have 3 children aged 13 years, 9 years and 1 year and 3 months old. Accused 2 supported his girlfriend and his children by doing peace jobs. He was earning R500 per week. His highest level of education is grade 7. He does not have a passport and neither

does he have an identity document. He has been in custody for 1 year and 5 months. The defence counsel requested this Court to depart from the minimum prescribed sentence of life imprisonment on count 1 and count 2. As support for this argument counsel argued that the participation of accused 2 was lessened due to the fact that he was found guilty on the basis of common purpose and that the intention he exercised in respect to all the offences was *dolus eventualis*.

SERIOUSNESS OF THE OFFENCES

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

In respect to count 1 and count 2

These crimes were committed in the early morning hours whilst the 2 deceased were outside Sarah's tavern. Accused 1 and 2 approached this group who were gambling and accused placed a bet when it was not even his turn. This clearly irritated the deceased on count 2 who rejected his bet. Accused 1 instead of accepting this, started insulting the bystanders and then drew a firearm and killed the deceased on count 2. Although there is no proof that these 2 murders were planned, this Court has found that the 2 murders were committed by accused 1 and 2 who were acting in the furtherance of a common purpose, accordingly both murders fall within the definition of Schedule 2 of part 1 of the Criminal Law Amendment Act 105 of 1997. The post-mortem report in respect to the deceased on count 1 shows a gunshot wound to the head, and the post-mortem report in respect to the deceased on count 2 shows the prevalence of numerous gunshot wounds. These murders were totally unnecessary. Accused 1 and 2 could have just left the scene without killing these 2 deceased. The actions of accused 1 and 2 are heightened by the fact that there were numerous innocent bystanders standing around this gambling table, and the callous manner in which accused 1 and his co-perpetrator Vorsheka, who is not before the court, could easily have killed more people.

[5] The State called 2 witnesses in aggravation of sentence. The first witness was

Mduduzi Xaba. He is the brother of the deceased on count 2. He stated that the deceased Mhlanguleni Xaba would have been either 42 or 43 years old had he not been killed. The deceased was self-employed running a transport business. The deceased had two homes, one in Johannesburg and one in Kwazulu Natal. He also had 2 wives, one in each province. The wife in Natal had 3 kids, aged 14 years, 10 years and 8 years old. The wife in Johannesburg had 5 kids, aged 19 years, 12 years, 8 years, 10 years and 3 years old. The deceased was taking care of all his children. The death of the deceased impacted heavily on the family of the deceased, but also the community who were dependant on the transport the deceased rendered. The death of the deceased has also impacted heavily on the financial situation of his family as one of the vans in Kwazulu Natal had to be sold so that they could use the money for the deceased's burial. The 19 year old daughter in Johannesburg also had to stop her studies as there was no longer money to pay for her studies.

[6] The second witness called by the state was Hoza Monareng. He stated that the deceased Sidwell Monareng was his younger brother. The deceased was employed and was looking after his 4 children aged 14 years, 13 years, 9 years, and 5 years old. Two of the children were from his marriage with his current wife, and the two other children were born out of wedlock with two separate woman. Currently, there is no one maintaining these 4 children and the family of the deceased has also experienced extreme financial hardship. The deceased's current wife is also not working.

[7] It is clear that both witnesses called by the State have also been affected emotionally by the loss of their respective brothers.

[8] This country has witnessed an ever-increasing wave of violence. Murder with the use of

firearms is ever-prevalent. Innocent and defenceless victims continue to fall prey to these types of offences.

- [9] Murder is the most serious of crimes. It not only ended the life of two innocent bystanders, but it left hardship for the family members left behind.

INTERESTS OF THE COMMUNITY

- [10] 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 the possession of unlicensed firearms and ammunition have reached high levels, the community craves the assistance of the courts.

- [11] In *S v Msimanga and Another* 2005 (1) SACR 377 (A), it was held that violence in any form is no longer tolerated, and our Courts, by imposing heavier sentences, must send out a message both to prospective criminals that their conduct is not to be endured, and to the public that Courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.

- [12] In respect to counts 3 and 4, the proliferation of unlicensed firearms has become difficult to control in South Africa. The courts continue to impose high sentences for these types of offences, but the commission of these crimes continue unabated. The firearm that was used by accused 1 discharged 9mm cartridges. 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 behaviour of the accused and others like them, impact 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.

[13] In respect to the murder counts, namely, count 1 and 2, section 51 (1) of Act 105 of 1997 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.

[14] In respect to count 3, the penalty in Act 60 Of 2000 for a contravention of section 3 is 15 years imprisonment.

[15] In respect to count 4, the penalty in Act 60 of 2000 for a contravention of section 90 is also 15 years imprisonment.

[16] Section 51 (3) of Act 105 of 1997 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.

[17] 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.”

- [18] The court has notwithstanding the application of the prescribed minimum sentences, in respect to count 1 and 2, considered other sentencing options. This court does not find that a fine, a suspended sentence or correctional supervision is appropriate in these circumstances.
- [19] 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 are a danger to the community.
- [20] After the 2 State witnesses testified today and explained the hardships the family of the deceased have endured, it is clear neither of the accused approached the families of the deceased to express any signs of remorse. They instead have placed this court through a very lengthy trial, accused 1 disputing the confession which he made at the time of his arrest. The fact that accused 1 made admissions at the end of the State’s case does not demonstrate to this court real and genuine remorse.
- [21] There is no clear explanation before this court as to what motivated the accused to commit these deeds.
- [22] The fact that accused 1 is 33 years old and accused 2 is 29 years old and both are first offenders, is certainly a positive factor in their favour, but it can hardly be a substantial and compelling circumstance on its own. (see *Shubane v The State* (073/14) 2014 ZASCA 148 26 September 2014).

[23] The learned Poonen JA in *S v Matyityi* 2011 (1) SACR 40 SCA at paragraph [14] stated that;

“at the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor”.

[24] The learned Poonen JA stated further at paragraph [24];

“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming...one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons... As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences...Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s notion of fairness.”

[25] In my view there are no substantial and compelling circumstances present in respect to accused 1 or 2 that warrants a departure from the prescribed statutory norm in respect to count 1 or 2. In respect to count 1 irrespective of the fact that accused 1 watched as Vorsheka fired shots, or whether it was his own firearm that killed the deceased on count 1, accused 1 knew what was going to happen. So too in respect to count 2, there was no reason for accused 1 to kill the deceased Mhlanguleni in cold blood. In respect to count 1 and 2, irrespective of the fact that accused 2 did not fire the shots that killed both

deceased, accused 2 still reconciled himself with the actions of accused 1 and Vorsheka and he knew what was going on. Neither of these 2 accused requested to approach the families of the deceased to tell them they were sorry for what they had done. There is also nothing explaining to this Court why these 2 accused changed from ostensibly normal citizens, to gun wielding criminals killing people in the early morning hours outside a tavern.

[26] Both accused were acting with a common purpose and this court finds no reason to differentiate between the sentences they will both receive. Notwithstanding the fact that the role of accused 2 might be distinguishable from that of accused 1 or Vorsheka, he did nothing to stop the others from shooting, and neither did he do anything to dissociate himself from these crimes that were being committed in his presence.

[27] Accused 1 and 2 have spent 1 year and 5 months in custody.

[28] In the case of *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014) it was held that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. It was further stated in this case that the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence is a just one. This Court finds, the sentence of life imprisonment in respect to the murders that were committed warrants a term of life imprisonment.

[29] The cumulative effect of sentences has been considered by this court and so has the

period of detention pending the finalisation of this matter been considered by the court. The two counts of murder are inextricably linked as they happened almost at the same time. Therefore this court finds that the sentences on counts 1 and 2 should run concurrently.

[30] In the result the following order is made:

Count 1

Accused 1 is sentenced to life imprisonment

Accused 2 is sentenced to life imprisonment

Count 2

Accused 1 is sentenced to life imprisonment

Accused 2 is sentenced to life imprisonment

Count 3

Accused 1 is sentenced to 8 years imprisonment

Accused 2 is sentenced to 8 years imprisonment

Count 4

Accused 1 is sentenced to 4 years imprisonment

Accused 2 is sentenced to 4 years imprisonment

[31] In terms of section 39 (2)(a)(i) of the Correctional Services Act 111 of 1998

(“Correctional Services Act”) any determinate sentence of incarceration in addition to life imprisonment is subsumed by the latter. Accordingly, in terms of section 39 (2)(a)(i) of the Correctional Services Act the sentences imposed on count 3 and 4 are automatically subsumed under the life imprisonment sentence imposed.

[32] In terms of the provisions of section 39(2)(a)(ii) of the Correctional Services Act the life imprisonment imposed on count 2 in respect to both accused will run concurrently with

the life imprisonment imposed on count 1.

[33] In terms of section 103 (1) of Act 60 of 2000, accused 1 and 2 are declared unfit to possess a firearm.

D DOSIO

ACTING JUDGE OF THE HIGH COURT

Date sentence imposed : 19 March 2018

Appearances:

On behalf of the State Adv MashegoWilliams

On behalf of Accused 1 Adv Maphiri

On behalf of Accused 2 Adv Brits