

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC21/2014

THE STATE

And

THOBANI KAMBE

VUSUMZI BADI

NKOSINATHI FANI

MASIXOLE SOLANI

SITHEMBISO MAYINJE

THEMBEKILE NDABANKULU

Accused

Coram: **Chetty J**

Heard: **25 April 2016**

Delivered: **29 April 2016**

Chetty J:

[1] This case exemplifies the brutal character of the society in which we live – a walk along our streets have become fraught with danger, typified by the senseless killing of the deceased who unfortunately came within the radar of the accused, a group of brigands, preying on the innocent and defenseless. Having been robbed of his meager possessions, he was unceremoniously dragged away and summarily executed. My factual findings hereanent, extrapolated from the judgment, were as follows: -

“[13] The events which unfolded behind the R5 store rests primarily on the testimony of accused no. 1 and *Amanda*. She testified that as she ran home she witnessed accused no. 1, axe in hand engaged in a striking motion. She then saw accused no. 6 armed with an instrument which she described as an assegai but was constrained to admit that she did not observe him doing anything therewith. When the three accused, i.e. accused no.'s 1, 5 and 6 emerged from the area where the deceased's body was eventually retrieved, she noticed that accused no.'s 5 and 6's shirts were covered in blood. Accused no. 6 came to her and threatened her with death should she reveal what had transpired that evening. The only other account of the manner in which the deceased met his demise is that of accused no. 1, who fingered accused no. 5 as the murderer. His exculpatory account must however fall to be rejected.”

[2] It is furthermore apparent from the judgment that all the accused were active participants in the robbery. Their collective conduct was described in the judgment as follows:

“[14] It is against this factual matrix that the liability of the individual accused must be assessed. Their guilt on the robbery count presents no difficulty. The evidence of *Amanda* conclusively establishes that they pursued the deceased, *Luyanda* and *Mpilo* en masse and gathered around the deceased once he had been grabbed by accused no. 3. Whilst laying prone on the ground she observed accused no.’s 2 and 4 removing the deceased’s pants. Although accused no. 4 denied being party to the theft of the deceased’s pants, that denial is clearly false. An independent witness, Ms *Thenjiwe Dingana* observed him and accused no. 2 arguing over the pants in the early hours of the morning. His cousin, Ms *Thabisa Gcakasi* testified that he admitted his complicity in the robbery to her. Although it was put to her by Mrs *Theron* that he denied having said that he participated in the robbery, his evidence thereanent must be rejected as palpably false. Accused no. 5’s direct role in the robbery is also clearly established. *Amanda* heard him saying that he wanted the phone and immediately thereafter the chase and subsequent apprehension of the

deceased occurred. Accused no. 6 is, on his own admission, guilty of robbery.”

[3] *Amanda’s* evidence establishes that the catalyst for the attack upon the deceased and *Luyanda* was the fateful ringing of Mr *Koba’s* cellphone. Accused no. 5’s insatiable desire to possess the phone caused the accused collectively to chase after their hapless victims until the deceased was apprehended and felled by the axe wielded by accused no. 1. Incapacitated by the blow, his meager possessions i.e. the clothing and shoes he was wearing, was removed from his body by the accused. Whilst I accept that the attack upon the deceased was not premeditated, the spontaneity of the conduct in pursuing the deceased and his friends establishes a propensity for violence on the part of the accused.

[4] Such violent tendencies manifested itself in the gruesome manner in which the deceased met his untimely death. In paragraph 5 of the main judgment, I detailed the extent and severity of the injuries to the deceased. It is unnecessary to regurgitate them in this judgment. Suffice it to say that *ex facie* the condition of the deceased’s cadaver, he was butchered.

[5] In my judgment I found that accused no’s 1, 5 and 6 dragged the deceased’s body to the rear of the R5 store and that on the totality of the evidence they, either individually or collectively, murdered the deceased. It is not in issue that such conviction

triggers the imposition of the mandatory sentence of life imprisonment absent a finding that there are substantial and compelling circumstances which militate against the imposition of such a sentence. I have been urged by accused no's 1, 5 and 6's legal representatives to find that the personal circumstances of the accused, the spontaneity of the initial confrontation, their relative youthfulness, state of inebriation and, save for accused no. 5, their protracted period of incarceration, renders the imposition of the ordained sentence unjust.

[6] The personal circumstances of all the accused are comprehensively set out in pre-sentence reports. Apropos accused no.'s 1, 5 and 6, their reports were admitted in evidence as exhibits "N", "R" and "S" respectively. Although accused no. 1's parents were separated when he was a young boy, they nonetheless maintained an amicable relationship and nurtured the accused throughout his formative years. A promising scholastic career was however curtailed by his foray into a world of drugs and alcohol which his parents reported to be completely at variance with his character. It appears that his dependency on drugs cut short a once promising tertiary education. Accused no. 1 was relatively young at the time of the commission of these offences. He was born on 27 May 1994 and almost nineteen years old. He has no previous convictions and given his family history, it is difficult to fathom why he armed himself with an axe and acted in such a brutal fashion. Notwithstanding the overwhelming weight of the evidence detailing his direct participation in the death of the deceased, he has steadfastly refrained from disclosing his role and has expressed no remorse for his conduct.

[7] Accused no. 5 was 23 years old at the time these offences were committed. Despite his relative youthfulness, he has a predilection for violence evidenced by his previous convictions - one for assault and the other for culpable homicide. For the latter offence he was sentenced to eight years imprisonment. As adumbrated hereinbefore, his utterances precipitated the chain of events which led to the death of the deceased. Notwithstanding his conviction, he too has expressed no remorse for his conduct.

[8] Accused no. 6 was also 23 years old at the time of the commission of these offences. His alcohol and drug abuse is well documented in the pre-sentence report and his predilection for violence within his family environment is expounded upon in the pre-sentence report by his sister. His violent predisposition finds corroboration in *Amanda's* evidence that after emerging from the area where the deceased had been murdered, he threatened her with death should she have the temerity to report what she had witnessed. He too has expressed no remorse for his conduct.

[9] Accused no. 2, 3 and 4, for reasons only known to themselves, were party, not only in chasing the deceased but dispossessing him of his clothing. Accused no.'s 2 and 4 were aged 20 and 19 years old at the time of the commission of the offences. They are both first offenders, and, as appears from the pre-sentence reports, enjoyed relatively stable home environments. Drugs and alcohol abuse however triggered severe behavioural changes which impacted on their scholastic paths. Accused no. 3 was the eldest of the accused, aged 28 at the time of the commission of this offence. He

has one previous conviction for theft but according to the report, never presented with behavioural problems during his formative years.

[10] The deceased death has had a profound effect on his family. The probation officer's report documents the psychological consequences of the crime as follows:-

"7.1 The complainant, Ms Maqolo is a fifty-eight-year-old adult female who was born and raised in Peddie. She reported that she is a teacher by profession and that she relocated to Port Elizabeth during 1984 for employment purposes. She mentioned that she has two children, of whom the deceased was the youngest. The deceased has an older sister.

7.2 Ms Maqolo stated that the deceased, Liwa Maqolo was born in port Elizabeth and that she raised him as a single parent. She reported that his father was, however, actively involved in his upbringing, both financially and emotionally.

7.3 According to Ms Maqolo, the deceased grew up a healthy child both physically and psychologically. She reported that he was raised in a stable environment in which his basic needs were met. Ms Maqolo mentioned that the deceased grew upon in a religious environment. She

stated that he attended church with her and that he was confirmed in his church.

7.4 The deceased's father, Mr Kungwayo reported that the deceased enjoyed playing sport. He reported that he played cricket and soccer, however, when he began attending high school he had to choose between the two and he chose soccer. Ms Maqolo further shared that during 2006 the deceased was elected to represent the Eastern Cape province in Johannesburg at a soccer tournament.

7.5 According to Ms Maqolo, the deceased did not ever present with behavioural challenges. She reported that he only made minor transgressions like any other child, as no one is perfect. She mentioned that he assisted with chores in the house and that he knew that there were no chores for boys or girls, as he was expected and did assist with all the domestic chores. Ms Maqolo shared that she recalled how the deceased would go the extra mile when it was her pay day because he knew that he would receive an incentive from her.

7.6 Ms Maqolo reported that the deceased started his schooling career at Sydenham Primary School. She reported that he was then enrolled at Lawson Brown High School and thereafter at Masiphathisane High School. She reported that the deceased was an average learner and

that he excelled more on technical work than academics.

Due to the aforementioned, Ms Maqolo reported that she decided to enroll the deceased at Qhayiya Further education and Training after he failed his Grade 11.

7.7 The deceased's mother stated that during the time the offence was committed against the deceased, he was enrolled as a Civil Engineering student at Qhayiya FET busy with the first year of his course. She further shared that prior to his murder; the deceased was also sent to initiation school.

7.8 According to Ms Maqolo, the deceased shared a close relationship with both his parents. His father reported that he and the victim enjoyed watching sport together on Television. The deceased's mother reported that she also developed an interest in sport as a result of the deceased's involvement in sport activities, as she used to go and watch the deceased playing sport. She also mentioned that she and the deceased attended the Splash festival yearly.

7.9 Ms Maqolo reported that the deceased loved domestic animals. She reported that the deceased was a friend of a neighbor who owned cattle and sheep and that he accompanied him when he went to feed them. She mentioned that he was popular and well-liked by his extended family in Peddie, as he assisted in caring for the

domestic animals when he arrived in Peddie, his mother's home town. This, according to his family, signified that he has not forgotten his roots.”

[11] I have reproduced the relevant paragraphs of the report to emphasize the effect the deceased's death has had on his family. The voices of a victim's family unfortunately often go unheard but, in the assessment of an appropriate sentence, they must be accorded due weight. To ignore them, would elevate an accused's interests above that of the societal demand.

[12] In the preceding analysis, I recounted the nature of the crime, the participation of the individual accused, their personal circumstances and the interests of society. Notwithstanding suggestions made in some of the pre-sentence reports that favour a non-custodial sentence, this is a case where imprisonment is imperatively called for. The only extant issues to my mind, being whether the factors enumerated on behalf of the various accused constitute the envisaged circumstances warranting a departure from the ordained sentence.

[13] In this regard it is instructive to refer to the judgment of Lewis JA in **S v Radebe and Another**¹ where the learned judge, apropos, the question whether the length of

¹ 2013 (2) SACR 165 (SCA)

time spent awaiting trial per se constitutes a substantial and compelling circumstance, said the following:-

“[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22.) A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in *S v Dlamini* 2012 (2) SACR 1 (SCA) para 41.)

[14] A better approach, in my view, is 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: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.

[15] That general principle was expressed, first, in relation to the way to assess whether substantial and compelling circumstances exist where a minimum sentence has been prescribed by the Criminal Law Amendment Act, in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) where Marais JA said (para 25):

'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.'

That approach was endorsed by the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC) (2001 (3) SA 382; 2001 (5) BCLR 423). More recently, in *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396), this court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Nugent JA said (para 15):

'It is clear from the terms in which the test was framed in *Malgas* and ~~H~~ 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.'

[14] In my judgment, and in respect of count 1, having due regard to the circumstances enumerated hereinbefore in respect of accused no.'s 2, 3 and 4, I am satisfied that there are indeed substantial and compelling circumstances which justify the imposition of a lesser sentence than that ordained by the legislature. Given their minimal participation in the robbery, their personal circumstances and the period spent awaiting trial, a sentence of fifteen years imprisonment is clearly not justified.

[15] Although some of these factors are of equal application to accused no.'s 1, 5 and 6, the enquiry whether the imposition of the ordained sentence is justified cannot be

done piecemeal. The two offences of which the accused have been convicted are not disparate - the murder was merely the culmination of the robbery. There can be no doubt that the deceased was not killed because he would have been able to identify his attackers. Amanda and the deceased's companions who had made good their escape were eye witnesses to the events which unfolded. There can be little doubt that the killing of the deceased was actuated by savagery. The perpetrators of such horrendous conduct clearly have no place in a civilised society. Collectively, the factors enumerated on their behalf do not pass muster to ward off the prescribed sentence. In their case the mandatory sentence is fully justified.

[16] In the result the accused are sentenced as follows:-

On count 1, Robbery with aggravating circumstances:

Accused 1, 5 and 6 are sentenced to 15 years imprisonment.

Accused 2, 3 and 4 are sentenced to 10 years imprisonment.

On count 2, Murder:-

Accused no.'s 1, 5 and 6 are sentenced to life imprisonment.

D. CHETTY

JUDGE OF THE HIGH COURT

Obo the State:	Adv Mnyani / Adv A. Canary (instructed by the NDPP)
Obo Accused No. 1:	Mr R Crompton (Instructed by Legal Aid)
Obo Accused No. 2:	Mr J Riley
Obo Accused No. 3:	Mr R O'Brien
Obo Accused No. 4:	Adv E Theron
Obo Accused No. 5:	Mr Schoonraad
Obo Accused No. 6:	Mr Ngqakayi