

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DISVISION, PORT ELIZABETH)

In the matter between:

Case No: CC2/2012

THE STATE

And

ANELE GAYIYA

ACCUSED NO. 1

OLWETHU NGOXOZA

ACCUSED NO. 2

ZOLA EROSI

ACCUSED NO. 3

LUVUYO GAVIN PRINCE

ACCUSED NO. 4

LUNTU LEONARD MAKASI

ACCUSED NO. 5

Coram: **Chetty J**

Heard On: **23 June 2016**

Decided On: **23 June 2016**

Chetty J:

[1] The five (5) accused persons were arraigned for trial before Sandi J on multiple charges, to wit –

COUNT 1: MURDER

**COUNTS 2, 3 AND 4: ROBBERY WITH AGGRAVATING
CIRCUMSTANCES (as envisaged in Section 1(1) of Act 51
of 1977)**

COUNTS 5 AND 6: ATTEMPTED MURDER

**COUNT 7: UNLAWFUL POSSESSION OF A FIREARM
(against accused 4 and 5 only) (in contravention
Section 3 read with Sections 1, 103, 117, 120(1)(a),
Section 121 read with Schedule 4 of Act 60 of 2000
and further read with Section 250 of Act 51 of 1977)**

**COUNT 8: UNLAWFUL POSSESSION OF AMMUNITION
(only against accused no. 2) (in contravention of
Section 90 read with Sections 103, 117, 120(1)(a),
Section 121 read with Schedule 4 and Section 151 of Act
60 of 2000 and further read with Section 250 of Act 51
of 1977)**

[2] The trial commenced on 21 May 2012 and the adduction of evidence was completed on 23 October 2014. The matter stood down for argument on 1 December 2014 but was adjourned to the following day whereafter the matter was postponed for judgment to 12 December 2014. Judgment was however only delivered on 12 August 2015 at the conclusion of which the trial was postponed for the purposes of obtaining pre-sentence reports in respect of the accused. Those reports were only furnished during the first week of February 2016. On 16 February 2016, the matter was once more postponed to 22 – 24 March 2016 for sentence but had to be postponed due to the ill health of Sandi J. The interminable delays which beset the finalisation of these proceedings were occasioned by a multiplicity of factors – the ill health of the investigating officer, the incapacity and withdrawal of accused no. 2's previous legal representative and finally the ill health of Sandi J. Finality must however be achieved. Given the current unavailability of Sandi J, I now proceed to conclude the sentencing stage of the proceedings pursuant to the provisions of s 275 of the ***Criminal Procedure Act***¹(the Act).

[3] The trial court convicted: –

- (i) accused no.'s 2 and 4 of murder on count 1;

¹ Act No, 51 of 1977

- (ii) accused no.'s 1, 2, 3, 4 and 5 of robbery with aggravating circumstances on counts 2, 3 and 4;
- (iii) accused no.'s 1, 3 and 5 of attempted murder on counts 5 and 6;
- (iv) accused no.'s 4 and 5 of the unlawful possession of a firearm on count 7; and
- (v) accused no. 2 of the unlawful possession of ammunition (count 8).

[4] The charges against the accused all relate to events which unfolded at an ice-cream distribution and sales centre, ESG, in Port Elizabeth. Given the effluxion of time between the adduction of evidence, the handing down of judgment and these sentencing proceedings, it is necessary to revisit the factual matrix, which, extrapolated from the evidence adduced and the trial court's judgment, may be narrated as follows.

[5] ESG was a family owned business, *Darren Stanley* (the deceased) being its chief operating officer. The deceased's father, Mr *Eric Gordon Stanley (Eric)* (the complainant on count 5), and his late wife, Mrs *Anne Stanley (Anne)* were all involved in the business, he on the logistics side and Anne, on the administrative. I

shall collectively refer to them as the *Stanleys*, or individually as *Eric* and *Anne*, or the couple or the parents. On the morning in question i.e. 17 July 2010 the *Stanleys* opened the business as usual to await the arrival of their workforce i.e. the five (5) accused. The accused were all provided with what may conveniently be termed ice-cream carts whence they sold their wares at various locales on the beachfront. According to *Eric* the accused worked on a commission basis and had to account for the sales at the end of the day on their return to the business premises whence their remuneration would be calculated.

[6] It appears from *Eric's* evidence that during the course of the morning and at the beachfront an altercation took place between the deceased and the accused and, although he, i.e. *Eric*, could not elaborate on the full extent of the disagreement, the primary cause would appear to have been the intransigence by the accused to pedal their wares at different locations along the beachfront. The deceased and *Eric* left and returned to the business. It is not in issue that the appointed time for the accused's return to the premises i.e. 5 p.m. passed, without any sign of them. *Eric* recounted that the deceased telephoned one of them and the response received was that they were still busy selling ice-cream. Eventually, the accused arrived and a confrontation ensued in the office between *Anne* and the accused. It appears to be

common cause that *Anne* refused to pay the accused notwithstanding the fact that one (1) of them, whom *Eric* referred to as *Olo*, had sold all his provisions.

[7] The trial court found that the non-payment of their dues precipitated the attack upon the deceased and his parents. The trial judge found as follows: -

“The mention of the fact that they would not be paid caused the accused persons to be angry. Some of the accused persons mentioned that they needed the money to use in their households, some of it to use to pay their taxi fares back to the township where they lived. The end result of all this was that Darren was murdered. Robbery of the property as set out in the indictment was committed. Amongst other things, the following property was robbed: cell phones, a pistol, ammunition, jewellery and a vehicle belonging to the Stanleys. In addition Eric and Anne Stanley were assaulted and were put in the deep freezers. They were left in those deep freezers screaming for help.”

[8] The trial court convicted accused no.'s 2 and 4 of murdering the deceased on application of the doctrine of common purpose. It is evident from the medical evidence that the deceased succumbed in consequence of blunt force being administered to his head. Dr *Mgogo*, who performed the post-mortem examination adverted to a plethora of injuries to the deceased's body and opined that a tremendous amount of force must have been used to cause same. It is furthermore not in dispute that when Sergeant *Bezuidenhout* entered the premises later that evening, the deceased was the person whom he found in the third closed fridge.

[9] It is furthermore not in issue that *Eric* and *Anne*, were found interred in and extricated from two (2) functional freezers. Both of them were cold, shivering and stained with blood. The medical evidence adduced attests to the fact that they had been savagely assaulted, and had to be attended to at the casualty department of the Livingstone hospital that very evening. The clinical findings pertaining to *Anne* were noted on the J88 as follows – ***patient trembling – ragged 25mm long laceration frontal scalp – bruising and swelling left back- abrasion left elbow – 20mm long laceration left thigh.*** *Eric's* clinical findings were noted on the J88 as follows – ***patient sitting in a wheelchair and trembling – abrasion and 10mm long laceration on right side of face – abrasion forehead – no fractures on forehead.***

[10] The circumstances in which the *Stanleys* were assaulted was recounted by *Eric*, *Anne*, having passed away prior to the commencement of the trial. In his testimony, *Eric* adverted to an altercation between *Anne* and three (3) of the accused inside her office. He described how she was hit on the head with the lid of an ice-cream box and when he went to her aid, how he too was attacked outside the office and beaten on his head with such severity that he was rendered virtually unconscious. He further stated that all that he could recall was being carried towards the freezers and trampled upon before being unceremoniously dumped into the freezer by a person whom he referred to as *Gavin*. It is not in issue that accused no. 5's second name is *Gavin*.

[11] The accused's version of what transpired in the office differs substantially. Although all three (3) of them i.e. accused no.'s 1, 3 and 5 confirmed being in the office and alluded to the argument that ensued between them and *Anne*, all denied having assaulted the *Stanley* couple. Accused no. 1 testified that he left the office when it became apparent to him that he would not get his money and took *Anne*'s cell phone as a form of security which he would hand back the following day when he received his commission. Accused no. 3 on the other hand described a violent confrontation between them and *Eric* when the latter produced a firearm and took aim to shoot at them. To dispossess him, accused no. 5 lashed out and kicked the

firearm away. Accused no. 5's version corresponded to that of accused no. 3 but he too decried any knowledge of having witnessed or participating in the assault on the *Stanleys*. The trial court however rejected their versions and found that they had in fact robbed the *Stanleys* of the items specified in the annexure to the indictments and had attempted to murder them.

[12] Accused no. 1 was nineteen (19) years of age at the time of the commission of these offences. His personal circumstances are fully set out in the pre-sentence report. He commenced employment with the *Stanleys* earlier that very year and has been in custody since his arrest in 2010. He dropped out of school during grade 10, was employed as a general worker at the harbour between 2008/2009. According to the compiler of the report the accused has expressed no remorse, steadfastly maintaining his innocence.

[13] Accused no. 2 was eighteen (18) years old at the time. His personal circumstances were likewise adverted to in the pre-sentence report. He too dropped out of school during grade 10 and commenced work with the *Stanleys* in 2010. Whilst he admits being in possession of ammunition, he denies all involvement in the offences of which he has been convicted.

[14] Accused no. 3 was aged twenty (20) at the time. His socio-economic circumstances are thoroughly documented in the pre-sentence report. He left school whilst in grade 12 and commenced employment with the *Stanleys* in 2010. Although he denies any involvement in the robbery he admits having restrained *Eric* to prevent him from reaching his firearm. As adumbrated hereinbefore, his exculpatory version was rejected by the trial court.

[15] Accused no. 4 nineteen (19) years old at the time these offences were committed. His social and familial circumstances are set out in his pre-sentence report. He is the product of an unstable marital relationship between his parents. Although he is unmarried, he has an eight (8) year old son who resides with his maternal grandmother. The accused left school whilst in grade 10 and enrolled at Qhayiya Further Education and Training College, first in Port Elizabeth and thereafter in Cape Town. On the advice of family members he returned to Port Elizabeth without completing his course. A brief six (6) week working career was his only employment prior to commencing work with the *Stanleys*. According to the report he acknowledges his guilt on the robbery and possession of firearm charges.

[16] Accused no. 5 was aged twenty (20) at the time. He too is the product of a dysfunctional family and was cared for primarily by his grandparents. Although he is unmarried, he has a five (5) year old daughter. He completed grade 10 and left school whilst in grade 11. Thereafter he started working at Eyethu Fisheries but left and commenced employment with the *Stanleys* in June 2010. He denies complicity in the offences of which he has been convicted save that he took some money from the office.

[17] The convictions on counts 1, 2, 3, 4 and 7 trigger the operation of the minimum sentence provisions in section 51 of the ***Criminal Law Amendment Act***². As adumbrated hereinbefore, the trial judge convicted accused no.'s 2 and 4 of murder on application of the common purpose doctrine. The conviction as aforesaid attracts a mandatory sentence of imprisonment for life absent a finding that substantial and compelling circumstances exist which militate against the imposition of such a sentence. In similar vein, the convictions of all the accused on the three (3) counts of robbery with aggravating circumstances i.e. counts 2, 3 and 4 and the conviction of accused no.'s 4 and 5 on the unlawful possession of the 6.35mm Finat model Inox semi-automatic pistol obligates the court to impose a sentence of fifteen (15) years imprisonment on each count unless the accused satisfy the court that

² Act No, 105 of 1997

there are substantial and compelling circumstances which justify the imposition of a lesser sentence.

[18] Our case law abounds with learned discourses on what constitutes substantial and compelling circumstances. The debate thereanent was authoritatively settled in **S v Malgas**³ where Marais J.A., concluded his precedent setting analysis of the question as follows: -

“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.

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due

³ 2001 (1) SACR 469 (SCA)

regard to the bench mark which the Legislature has provided.”

[19] As adverted to earlier in this judgment, the accused were all aged between eighteen (18) and twenty (20) at the time of the commission of these offences. They are all products of unstable and dysfunctional home environments and drop-outs from school mainly due to financial constraints. The evidence adduced establishes that the offences were not premeditated. They had been in the employ of the *Stanley* family for a relatively short period of time but there does not appear to have been any hostility between them and their employers. *Eric* proffered the evidence that he was referred to by the accused as “**Daddy**”. What emerges clearly from the evidence however is that the catalyst for the assault upon the *Stanleys* was not the initial verbal abuse by the deceased of them but the refusal by *Anne* to pay the accused the money they were in truth entitled to. It is not in issue that they had worked the entire day. Although the accused’s violent conduct towards the *Stanleys* is inexcusable and is to be deprecated, it arose directly in consequence of the *Stanleys*’ own unconscionable behaviour. The accused had pedalled their bicycles selling ice-cream the entire day and their late return to the business premises was not attributable to any fault on their part. The breakdown of one of the bicycles

precipitated their late arrival and yet according to *Eric*, this infuriated the deceased and ultimately led to the conflagration.

[20] *Anne's* refusal to pay the accused their dues inflamed the situation and, no doubt, ultimately led to the confrontation between them and the *Stanleys*. This factor, together with the relative immaturity of the accused, is, to my mind, sufficiently mitigating to render the imposition of the ordained sentences unjust. However, the brutality of the attack upon the *Stanleys*, imperatively calls for a custodial sentence. It is apparent from the report by the probation officer, Ms *Pieterse*, that the assault had a traumatic effect on the *Stanleys* and the impact which it had on the surviving *Stanleys* must be accorded due weight. By the same token the accused have been in custody awaiting trial for approximately six (6) years and this factor together with their clean record must likewise redound to their benefit.

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

Accused No.'s 1, 3 and 5:

Counts 2, 3 and 4 are taken together for the purposes of sentence and accused no.'s 1, 3 and 5 are each sentenced to ten (10) years imprisonment;

On **Count 5** – accused no.'s 1, 3 and 5 are sentenced to twelve (12) years imprisonment;

On **Count 6** – accused no.'s 1, 3 and 5 are sentenced to twelve (12) years imprisonment.

On **Count 7** accused no. 5 is sentenced to five (5) years imprisonment.

It is however ordered that the sentences imposed in respect of counts 2, 3, 4, 6 and 7 run concurrently with that imposed on Count 5.

Accused No.'s 2 and 4:

On **Count 1** – accused 2 and 4 are sentenced to fifteen (15) years imprisonment;

Counts 2, 3 and 4 are taken together for the purpose of sentence and accused no.'s 2 and 4 are each sentenced to ten (10) years imprisonment;

On **Count 7** – accused no. 4 is sentenced to five (5) years imprisonment;

On **Count 8** – accused no. 2 is sentenced to one (1) year imprisonment.

It is however ordered that the sentences imposed on:

JUDGE OF THE HIGH COURT

<i>Obo Accused No. 1:</i>	<i>Mr D Erasmus</i>
<i>Obo Accused No. 2:</i>	<i>Mr J Riley</i>
<i>Obo Accused No. 3:</i>	<i>Mr K. Saziwa</i>
<i>Obo Accused No. 4:</i>	<i>Adv G. Cilliers</i>
<i>Obo Accused No. 5:</i>	<i>Adv R. Crompton</i>
<i>Instructed by</i>	<i>Legal Aid Centre, Port Elizabeth</i>