

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 37/2017

Date heard: 7 May 2019

Date delivered: 13 May 2019

THE STATE

And

LINDOKUHLE JANUARY

Accused 1

OLWETHU DLANGA

Accused 2

AWONKE YAKO

Accused 3

LONWABO MAWENI

Accused 4

JUDGMENT

Goosen J:

[1] For members of the public intending to visit the Greenacres Shopping Centre in Port Elizabeth the morning of 29 July 2016 no doubt began as any other day.

Apart from the rainy conditions there was no reason to suppose that the day would not be like any other. For Mr *Monde Goduka* and for the *Goduka* family the day however would be fatal and tragic. For Mr *George*, now deceased, he would find himself in the midst of gunfire, desperately trying to avoid the theft of his motor vehicle. For Mrs *Slabbert*, her trip to Cell C to have her telephone repaired would see her robbed of her motor vehicle at gunpoint and leave her severely traumatised. For the staff of Fischer's Jewellers their workday would begin with what they most feared but had at least prepared for, a gang of armed robbers in the store.

[2] I do not write this introductory passage for mere dramatic effect. It is to highlight the stark and terrible reality that this case brings to the fore. Before me today are four men, three of them under the age of 25 years. They have been convicted of very serious offences. The three young men are first time offenders. What they did on that fateful day will regrettably shape the rest of their lives.

[3] Seated in the public gallery are the relatives and friends of the deceased. They too are marked by the events of that day and, no doubt, hope that the punishment meted out will give them a sense that justice has been served.

[4] The task of deciding upon an appropriate, just and fair sentence is one of, if not the most difficult task undertaken by a court. The reason is not hard to discern. The punishment must fit the crime i.e. it must be appropriate to and commensurate with the crime. For this reason, careful attention is to be paid to the nature of the crime, the circumstances of its commission and its effect, both specific and generic. It must, therefore, take cognisance of the personal circumstances of the accused, her/his role in the commission of the offence and his/her attitude to the crime. Finally,

the particular punishment must serve the public interest. It must, so far as is reasonably possible, be able to achieve the objects of punishment. These include the object of deterrence of future criminal conduct; the object of retribution and that of rehabilitation of the offender. All of these competing interests must be balanced to achieve a fair and just sentence that recognises the humanity and dignity of both victim and perpetrator.

[5] In this case, several of the offences for which the accused have been convicted carry prescribed minimum sentences. In respect of counts 1 and 6 (robbery with aggravating circumstances) a minimum sentence of 15 years imprisonment is prescribed. Count 5 (the murder charge) carries a prescribed sentence of life imprisonment. Counts 7 and 9 (the unlawful possession of a semi-automatic firearm) have a prescribed sentence of 15 years.

[6] The statutorily prescribed sentences are discretionary inasmuch as the sentencing court may impose a sentence other than that prescribed if it is satisfied that substantial and compelling circumstances are present warranting a departure. (See **S v Malgas**¹; **S v Dodo**²; **S v Vilakazi**³.)

[7] A court will not, however, deviate from the prescribed sentences for flimsy or insubstantial reasons. This means that it must on reasonable and justifiable grounds exercise its discretion to depart.

[8] In determining whether substantial and compelling circumstances are present the court takes into account all of the so-called traditional mitigating factors. Although

¹ 2001 (1) SACR 469 (SCA)

² 2001 (3) SA 382 (CC)

³ 2009 (1) SACR 552 (SCA)

the court is not concerned with establishing whether extraordinary circumstances exist, it must be satisfied that the mitigation gives rise to a substantial reason to depart from the prescribed sentence.

[9] In giving consideration to these factors the court is called upon to give due weight to the sentencing policy as determined by the legislature. The court must, however, consider the proportionality of the prescribed sentence in relation to the crime, the criminal and the interests of the society (See **S v Vilakazi**⁴).

[10] It should also be noted that the court also has discretion to impose a sentence in excess of the minimum prescribed. A court will do so in circumstances where the presence of severely aggravating circumstances are established. (See in this regard **Mdlongwa v S**⁵ ; cf also **S v Khoza**⁶.)

[11] None of the accused presented testimony in relation to sentence. However, pre-sentence probation officers' reports were compiled in respect of accused 1, 2 and 3. These were handed in and received in evidence as exhibits "SSS", "TTT" and "UUU". A victim impact assessment report, which dealt with the impact of the murder of Mr *Goduka* upon the *Goduka* family, was admitted as exhibit "RRR".

[12] I shall where necessary refer to particular aspects covered by these reports. It is, however, unnecessary to summarise or recount the content of each of these reports, each of which I have taken into consideration.

⁴ (*supra*) par [14]-[15]

⁵ (99/10) [2010] ZASCA 82; 2010 (2) SACR 419 (SCA) (31 May 2010)

⁶ 2010 (2) SACR 2017 (SCA) at par [89]

[13] It is appropriate to deal with the nature, seriousness and effect of the crimes before turning to the mitigating factors said to be present. There can be little doubt that the robbery committed at Fischer's falls within the category of the more serious manifestations of the crime. It was a carefully planned and executed robbery, as the brief description of events herein and the findings made in the main judgment make clear.

[14] The accused armed themselves with loaded firearms and other equipment. As is evident from the video footage the shopping mall is patrolled by a number of security personnel. The accused were plainly aware of this. Their scouting of the mall before executing the robbery makes this clear. The firearms were used to threaten the staff and security inside Fischer's and to subdue customers. In making their escape members of the public were also threatened.

[15] The evidence establishes brazen conduct during normal business hours when it can be expected that many shoppers and other persons would be present. The robbers proceeded with calculated determination to carry out the robbery. The existence of security measures taken to deter such criminal conduct proved to be of little avail. No doubt because the accused were armed and prepared to use their arms. The callous and wanton disregard for the safety and lives of innocent members of the public is startling. So too is the determination to secure their getaway. In this regard, rather than submit to police officers pursuing them the accused persisted. Shots were fired. An innocent bystander was shot and killed and further separate crimes are committed. These, in my view, are all seriously aggravating features.

[16] The murder of Mr *Goduka* is chillingly captured on the video footage. The images show accused 1 rapidly approaching the vehicle the deceased is seated in. Almost immediately a shot is fired. There is no attempt to dispossess him of his vehicle nor any of his personal belongings. Instead, the accused flee from the scene on foot.

[17] The evidence points to no discernable reason for the shooting of Mr *Goduka*. None has been given by the accused. His death, it appears, was a cold-blooded and senseless act performed by accused 1, as noted in the main judgment, in execution of a direct intention to kill. It is an egregious crime.

[18] Mr *Goduka's* death has left his family deeply traumatized. It is apparent that his widow has borne the loss with great difficulty. His son cannot even bring himself to talk about the trauma. These are not wounds that will not heal speedily, if ever. The family has lost a loving and caring husband, father and grandfather, for no reason than that he went about his business as an ordinary citizen would in an open and democratic society.

[19] It is not only the *Goduka* family that has suffered, albeit that their loss is possibly the gravest. Mr *George*, now deceased, must have feared for his life as he resisted the hijacking of his vehicle. His vehicle was severely damaged. He was caught in the cross-fire of a shoot-out between the robbers and the police. Mrs *Slabbert* was robbed of her vehicle at gunpoint. Her personal belongings were taken and shots were fired at the robbers fleeing in her motor vehicle. There are also the staff of *Fischer's*, for whom this was the second armed robbery and the customers and members of the public who were threatened with firearms during the course of the robbery.

[20] Accused 1, 2 and 3 were 22, 20 and 20 years old respectively at the time of the commission of the offence⁷. In respect of all three of the accused, it was argued that their youthfulness is to be regarded as an important mitigating factor. The argument was that this factor, when considered in conjunction with the lack of previous convictions, ought to be accepted as constituting substantial and compelling circumstances. I shall deal more fully hereunder with the question regarding substantial and compelling circumstances and the personal circumstances of the accused. Before doing so it is necessary to say something about youthfulness as a mitigating factor.

[21] Youthfulness as it impacts the commission of an offence has always generally been regarded as a mitigating factor. The rationale for doing so lies therein that the younger an offender is the more likely it will be that his/her judgment is effected by immaturity; by impulsiveness; by susceptibility to suggestion or peer pressure. These are frailties which occur or are to be found at a stage when the young person is still developing an independent and mature character.

[22] Youthfulness in character for these, and many related reasons, is then generally considered to be relevant to moral blameworthiness. Hence it will serve to mitigate punishment to a level appropriate having regard to the age of the accused.

[23] Our law recognizes that persons of a certain age and below are to be considered as children. Given the constitutional requirement of the paramountcy of a child's best interests, the criminal law deals with children in a very particular way.

⁷ Mrs Swanepoel pointed out that there is some confusion regarding the age and identity book details of accused 1 since different ages and dates of birth are given. Nothing significant turns on this. For present purposes it is to be accepted that he was 22 years of age as at the date of commission of the offences.

The provisions of the ***Child Justice Act***⁸ regulate criminal matters where the accused is a child (i.e. under the age of 18). Although all persons aged 18 and older are to be treated as an adult, their ages in relation to the defining age remains an important consideration.

[24] In such circumstances, reliance upon the youthfulness of the adult offender requires that the court consider facts which suggest or point to actual or to be inferred immaturity in the assessment of the conduct of the accused.

[25] In **S v Matyityi**⁹ Ponnann JA had the following to say about youthfulness:

"[14] Turning to the respondent's age: what exactly about the respondent's age tipped the scales in his favour, was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness', without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness.

⁸ Act No, 75 of 2008

⁹ 2011 (1) SACR 40 (SCA) at par 14

The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor." Dealing with the facts of that case Ponnan JA said: "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. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did." (Emphasis added)

[26] The same applies here. The only evidence which could support an argument for immaturity is that reflected in the pre-sentence reports. The accused themselves did not testify. The probation report in regard to accused 1 reflects a positive and well-balanced upbringing of the accused. Although his father died in a motor vehicle accident when the accused was very young, he was brought up in a caring and loving family environment. The report states that:

"5.6 Information received indicates that the accused was born in Hofmeyer but grew up in Port Elizabeth. He was raised by his grandparents whom according to the accused ensured that they instil positive values upon them as children. It was further

reported that the accused grew up in a religious family where Christian values were endorsed.

- 5.7 With regard to his upbringing, the accused reported that he has pleasant memories about his childhood. The accused highlighted learnings that he received from his grandparents about responsibility and discipline. The accused reminisced events at home when one of the children misbehave and they would end up all being punished unless the responsible person confesses to the wrong doing. According to the accused, his grandparents also taught them unity as they treated all of them equally.”

[27] Accused 1 completed grade 9 successfully. He left school in grade 10 during his second attempt. He is unmarried and has no children. He is unemployed and is financially dependent upon his family. The probation officer reports that his development stage is that of a young adult, although he has not achieved financial independence. There is nothing in the report which suggests that the accused is emotionally, intellectually or psychologically immature. There is also no evidence which might suggest that the accused’s lack of maturity played any role in reducing his moral blameworthiness in relation to the offences committed.

[28] The same is true in respect of the probation reports regarding accused 2 and 3. Accused 2 was provided with a stable family home environment notwithstanding that his father and mother separated when he was young. His father played no role in his upbringing. The family struggled financially and survived on social assistance grants. He was able to progress to grade 9 but left school in grade 10 because of

financial constraints. He was able to secure casual odd jobs by which to contribute to the household. The report records that:

"9.6 The accused grew up in a secure and strict family environment.

His mother and maternal family were always protective and wanted the best for their children.

9.7 The accused shares positive interpersonal relationships with his mother and maternal family in general. The accused is able to communicate openly with them, and when faced with challenges he did not hesitate to share his fears and troubles with them."

[29] Accused 3 was raised by his mother and maternal aunt. His father and mother separated before the accused was born. The report records the following:

"5.5 The accused reported that he had a normal childhood. He mentioned that he could not recall any negative experiences that could have impacted his development. He reported that whilst growing up he attended church with his grandmother although he subsequently lost interest and stopped attending church services. He stated that his household was governed by rules and curfew times. The accused indicated that his mother tried her best to discipline him.

5.6 According to the accused, things took a turn in his life when he started smoking dagga. He reported that his behaviour started to change bit by bit. He mentioned that he neglected his duties at home. The accused's mother reported that the accused started displaying behavioural challenges at school and she mentioned

that she was often called to school meetings to inform her about the accused's behaviour. She mentioned that the accused bunked school and eventually stopped attending school altogether.

- 5.7 According to the accused's mother, she motivated the accused to change his way and at times shouted or instilled corporal punishment. She mentioned that sometimes the accused retaliated. The accused reported that both his mother and sister disciplined him however he indicated that his behaviour worsened instead."

[30] It appears elsewhere in the report that the accused, whilst attending Thubelihle High School in grade 8, secured a bursary from the Mzingisi Foundation School of Excellence for soccer. He was able to enrol at Ithembelihle Comprehensive School in grade 9 where tuition, uniform, stationery and meals were paid for. He, however, dropped out of school in grade 10. It appears it was then that he commenced smoking dagga. According to the accused, this led him to make poor choices. He has, however, been able to stop smoking dagga in the period before his arrest.

[31] As indicated above the youthfulness of the accused does not, on the basis of acceptable evidence point to immaturity. On the contrary, the conduct of each of these young men during the commission of these offences points to careful and calculated action on their part in the commission of the offences. There is, in my view, no basis to find that immaturity played any role in explanation of their involvement.

[32] The accused each maintain their innocence in relation to the offences. Based upon this they take no responsibility for the commission of the offences or the ensuing consequences.

[33] It was argued on behalf of each of accused 1, 2 and 3 that substantial and compelling circumstances are to be found in their youthfulness and lack of previous convictions viewed cumulatively in the light of their personal circumstances.

[34] As is evident from the personal circumstances of these accused, set out above, they enjoyed relatively stable family environments. It is true that they did not have the benefit of a father figure in their formative years and that their socio-economic circumstances were poor. This is a circumstance which all too frequently is observed in the cases that come before this court. No doubt it plays a role in the disintegration of family units and even communities, but there is no necessary causal nexus between these circumstances and the choice of criminal conduct which serves as a factor reducing the moral blameworthiness of individuals.

[35] I shall accept, however, that these circumstances, not of their making, are to be considered as generally mitigating. I am unable to find however that these factors, weighed cumulatively, constitute substantial and compelling circumstances which would warrant, on that basis, a departure from the prescribed minimum sentences which apply. The mitigating features to be found in the accused's personal circumstances pale into insignificance when regard is had to the nature and seriousness of the crimes they have committed. The seriously aggravating nature of their conduct suggests that far from being young and immature these young men are callous and uncaring. In the case of accused 1, in particular, his conduct suggests that he is, in fact, a danger to society.

[36] Before dealing with the broader question of proportionality which this court is required to consider in relation to the sentences it imposes, it is necessary to deal briefly with the circumstances of accused 4.

[37] He is 43 years old. He has previous convictions which date back over several years. In 1994, he was convicted of theft. In that same year, he was convicted of housebreaking with intent to steal and theft. In 1995, 1996 and 1997 he was again convicted of theft. In 2003 he was convicted of robbery and offences in terms of the ***Arms and Ammunitions Act***¹⁰. He was sentenced to 18 years imprisonment. Accused 4, in the light of this latter conviction is to be dealt with as a repeat offender.

[38] Accused 4's personal circumstances, as placed on record by Mr Saziwa, are the following. He is an unmarried father of a daughter aged 22 years and a son, aged 3 years. He matriculated in 2007 and has since acquired an N6 qualification in Business Management, Marketing Management and Financial Management at the time of his arrest. He admitted during his evidence at trial that he earned an income from selling drugs. There is nothing in accused 4's personal circumstances which would qualify as substantial and compelling circumstances.

[39] This brings me to consideration of the appropriateness of the prescribed sentences. I deal firstly with the sentence of life imprisonment in respect of count 5. A sentence of life imprisonment is the most severe sentence that a court may impose. It is for this reason to be reserved for the most serious or egregious offences. Its imposition suggests that there is little or no prospect that the accused can be rehabilitated or that the accused poses a danger to society and that, in the

¹⁰ Act No, 75 of 1969

interests of the safety of the community, the accused should be incarcerated, in effect, for the rest of his natural life.

[40] The starting point is that the sentence has been given the imprimatur of an appropriate sentence for certain categories of crimes. Due weight must be given to this policy determination made by the legislature. The court must, however, consider whether it is, in the circumstances of the case, a proportionate sentence. If found to be disproportionate then there are substantial grounds justifying a departure. It was noted in **S v Mhlakaza and Another**¹¹:

“The object of sentencing is not to satisfy public opinion but to serve the public interest. (Compare Ashworth & Hough 'Sentencing and the Climate of Opinion' [1996] Crim LR at 776; S v Mafu 1992 (2) SACR 494 (A) at 496g-j.) A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public. In this context the approach expressed in S v Makwanyane and Another 1995 (2) SACR 1 (CC) at 38-9, paras 87-9 (per Chaskalson P) applies mutatis mutandis: public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public.”

¹¹ 1997 (1) SACR 515 (SCA) at 518 e-g

[41] The proportionality analysis involves, in each instance, the careful balancing exercise referred to above. In this case, the killing of Mr *Goduka* was a senseless and gratuitous act which, on the available evidence, could not have advanced the objective of the group of robbers. Accused 1 acted with direct intention to kill. Although it was found that each of the accused had the requisite *mens rea* in respect of the murder the form of *mens rea* differed from that of accused 1. Accused 2, 3 and 4 played no direct role in the murder. For this reason and for the purpose of considering the proportionality of the sentence ordained, I shall accept that their moral blameworthiness is somewhat reduced.

[42] In **S v Langeni**¹² it was held that:

“[25] In determining the appropriate sentence the totality of the appellant's conduct and the consequences thereof must be considered. The concerns of society must be evaluated against the facts of the appellant's conduct. This would include the number of crimes committed, the nature of the crimes, whether they were planned or premeditated, the degree of violence and attitude of the perpetrator, the period over which they were committed, the nature of the weapons used and injuries and any other harm inflicted, whether the victims posed a threat to the appellant, and what the long-term impact on them was, as a result of the crimes. Guidance can certainly be found in other cases, but each case has to be decided on its own facts, taking into account the overall needs of the society and the circumstances of the accused.”

¹² 2012 (1) SACR 413 (ECG) at par 25

[43] When I consider the nature of the crime for which accused 1 has been convicted in count 5 I am unable to find that the ordained sentence is disproportionate. I come to this conclusion notwithstanding his age and personal circumstances. I am accordingly of the view that no substantial and compelling circumstances exist which warrant a departure from the prescribed sentence.

[44] In the case of accused 2, 3 and 4 that sentence would, in my view, be disproportionate having regard to the role they played. Nevertheless, a very lengthy sentence will be appropriate.

[45] I now turn to the proportionality of the sentences prescribed for counts 1, 6, 7 and 9. In my view, the prescribed sentence in respect of count 1 (i.e. 15 years) does not adequately mark the seriousness of the offence nor the brazen conduct of the accused. This, in my view, is an instance where this court ought to impose a sentence in excess of that prescribed. In S v Jaxa¹³Plasket J said:

"Society has a legitimate interest in seeing that those who devastate the lives of people through the use of violence, and who use violence to steal from others are appropriately punished and that the punishment imposed reflects societal censure and an appropriate measure of retribution."

[46] Armed robberies where businesses are the targets are prevalent not only in this court's jurisdiction but throughout the country. Despite the use of more and more sophisticated security measures business premises continue to be targeted by

¹³ Unreported EC 10/2009 par 10 cited in S v Langeni (*supra*) at par 27

criminal gangs. In this instance the business targeted was located in a mall frequented by large numbers of the public enjoying all of the myriad facilities offered in such centres. The robbery was executed in the face of high levels of security and despite the attendant risk of innocent persons being harmed.

[47] In the case of the other prescribed sentence little need be said. They too, in my view, are both appropriate and proportionate when regard is had to the overall circumstances and the nature of the events as a whole.

[48] That leaves for consideration the question of the cumulative effect of the sentences to be imposed. Two aspects require consideration. The first is whether the sentences to be imposed for certain of the offences should not be served concurrently because of the close interrelationship between the offences. The second is the proportionality of the sentences cumulatively considered.

[49] In relation to the first question, it was argued by defence counsel that all of the separate offences in effect formed part of a single enterprise and that, for this reason, the sentences ought to run concurrently.

[50] The accepted evidence establishes that the accused went to the Greenacres Mall on the day in question to execute a prior plan to rob Fischer's Jewellers. A vehicle was secured to transport them there and to serve as a getaway vehicle. It is apparent that the getaway vehicle changed position slightly whilst the four accused and *Mantana* were in the mall executing the robbery. It is also apparent that the five robbers fled to the getaway vehicle but that it had been abandoned.

[51] Given these facts, it seems to me appropriate to regard the offences committed in the execution of the robbery up to this stage as part of a single course of events. Accordingly, it will be appropriate that the sentences to be imposed upon the relevant accused in respect of the robbery, the attempted murder and possession of the firearms and ammunition be served concurrently. This will also ameliorate the cumulative effect of thereof.

[52] However, as was quite properly argued by Ms *Swanepoel*, the attempted robbery of Mr *George* (count 3) and the robbery of Mrs *Slabbert* (count 6) ought to be viewed in a different light. Once the accused failed in their attempted getaway as planned and while being pursued by the police they were then faced with a choice. They could have surrendered. Yet, they did not. They immediately acted in concert to attempt to rob Mr *George* whilst shots were being fired between their group and the police. Still later accused 1, 2 and 4 executed the robbery of Mrs *Slabbert*. To regard all of these actions as one single continuous criminal act for purposes of sentence would ignore not only the distinct nature of the crimes but also the several separate instances of volition which underlined the intention to commit the further criminal conduct. In my view the sentences to be imposed ought not, for this reason, to be served wholly concurrently. It will, however, be appropriate to order that a portion of these sentences be served concurrently with the other sentences imposed in order to mitigate the cumulative effect and to ensure that it is proportionate to the crimes.

[53] In respect of each of the offences a period of direct imprisonment is appropriate. Accused 4 has been additionally convicted on an alternative count of money laundering (count 11). In essence, this concerns the use of a stolen vehicle

for the purpose of committing the offences whilst knowing that it is stolen. In my view, the sentence imposed in this count ought to run concurrently with the sentence imposed in respect of count 1.

[54] It is necessary to remark briefly on the sentence to be imposed in respect of the unlawful possession of a firearm (Accused 1 and 2 only). For the reasons already advanced there are no substantial and compelling circumstances present. Whilst sentences of the order prescribed may be regarded, in cases of possession simpliciter, as severe, it cannot be so in instances such as the present. In this instance, the possession served the function of equipping the accused with the means to commit robbery without any substantial subterfuge. The accused came armed and were decidedly dangerous, using the possession of semi-automatic weapons to strike fear and to subdue. Moreover to overcome any resistance by superior force and violence where necessary. The weapons and ammunition they possessed were tools of their trade. In my view, these circumstances warrant the sanction imposed by law.

[55] Finally, a word should be said about two aspects addressed by counsel in submission on mitigation. The first concerns the question of remorse and rehabilitation. As already stated none of the accused accepted any responsibility for their conduct. In the probation reports, it is recorded that accused 1, 2 and 3 maintain their innocence persisting in their denial of any involvement. This is of course against the overwhelming evidence. Nevertheless, they are entitled to maintain their innocence. That is their right. The fact that they do not express remorse cannot serve to negative any mitigation nor as an aggravating factor. The persistence in a claim to innocence does, however, carry a consequence. The

obvious consequence is that there can be no acknowledgement of individual or collective responsibility for the criminal conduct and its consequences. In the absence of responsibility and genuine contrition rehabilitation is unlikely.

[56] As Ponnann JA remarked in Matyityi (*supra*) at par [13]:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look.”

[57] This passage reflects also the intersection between responsibility, remorse and rehabilitation. Although these concepts may not be absolutely co-terminus, there can be no doubt that the prospect of rehabilitation can more readily be inferred when a criminal takes responsibility for the conduct resulting in his/her conviction.

[58] It is so that the age of accused 1, 2 and 3 suggest, at least notionally, that there must be such a prospect of one day returning to the bosom of society committed never to offend again. There is however no evidence upon which it may

be found that this is very likely, to such extent that it can meaningfully reduce the period of incarceration otherwise required.

[59] Finally, there is the question of mercy. The argument advanced particularly on behalf of accused 1, 2 and 3 was that the court should in its general discretion impose a sentence or sentences which are tinged with mercy. This is what a court does in the ordinary course. It is not an overarching discretionary discount applied to a sentence. It is a factor which animates what the court regards, taking all of the circumstances into account, to be a just, fair and reasonable sentence which meets its objects.

[60] In the result the accused are sentenced as follows:

Accused 1

- Count 1: Robbery with aggravating circumstances – 20 years imprisonment;
- Count 2: Attempted murder – 10 years imprisonment;
- Count 3: Attempted robbery with aggravating circumstances – 8 years imprisonment;
- Count 5: Murder – life imprisonment ;
- Count 6: Robbery with aggravating circumstances – 15 years imprisonment;
- Count 7: Unlawful possession of a firearm – 15 years imprisonment;
- Count 8: Unlawful possession of ammunition – 3 years imprisonment

It is ordered that the sentences in counts 1, 2, 7 and 8 shall run concurrently.

It is further ordered that 3 years of the sentence on count 3 and 10 years of the sentence on count 6 shall run concurrently with the sentence on count 1.

In terms of s 39(2)(A)(i) of Act 111 of 1998 the determinate sentences imposed shall run concurrently with the sentence imposed on count 5.

Accused 2

Count 1: Robbery with aggravating circumstances – 20 years imprisonment;

Count 2: Attempted murder – 10 years imprisonment;

Count 3: Attempted robbery with aggravating circumstances – 8 years imprisonment;

Count 5: Murder – 25 years imprisonment;

Count 6: Robbery with aggravating circumstances – 15 years imprisonment;

Count 9: Unlawful possession of a firearm – 15 years imprisonment;

Count 10: Unlawful possession of ammunition – 3 years imprisonment

It is ordered that the sentences in counts 1, 2, 5, 9 and 10 shall run concurrently.

It is further ordered that 3 years of the sentence on count 3 and 10 years of the sentence on count 6 shall run concurrently with the sentence imposed on count 5.

Accused 3

Count 1: Robbery with aggravating circumstances – 20 years imprisonment;

Count 2: Attempted murder – 10 years imprisonment;

Count 3: Attempted robbery with aggravating circumstances – 8 years imprisonment;

Count 5: Murder – 25 years imprisonment;

It is ordered that the sentences on counts 1, 2 and 5 shall run concurrently.

It is further ordered that 3 years of the sentence on count 3 be served concurrently with the sentence on count 5.

Accused 4

Count 1: Robbery with aggravating circumstances – 20 years imprisonment;

Count 2: Attempted murder – 10 years imprisonment;

Count 3: Attempted robbery with aggravating circumstances – 8 years imprisonment;

Count 5: Murder – 25 years imprisonment;

Count 6: Robbery with aggravating circumstances – 15 years imprisonment;

Count 11: First alternative to count 11 – Money laundering – 5 years imprisonment.

It is ordered that the sentences on counts 1, 2, 5 and 11 run concurrently.

It is further ordered that 3 years of the sentence on count 3 and 10 years of the sentence on count 6 shall run concurrently with the sentence on count 5.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

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