

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS 8/2023

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 02 November 2023

WJ du Plessis

In the matter between:

THE STATE

and

KHUMALO, NQOBILE

FIRST ACCUSED

NCUBE, WELLINGTON

SECOND ACCUSED

JUDGMENT ON SENTENCE

DU PLESSIS AJ

- [1] A church is a sanctity for people to find refuge from the troubles of life, a place to belong, a community. Likewise, a public street in a suburb, especially around a spaza shop, is a place for community, a public place, a place where people meet. A home is a sanctuary. The death of Pastor Unathi at his church during the robbery, the random shooting of Mr Ngwenya who were on his way to buy bread with his three friends, and the shooting of Mr Leketi as he returned home from an

early dinner, has caused trauma and heartbreak, and robs society of spaces of refuge. The unlawful possession of firearms is a common thread through this trauma.

- [2] Mr Khumalo and Mr Ncube, you were found guilty of various offences. Mr Khumalo was found guilty on one count of murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997, 3 counts of robbery with aggravating circumstances, read with s 51(2) of the Criminal Law Amendment Act 105 of 1997; two counts of attempted murder; one count of discharge of a firearm in a built-up area of any public place; three counts of unlawful possession of a firearm; 4 counts of unlawful possession of ammunition.
- [3] Mr Ncube was found guilty on one count of murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997, three counts of robbery with aggravating circumstances, read with s 51(2) of the Criminal Law Amendment Act 105 of 1997; two counts of attempted murder; two counts of unlawful possession of a firearm; and two counts of unlawful possession of ammunition.
- [4] What is thus left is to determine a suitable sentence, a most arduous task of weighing up contradictory factors and interests, all the while aware of the impact this will have on all the parties involved, Mr Khumalo and Mr Ncube included.
- [5] While the court exercises discretion when imposing a sentence, this discretion is sometimes limited by the legislature's prescripts and judgments in higher courts.
- [6] Some of the basic principles that are important in sentencing were stated in *Rabie v S*¹ stated that

A judicial officer should not approach punishment in a spirit of anger because, being a human being, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society, which his task and the objects of punishment demands from him. Nor should he strive for or after severity, or on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach the task with a humane and compassionate understanding of human frailties and the pressure of society, which contributes to criminality.

¹ 1975 (4) SA 855 (A) at 862G.

Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

- [7] These elements were set out in *Zinn v S*,² and require me to weigh up your personal circumstance, with the crime's severity and the community's interest when determining punishment. All the while, I do so being aware of the various purposes of punishment: retribution, deterrence, incapacitation and rehabilitation.
- [8] The first limitation on the court's discretion is the minimum sentence regime. In charging the accused, the State invoked the provisions of s 51(1) of the Criminal Law Amendment Act³ read with Part 1 of Schedule 2 in respect of the murder, which prescribes a minimum sentence of life imprisonment when the death of the victim was caused while the accused commit robbery with aggravating circumstances.⁴ They also relied on s 51(2) of the Act for the robbery, which prescribes a minimum sentence of 15 years for robbery with aggravating circumstances (including involving the taking of a motor vehicle).⁵ Both of you were informed of this.
- [9] The court must impose the prescribed minimum sentence unless there are substantial and compelling reasons to justify a departure from it.⁶ The legal position is set out in the well-known case of *S v Malgas*,⁷ where the court made it clear that the sentence should be imposed unless the cumulative effect of all the mitigating factors that the court can take into account when imposing the sentence would justify the court in departing from the prescribed sentence in a particular case. In *S v Dodo*⁸ the court emphasised the proportionality between the offence and the period of imprisonment by stating:

² 1969 (2) SA 537 (A).

³ 105 of 1997.

⁴ Part I Schedule 2 (c)(ii).

⁵ Part II Schedule 2.

⁶ S 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.

⁷ [2001] 3 All SA 220 (A).

⁸ [2001] ZACC 16.

[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

- [10] With this background, the court will now evaluate the personal circumstances of the offenders, their crimes, and the interest of society in determining whether there are reasons to depart from the minimum sentence provisions and to determine the punishment for the other crimes.

The personal circumstances of Mr Khumalo and Mr Ncube

- [11] Mr Khumalo, I know you are 33, married, and have three children aged 8, 3 and 2. You left school fairly early in the third form. Before you were arrested, you fixed electronic appliances for about R1800 per day. You maintained your family with this income.
- [12] Mr Ncube, you are 37 years old, married, and have a 2-year-old child. Like Mr Khumalo, you left school relatively early in grade 7. Before you were arrested, you worked as a mechanic for your brother, earning around R300 per day.
- [13] Both of you are first offenders, both maintain their minor children, and both spent over a year in prison awaiting finalisation of the matter. Other than your age, nothing indicates their chances of rehabilitation. The State argued that there is nothing special about your circumstances; in other words, nothing that is substantial and compelling to deviate from the minimum sentence.
- [14] Much more I do not know, other than that you are not just the crimes that you committed. You are entitled to be treated with dignity and not be reduced to your crimes. You are not a mere means to an end, meaning the punishment cannot only

be given to make sure that other do not commit the same crimes, or to satisfy the retribution that the victims might want. While that is part of the reason for punishing you, I am more concerned about the danger you pose to society and the importance of incarcerating you to ensure the safety of an already traumatised community.

The crimes

- [15] The offences of murder and attempted murder which you have been convicted for are severe, including utilising firearms to intimidate people into robbing them and assaulting them. In the instance of Mr Ngwenya, he did not resist. He and his friends were walking down the street to buy bread when they were merely in the way of armed robbers, who decided to shoot him in the face. As for the attempted murder of Mr Leketi, it involved shooting a person who was fleeing after being robbed of their cell phone. Mr Leketi did not resist. He did not endanger any lives; he was trying to find refuge from the real danger and was shot in the back. In the case of Pastor Unathi, it involved killing him as he exited his church praying while the congregants were robbed of their belongings inside the church. All these crimes were made possible by the crime of unlawful possession of arms and ammunition that seems to be too easily accessible.
- [16] We do not know who fired the shot that killed the pastor and can, for that reason, not know their thought process to determine whether there was premeditation or not.⁹ That is why you are guilty of murder through common purpose: robbing a church with firearms, knowing and accepting that there is a possibility to utilise the firearms during the robbery, and when using the firearms, that someone may be killed. It was argued on your behalf that since the pastor was shot only once, that life would be a harsh sentence in this case. This was based on *S v Khumalo*¹⁰, which stated that the punishment must fit the criminal and the crime, and justice must be done with mercy, not with a sledgehammer. I have considered this argument seriously, but I am not convinced that shooting someone only once is

⁹ *S v Ratau* 2023 (2) SACR 40 (MM).

¹⁰ 1973 3 SA 279 A.

substantial and compelling enough to depart from the minimum sentencing. In this case, the vulnerability of churchgoers and the fact that there was no evidence that the pastor resisted the robbery is rather aggravating.

The interest of society

- [17] Our Constitution emphasises the right to life and the right to human dignity. It also binds you, Mr Khumalo and Mr Ncube, and requires that you, too, respect the life of others and their human dignity. Killing someone is the most extreme form of disregarding the humanity of others. The disregard for the lives of others is not something that this court will tolerate. And while I cannot force you to respect the lives of others, I must hold you accountable for the consequences of your choices to disregard the humanity of others.
- [18] Armed robbery threatens the fabric of our society.¹¹ As stated in the beginning, a church is often the place of safety for people seeking sanctuary from the turbulence of life. Should such spiritual sanctities and communities of belonging become so unsafe that people fear going there, it will have dire consequences for us as a society. The callousness of entering such a space with firearms, robbing congregants of their belongings and not hesitating to use the firearm in the commission of the offence leading to the death of a beloved pastor and the assault of two congregants must be appropriately addressed in sentencing.
- [19] Likewise, the interest and safety of people doing everyday things like buying bread and returning home from dinner should not become a lifelong trauma of staring death in the eyes. The impact of these crimes is severe.
- [20] This was evident from the testimony of Paster Siya, who has known Pastor Unathi for over ten years through church structures from his university days. He described the pastor as the oldest of four siblings, who took care of some of the siblings. His death shocked many people. He started the church in Cosmo City with members who loved him. His death was a horrible loss for people in the ministry, with many

¹¹ *S v Langeni* [2011] ZAECHC 42.

people left with unanswered questions and still mourning the loss. This was also evident when Ms Mpofu testified, visibly still shaken by the murder.

[21] During the trial, Mr Leketi testified that he had to move out of his house, as he could not return to it after the trauma. At the same time, his family lived in fear for his life. Mr Ngwenya still suffers from the trauma and is fearful of everything, including fireworks, having to relive the near ending of his life every time he walks past the shop. The prevalence of extreme violent crime in our society is concerning, and the trauma impact on the victims and their loved ones is immense.

[22] It is furthermore in the interest of society to condemn the unlawful use of firearms.

Conclusion

[23] I have contemplated all these factors the last few days, focusing on the required mercy and the need for society to be safe. It would have been easier for the court to show mercy if there was some admittance to the wrongdoing, taking responsibility for the deeds, or indications that rehabilitation is possible. That does not mean that I have abandoned the idea of mercy; it merely means that it has less influence on my decision.

[24] My decision, as stated, is influenced by the high prevalence of very violent crime in our society, which impacts significantly on the psychological well-being of our community. Human life has become worth a cell phone and a few other belongings of church congregants. In the rare occasion that wrongdoers are caught and tried, it is important to hold them accountable for their actions. Actions have consequences.

[25] I have thus considered your circumstances and could not find anything substantial and compelling that will allow me to depart from imposing the minimum sentences. The mercy that I can show is letting the sentences I am imposing run concurrently rather than cumulatively.

[26] As for the charges of wielding a firearm, the unlawful possession of an arm and the unlawful possession of ammunition, I have considered the central role this played

in committing your offences. This implies that in some instances, like robbery, possessing the firearm already plays a central role and will be considered together when imposing the sentence.

Order

[27] I, therefore, make the following order:

1. Accused 1:

- a. On count 1, 9, 13 robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997, you are sentenced to 15 years imprisonment each;
- b. On count 2 and 5, attempted murder of Constable Leketi and Mr Ngwenya, you are sentenced to 8 years each;
- c. On count 7, 11, 14 unlawful possession of an arm, and count 6, discharge of a firearm in a built-up area of any public place, all taken as one for purposes of sentencing, you are sentenced to 10 years;
- d. On count 8, 12, 15, 16 unlawful possession of ammunition, taken together for purpose of sentencing, you are sentence to 3 years.
- e. On count 10, murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997, you are sentenced to life imprisonment.
- f. The sentences in respect of all counts will run concurrently in terms of the provisions of s 280(2) of the Criminal Procedure Act 51 of 1977.
- g. You are declared unfit to possess a firearm.

2. Accused 2

- a. On count 1, 9, 13 robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997, you are sentenced to 15 years imprisonment each;

- b. On count 2 and 5, attempted murder of Constable Leketi and Mr Ngwenya, you are sentenced to 8 years each;
- c. On count 11, 14 unlawful possession of an arm, all taken as one for purposes of sentencing, you are sentenced to 10 years;
- d. On count 12, 15 unlawful possession of ammunition, taken together for sentencing, you are sentenced to 3 years.
- e. On count 10, murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997, you are sentenced to life imprisonment.
- f. The sentences in respect of all counts will run concurrently in terms of the provisions of s 280(2) of the Criminal Procedure Act 51 of 1977.
- g. You are declared unfit to possess a firearm.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the State:	Adv A de Klerk
Counsel for the accused:	Ms S Bovu
Instructed by:	Legal Aid South Africa
Date of the hearing:	24 October 2023
Date of delivery of judgment:	02 November 2023