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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 66/2017

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

THE STATE

and

NTSANE ISIAH TOGOWE

JUDGMENT ON SENTENCE

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 16 MAY 2022

[1] The accused was convicted on one count of murder read with the provisions of section 51(1) of the Criminal Law Amendment, Act 105 of 1997(the Act) and on one count of robbery with aggravating circumstances read with the provisions of section 51(2) of the Act. He stands before court today for sentencing.

[2] The facts on which the convictions are based are briefly as follows:

1) The deceased was a businessman in Bloemfontein and owned a bottle store and a tavern. On 29 March 2016 he was in the bathroom in his home unclothed.

2) The accused and two other men were seen approaching the deceased's tavern. They entered and went to D[....] M[....]1, closed his mouth with a hand and pointed her with a firearm. Thereafter they pushed her and one M[....]2 into the house where they met M[....] 3M[....]4. They proceeded to the bathroom where the accused shot the deceased twice. He died of a gunshot wound on the chest.

3) The accused and his companion proceeded to rob the deceased and his employees of money in the amount of R40 000, a gold wrist watch, a firearm and a bakkie.

4) The accused was later positively identified as one of the robbers and the person who was in possession of the firearm at the time when the deceased was shot and killed. It was also established that he was one of the people who robbed the deceased and his employees.

[3] The accused testified in mitigation of sentence and did not call any witness. When the court imposes punishment it must also have regard to the personal circumstances of the accused, the nature or seriousness of the crime as well as the interests of society. The court in *S v Rabie*¹ observed that the punishment which the court imposes should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy. With regard to his personal circumstances the evidence reveals that the accused is currently 45 years of age and unmarried. He has three children aged 9, 12 and 16. The children stay with their mother. Prior to October 2017 the elder one stayed with the accused and the others only visited over the weekends. When the mother of the children worked night duties the children stayed with him.

[4] The accused did matric at Fame College. He had a transportation business and his average income in the business was between R3 000 and R3 800 per month. Between February and March 2018 he sold his motor vehicle used in the business.

¹ 1975(4) SA 855(A).

The money was given to his wife for the maintenance of the children. He testified that his two sisters and their children were also dependent on him financially.

[5] He testified that he was remorseful. In showing his remorse he went to the grave of the deceased to ask for forgiveness and also to convey to the deceased that he was not responsible for the latter's death.

[6] The state called the son of deceased in aggravation of sentence. He is 53 years old. He is the sole survivor in the family following the passing on of his two other siblings in circumstances unrelated to this case. He has taken over the businesses of the deceased. According to him the businesses are not doing well since the deceased passed on. The income has gone down after the death of the deceased. He testified about how the death of the deceased had impacted him.

[7] The main purpose of punishment is said to be 'deterrent, preventative, reformatory and retributive'.²

[8] Counsel for the accused submitted that the personal circumstances of the accused taken cumulatively constituted substantial and compelling circumstances which warranted this court to deviate from imposing the prescribed minimum sentences. It is further submitted that the accused has shown remorse and in this regard he went to the grave of the deceased to ask for forgiveness. The state holds a different view.

[9] *S v Malgas*³ sets out how the concept of substantial and compelling circumstances must be approached. In this regard the court indicated that a court must approach the question of sentencing conscious of the fact that the minimum sentences had been ordained as the sentences which ordinarily should be imposed unless substantial and compelling circumstances were found to be present.

[10] When dealing with the issue of remorse it is apt to refer broadly to this passage in *S v Matyityi* in which the court said the following with regard the question of remorse.

² See *R v Swanepoel* 1945(AD) 444 at 455.

³ 2001(1) SACR 469.

“... Remorse is a gnawing pain of consciousness for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment 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. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia; what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”⁴

[11] The accused testified that he went to the grave of the deceased upon been released from custody on bail. He indicated that the reason that he went to the grave was to go and ask for forgiveness from the deceased and also inform him that he was not responsible for his death. The difficulty I have with the conduct of the accused is that his conduct does not demonstrate true and genuine remorse. Even if one accepts that he went to the grave of the deceased it is clear that he still did not acknowledge his wrong doing. He still denied that he was responsible for the death of the deceased. His hollow apology does not assist him. He had the opportunity to take the court into his confidence and explain what motivated him to commit these heinous offences but he chose not to grab it. It is difficult to understand how a person can claim genuine remorse and with the same breath deny any wrong doing.

[12] It is appropriate at this stage to refer to the following decisions as referred to in *S v Swart* where the court made reference to the following: In *Sv Mhlakaza and Another* 1997(1) SACR 515 (SCA) AT H519 d-e the following was said:

⁴ 200(1) SACR 40(SCA) at para 13.

“Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence...Retribution may even be decisive.”⁵

[13] The aggravating factors in this case are that the deceased was shot and killed in his own home. He was in the bathroom. He had no clothes on. It is clear from the evidence that he was unarmed. There is no evidence on record to show that he even resisted the attack. The version of both witnesses by the state is that when Ms M[....]4 screamed at the time when the accused and his companions entered the room in which she was, she only enquired what was happening. The deceased was shot in that state of nakedness. Ms M[....]1 testified as to how traumatic it was for her to see the nakedness of the deceased and had to get a blanket to cover him. She testified that she had always looked up to him as a father and it was difficult to see him lying on the floor naked.

[14] Society expects that people should not only feel safe in their homes but should actually be safe. The deceased was murdered after taking a bath in the sanctity of his home. The evidence reveal that the accused was the only one seen in possession of the firearm. He was the main person forcing Ms M[....]4 to open the safe. He was the person who actually shot the deceased. He played a greater role in the commission of these crimes.

[15] The remarks in *S v Di Blasi* set out precisely what society expects in cases of this nature. The court in that case said:

“The requirements of society demand that a premeditate, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct.”⁶

⁵ 2004(2) SACR 370 at para 11.

⁶ 1996(1) SA SACR 1 (A) at para 10f-g.

[16] It cannot be argued otherwise that the murder and robbery were premeditated and callous. In my view the murder of the deceased was totally unnecessary due to the fact that he offered no resistance and was unarmed. I hasten to add that I should not be interpreted to mean that if the deceased had offered resistance and was armed, then in that case the conduct of the accused would be less blameworthy. Far from it, I only refer to this to illustrate the vulnerability of the deceased at the time he was shot.

[17] The accused was convicted of theft on 5 March 1998. It is clear that this conviction took place more than 20 years ago. I will not take it into account in these proceedings. Much was made about the accused being responsible for the maintenance and support of his children, his siblings and his father. Nothing in my view turns on this. The accused skipped his bail in this case on October 2017. He was only apprehended in 2021. He was according to his testimony in Lesotho. He had someone in Bloemfontein using his vehicle as a taxi and from the proceeds he maintained his children. It is his testimony that he sold the motor vehicle in February 2021. There is no evidence as to how he managed to continue to maintain them after the vehicle was sold. The fathers of the sisters must maintain their children. The personal circumstances of the accused taken cumulatively do not constitute substantial and compelling circumstances.

[18] Having regard to the aggravating circumstances and weighing them against the mitigating factors, I am of the considered view that the Accused failed to establish any substantial and compelling circumstances warranting this court to deviate from imposing the prescribed minimum sentences. I accordingly make these orders and the accused is sentenced as follows:

ORDER

1. Count 1: Murder

The accused is sentenced to life imprisonment;

2. Count 2: Robbery with aggravating circumstances

The accused is sentenced to 15(fifteen) years imprisonment;

3. In terms of s103(1) of the Firearms Control Act, 60 of 2000, no order is made.

P.E. MOLITSOANE, J

On behalf of the State: Adv. Bontes

Instructed by: The Deputy Director of Public Prosecutions
BLOEMFONTEIN

On behalf of Accused: Adv. Abrahams

Instructed by: The Legal Aid of South Africa
BLOEMFONTEIN