

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: CC31/2022

Heard: 24, 25, 26, 27 & 28 October 2022

Delivered: 14 November 2022

In the matter between:

THE STATE

and

AYANDA RWEQANE

SENTENCE

MOLONY AJ:

1. The accused in this matter has been found guilty on the following charges:
 - (a) One count of attempted murder.
 - (b) One count of housebreaking with intent to commit robbery with aggravating circumstances. The aggravating circumstances relate to the use of a firearm, and a discretionary minimum sentence of 5 years imprisonment is applicable to this charge.
 - (c) Attempted robbery with aggravating circumstances. Aggravating circumstances were present in that a firearm was wielded during the commission of the attempted robbery.

(d) Murder. A discretionary minimum sentence of life imprisonment is applicable to this charge, as the death of the victim was caused during an attempt to commit the offence of robbery with aggravating circumstances, and was committed by a group of persons acting in the furtherance of a common purpose or conspiracy.

(e) Unlawful possession of a firearm. A discretionary minimum sentence of 15 years imprisonment is applicable to this charge, as the accused was in possession of a semi-automatic firearm.

(f) Unlawful possession of ammunition.

2. It is trite that when determining an appropriate sentence, the nature of the crime, the circumstances of the offender and the interests of society must be considered, and that relevant mitigating and aggravating factors must be weighed in order to determine a sentence which is proportionate under the circumstances.

3. The accused's personal circumstances, as placed on record, are the following:

(a) He is 34 years old and lives in M[...] with his mother, who is unemployed. His father passed away in 2021. The accused's brother, who had a business building houses, supports the family.

(b) The accused left school in grade 11.

(c) He is not married, and has two minor children, those being a boy who is 7 years old, and a boy who is 3 months old. Both children live with the accused's girlfriend, who is their mother. She is unemployed and receives a social grant for the children.

(d) Prior to his arrest he did odd jobs, and was working for his brother. He earned R 100 per day painting houses. He used the money to assist with supporting his children.

(e) He has been in custody since 20 August 2021 (which is a period of almost 15 months).

4. The accused has four previous convictions for robbery.
5. The first was committed in 2007, with the accused being convicted on 13 May 2009. He received a sentence of 3 years imprisonment, of which 1 year was conditionally suspended for 4 years. It is noted that he was also deemed to be unfit to possess a firearm.
6. The remaining 3 counts of robbery were committed on 20 November 2011 (which was about 2 and a half years after his first conviction for robbery), with the accused being convicted on 13 June 2013. All 3 counts were treated as one for purposes of sentence. The accused was sentenced to 15 years imprisonment, and, it is noted, declared unfit to possess a firearm.
7. Mr Coetzee placed on record that the above-mentioned 3 counts of robbery were car hijackings where a firearm was involved. The accused was, in relation to the sentence of 15 years imprisonment, released on parole on 26 April 2021. His parole period is set to expire on 2 July 2028. Mr Solani confirmed the aforementioned as correct.
8. In regard to the applicable discretionary minimum sentences, it was submitted by Mr Solani that the following mitigating factors, considered cumulatively (and in conjunction with the accused's personal circumstances), constituted substantial and compelling factors justifying the imposition of a lesser sentence:
 - (a) In regard to the murder charge, the accused was convicted on the basis of common purpose.
 - (b) It was unknown whether it was the accused or the deceased who carried the firearm used to commit the offences.
 - (c) The complainant did not ultimately suffer financial loss, as nothing was taken from his home.

(d) The complainant did not sustain any physical injuries.

9. It was submitted further that life imprisonment would be a very harsh sentence to impose.

10. It was submitted that any sentences imposed be ordered to run concurrently, as they all related to a single incident.

11. Mr Coetzee submitted the following in regard to aggravating factors:

(a) The offences involved are extremely serious.

(b) The intended victim was an elderly gentleman, living alone in an isolated area. On the probabilities he was clearly sought out and was (as it was described by Mr Coetzee) a 'soft target'. Despite this he was able to resist and fight back.

(c) It was fortuitous that the complainant was not injured, given the shots fired at him during the course of the incident. Mr Coetzee submitted that the accused should not benefit from the fact that nothing was taken, and that the complainant was not wounded or killed, as none of the aforementioned was due to the conduct of the accused, but rather due to the active resistance of the complainant.

(d) In 2009 the accused had the benefit of a relatively light sentence in regard to his first previous conviction for robbery.

(e) He was then convicted of 3 counts of robbery. He had been out on parole, in regard to his 15 year sentence of imprisonment, for approximately 4 months when he committed the offences in this matter.

(f) The accused had been given ample previous opportunity to reform himself, but had not done so. Instead he had gone to considerable effort to travel all the way to the complainant's farm, with the deceased, and had spent two days observing the goings on at the complainant's home. This was not a spur of the moment decision, but had been planned.

(g) The accused had shown no remorse at all.

12. Mr Coetzee acknowledged that the accused had been found guilty of murder on the basis of *dolus eventualis*, and had not been the one to fire the shots which killed the deceased.

13. He submitted however, that the aggravating factors far outweigh the mitigating factors, and that there were no substantial and compelling factors present. He submitted further that there was a need for society to be protected and for like-minded offenders to be deterred. He asked that judicial notice be taken of the fact that farm murders were not unheard of, especially where helpless victims were at risk.

14. He submitted that in other robbery matters where accused were convicted (and which involved the death of co-perpetrators), the sentences varied from 20 years to life imprisonment. In regard to sentences for possession of firearms, sentences ranged from 8 years to 15 years. Where accused received sentences at the lower end of the spectrum, it was under circumstances where the accused in question were first offenders.

15. In considering whether or not there are substantial and compelling circumstances present which justify the imposition of a lesser sentence, I will remain mindful of the guidance provided by the matter of *S v Malgas*¹ which included, *inter alia*, the following considerations:

(a) As a result of the enactment of Act 105 of 1997, the courts are required to approach the question of sentence conscious that particular sentences have been prescribed as those to ordinarily be imposed for the specific crimes.

(b) Specified sentences are not to be departed from for lightly, or for flimsy reasons.

¹ 2001 (2) SA 1222 (SCA).

(c) The factors which are traditionally considered to be mitigating factors remain part of the consideration process.

(d) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (that being 'substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

(e) If the sentencing court on consideration of the circumstances is satisfied that the circumstances in a matter 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.

16. I will also remain mindful of the fact that the offences in this matter occurred during the same sequence of events.

17. I have given careful consideration to the form of intention involved in regard to count 4 (that being *dolus eventualis*), and that the accused himself did not fire the shots which killed the deceased.

18. I have taken into consideration that no definitive finding was made in regard to whether it was the accused or the deceased (or both of them) who in fact wielded the relevant firearm on the day in question.

19. Having considered and weighed the relevant mitigating and aggravating factors, it is, however, clear that the aggravating factors in this matter far outweigh the mitigating factors.

20. The accused and the deceased planned their trip to the complainant's farm, choosing a vulnerable target, that being an elderly gentleman in his 80's, who resided alone on an isolated farm.

21. They observed the complainant's home and planned their attack for a time when the only employee on the premises would be at home for lunch, and the only dog on the premises would be locked away. It is completely fortuitous that, due to the complainant fighting back on the day in question (resulting in a violent gun battle), nothing was ultimately stolen, and the complainant not only survived, but sustained no serious physical injuries. Had things gone to plan the result would, in all probability, have been significantly worse for the complainant.

22. The accused thereafter made off with the firearm and fled the scene, managing to evade arrest for a further two days.

23. The accused has, furthermore, demonstrated no remorse whatsoever. He instead sought to place the entirety of the blame on his co-perpetrator, that being the deceased.

24. His previous convictions, along with the fact that he was on parole in regard to 3 convictions stemming from armed robberies when committing the offences in this matter, do not speak to any propensity towards rehabilitation.

25. Given all of the above, I am unpersuaded that the relevant mitigating factors, cumulatively considered in the context and circumstances of this matter, justify a departure from the standardised response that the Legislature has ordained. I accordingly find that no substantial and compelling circumstances exist in regard to the applicable discretionary minimum sentences.

26. Given the nature of counts 2 and 3, I am satisfied that they can be taken together for purposes of sentence. Similarly counts 5 and 6 can be taken together for purposes of sentence.

27. I accordingly impose the following sentences:

Count 1: 15 years imprisonment.

Counts 2 & 3: 10 years imprisonment.

Count 4: Life imprisonment.

Counts 5 & 6: 15 years imprisonment.

N MOLONY
JUDGE OF THE HIGH COURT (ACTING)

For the State : Mr Coetzee

For the Defence : Mr Solani