

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

Case No. CC05/2017

In the matter between:

THE STATE

And

MOELETSI LETSOHO

Accused

JUDGMENT

JOLWANA J

[1] The accused was charged with three counts being conspiracy to commit the offence of robbery (count 1), robbery with aggravating circumstances (count 2) and murder (count 3). He was acquitted in respect of count 1 and was convicted in respect of counts 2 and 3. I am now required to pass an appropriate sentence for

these two offences. Section 51 of the Criminal Law Amendment Act 105 of 1997, read with Parts I and II of Schedule 2 is applicable. The prescribed minimum sentences are 15 years imprisonment in respect of robbery and life imprisonment in respect of murder.

[2] In *S v Malgas*¹ the court explained the legal position regarding the prescribed minimum sentences as follows:

“[8] First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach the question conscious of the fact that the legislature has ordained life imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the foreseeable injustices which could result from obliging them to pass the specified sentences come what may.”

[3] The deceased who was employed as a taxi driver by Mr Dingalibala was given the vehicle on the 9 June 2016 and he was to keep it for the night as he was due to take passengers on a special trip to Ugie. However, he did not take the vehicle to his homestead but was somehow, it appears, lured into the homestead of the accused. That night the deceased was bludgeoned to death with a knob stick by the accused at the home of the accused in a bedroom that had been prepared for him to

¹ *S v Malgas* 2001 (1) SACR 469 (SCA)

sleep in. His body was later dumped in a culvert at Coldstream farm in Maclear. His vehicle was driven to Lesotho where it was sold.

[4] The deceased was found some days later wearing an underwear only and wrapped in a blanket. This, at the very least, suggests that he must have been sleeping when he was bludgeoned to death. Dr Mjamba who conducted the post-mortem examination testified that the deceased had been assaulted and sustained multiple scalp lacerations, depressed skull fractures on his forehead and at the back of his head. This resulted in brain tissue injury and intracranial bleeding all of which led to his death.

[5] It is worth noting that the deceased had no injuries on his arms at all. This is also consistent with the deceased having been possibly assaulted in his sleep. Blood was only found by the police in the bedroom in which the assault took place and nowhere else in that house. Warrant officer Mongezi Nxesi who worked at Maluti Criminal Record Centre and had been called to that crime scene testified that in one of the bedrooms in that house he found blood stains on the wall, the headboard and a pool of blood in the red blanket which he found between the mattress and the base of the bed. When he turned over the mattress he found blood on it as well. The DNA results confirmed that the blood in that room was that of the deceased.

[6] These graphic details are themselves a testimony to the brutality with which the deceased was killed. This is indeed a heinous crime committed with extreme brutality upon the deceased who evidently did not or could not defend himself. It was committed for the sole purpose of robbing the deceased of the vehicle in his possession and ensuring that the accused would not be held accountable for his crimes.

[7] Section 51(3) (a) of the Criminal Law Amendment Act 105 of 1997 provides thus:

“If any court referred to in subsections (1) and (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.”

[8] As already mentioned hereinbefore, section 51(1) and (2) of the Criminal Law Amendment Act decrees that minimum sentences of life imprisonment and 15 years imprisonment respectively are applicable in this matter. The question to which I now turn is whether there are any substantial and compelling circumstances justifying a departure from these sentences.

[9] It was submitted on behalf of the accused that the state has proved no previous convictions against him. The accused is now 59 years old as he was born on 17 July 1960. His wife died in 2015. He lived in his homestead with his son Kekeletso who has since died. He has been in prison since his arrest on 28 June 2016 for a period of just over three years and three months. He has since developed asthma and sometimes he coughs and vomits blood. However, no evidence of him having been diagnosed or treated for this sickness was given. On the basis of these personal circumstances of the accused it was submitted that I should depart from the prescribed minimum sentences.

[10] In *Director of Public Prosecutions, KwaZulu Natal v P*² the traditional approach to sentencing was described in the following terms:

² *Director of Public Prosecutions, KwaZulu Natal v P* 2006 (1) SACR 243(SCA) at 250

“[13] The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the triad consisting of the crime, the offender and the interests of society. In the assessment of an appropriate sentence, the court is required to have regard to the main purpose of punishment, namely the deterrent, preventive, reformative and the retributive aspects thereof. To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender.”

[11] Mr Lumkile Sitshinga was called by the state to testify in aggravation of sentence. He testified that he is the younger brother of the deceased. The deceased was married with two children. The first born is Qhwane, a 22 years old young man and a girl named N[...] who will turn 18 years old in December 2019. Qhwane could not further his education after passing matric due to financial difficulties after the death of his father. N[...] is now doing matric for which she is financially assisted by him to the extent necessary. He testified that this is difficult because the death of the deceased meant that he must take over some of his late brother's responsibilities in taking care of his children in addition to his own responsibilities.

[12] At the time of his death the deceased stayed at their home with their mother. His mother developed diabetes and high blood pressure after the death of her son, the deceased. The deceased's wife died in 2015. Some of what becomes clear from the evidence of Mr Lumkile Sitshinga is that the deceased was a family man who took care of his wife and their two children. During the main trial Mr Dingalibala had testified that the deceased was employed by him as a taxi driver. He therefore earned an honest living to support his family. In fact on the night he was murdered he was going to take passengers on a special trip to Ugie. He was therefore a good citizen who did not resort to crime but did the least he could do to provide for his family.

[13] The deceased's children were orphaned in a merciless killing that was motivated by greed. Their lives changed forever. Qhwane, the eldest of the two children is now sitting at home unemployed when his chances of being employed could have been vastly improved if he had a tertiary qualification in these difficult economic times. His little sister N[...] is similarly facing an uncertain or even a bleak future as the last of their parents, their father was killed resulting in them being orphaned. When their father was killed their mother had died only a year before in 2015. Therefore, they had to bury their parents in two successive years being 2015 and 2016. It goes without saying that the community of Ramofole must be horrified at the deceased's senseless killing.

[14] The accused maintained his innocence throughout the trial and gave a version that suggested that it must be Mr Mbobo, the 204 witness, not him who killed the deceased. His version during the trial which was put to state witnesses and which he confirmed during his evidence in chief was that Mr Mbobo had arrived at his homestead where the deceased had had nose bleeding after he fell on a verandah. He had further testified that the deceased had no injuries when he left with Mr Mbobo who said he was taking him to hospital in the deceased's vehicle. All of these were lies calculated to ensure that it was Mr Mbobo who would be held accountable for the deceased's death while he knew that he alone had killed the deceased in his homestead. He cunningly involved Mr Mbobo in this murder by getting him to assist him in dumping the body of the deceased at Coldstream farm in Maclear.

[15] It was submitted by his legal representative that he was remorseful. However, he elected not to open his heart to the court and express verbally and directly his remorse about the murder of the deceased. If anything this confirms his lack of

remorse which was evident throughout the trial. Having been in prison for a period of three years during which he had opportunity to reflect on his actions he came to court and lied about what happened and made every effort to ensure that he did not pay for his crimes.

[16] When confronted with the evidence of the state which exposed his lies he succumbed under cross examination as he was no longer able to sustain his lies. When he was confronted with the improbability of his version under cross-examination he changed his mind and admitted that he murdered the deceased by assaulting him with a knob stick in that bedroom. This, in my view, was not out of remorse or any sense of regret for his actions. He had nowhere to hide as his lies had been exposed by the state witnesses.

[17] In *S v Matyityi*³ Ponnann JA made some apt observations on remorse. He said:

“[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 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 a 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.”

³ *S v Matyityi* 2011 (1) SACR 40 (SCA)

[18] The accused did not give evidence in mitigation of sentence. All the accused's personal circumstances referred to above were part of the submissions made on his behalf by his legal representative on the basis of which I was urged to find that there were substantial and compelling circumstances justifying a departure from the prescribed minimum sentences. There is thus no factual or evidential basis on which the accused can be said to be remorseful. He never showed any remorse during the trial, maintaining his innocence which he sought to sustain through sheer craftiness until the whole façade of innocence and ignorance about these crimes unravelled under relentless cross examination by state counsel Mr Pomolo.

[19] It was also submitted by Mr Sakwe who appeared for the accused that the accused's wife died in 2015. It is indeed unfortunate that anybody should lose their loved ones. However, the very following year of the passing on of his wife at a time when in most societies and cultures the accused could still be mourning the death of his wife, he had already moved on and planned these crimes. He executed this murder with merciless gruesomeness at the very home which he had shared with his wife who had passed on only a year earlier. It did not end there, he also got his son to assist him in loading the body of the deceased in the vehicle of the deceased and went on to implicate Mr Mbobo by getting him involved in disposing of and dumping the body of the deceased far away from his homestead which was the murder scene.

[20] In a normal family one would have thought that even his son Kekeletso was still slowly coming to terms with the death of his mother who died a year earlier. It is unclear whether Kekeletso was part of the conspiracy but if the accused's version is to be accepted, Kekeletso was not involved in the conspiracy and the murder of the deceased or in any of the crimes. He was only asked by the accused's to assist him in loading the deceased in the vehicle. Whether or not Kekeletso was forced to load

the deceased's body by the accused or he willingly did so is unclear as all these details are only known to the accused who is the only living person who was at the crime scene when the crime was committed.

[21] The full details of the planning, the gruesome killing, and the final inhumane dumping of the body of the deceased will never be known. The details regarding the sale of the vehicle of Mr Dingalibala in Lesotho which was in possession of the deceased will also never be known as some of this information is known only to the accused. The other criminals involved in the criminal sale and purchase of Mr Dingalibala's vehicle are walking freely, roaming the streets with a real potential to commit further crimes. This is so because the accused elected not to tell the full truth of what actually happened. It is not without significance that the accused and other people involved in his criminal conduct committed cross border crimes between South Africa and its neighbouring country, Lesotho.

[22] In the recent past this country was engulfed in a wave of criminality targeting foreign nationals who came to this country to eke out a living for their families. Some have had to leave this country with their small businesses having been looted and some burnt to ashes in what has become known as xenophobic violence. It is the criminality such as the one the accused was involved in that contributed to that scary situation. The person or persons to whom the vehicle was sold in Lesotho and how it got registered in that country are part of the facts that remain unknown.

[23] The well-known principles of our law on sentencing which must always guide a sentencing court at arriving at an appropriate sentence that fits the accused, the crime and the society were explained succinctly in *S v SMM*⁴ as follows:

“[13] ...It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involved a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put in *S v Rabie*:

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

[24] As indicated before, submissions were made regarding the accused’s personal circumstances. In my view none of them are substantial and compelling. In *Malgas* the court warned against paying lip service to what the legislature has ordained to be an appropriate sentence. In this country crime is rampant and criminals are running amok with impunity inducing a general sense of fear in society. The departure from the imposition of minimum sentence can only be justified if substantial and compelling circumstances are found to exist and not an individual presiding officer’s preference for a lesser sentence. In *Malgas* the court said that an attempt at arriving

⁴ *S v SMM* 2013 (2) SACR 292 (SCA)

at standardised minimum sentences for the specified serious crimes with the requisite residual discretion to depart from them being allowed is the norm.

[25] In *S v Vilakazi*⁵ the court made the following salutary observations on the personal circumstances of an accused:

“[58] ...In cases of serious crime the personal circumstances of the offender, by themselves will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be ... But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment ...”

[26] In this case these crimes were motivated by greed and executed with extreme brutality. There was neither remorse nor the gushing out of the expression of regret for the crimes beyond the submissions made on behalf of the accused by his legal representative. There was nothing said or done by the accused or on his behalf to suggest that he could be rehabilitated. The fact that he is a first offender at the age of 59 years must actually count against him as he should have known better than succumb to greed. His very first offences are so brutal and were pre planned and executed with a clear plan to conceal the truth.

[27] The accused has been in custody since his arrest on 28 June 2016 for just over three years and three months. However, it does not follow that an accused must always and in all circumstances get a discount for the pre-sentence incarceration period. This, like all sentencing decisions remains part of the residual discretion of

⁵ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 574

the court in my view. I am aware of the Supreme Court of Appeal's decision in *Dlamini v S*⁶ in which Cachalia JA expressed himself as follows:

“[41] This brings me to the 10 months Mr Dlamini spent in custody before he was sentenced, which as I have mentioned, neither the magistrate nor the high court took into account in deciding the appropriate sentence. It is trite that the period an accused is held in custody while awaiting completion of his trial should be taken into account when deciding on the appropriate sentence. This is done by making the period of imprisonment actually imposed shorter than it would otherwise have been. However, courts have not spoken clearly on how to calculate this period. One approach has been to do an exact subtraction; another is to deduct the period actually spent; yet another is to treat the time spent in custody, at the very least, as equivalent to the time spent served without remission; and a fourth, more adventurous method is to treat the period as equivalent to about twice the length, because of the harsher conditions that awaiting-trial prisoners are subjected to in comparison with the conditions of sentenced prisoners.”

[28] I do not understand the court in *Dlamini* to have said that the pre-sentence incarceration period must always be deducted from the sentence imposed. I understand the court to have said that this period must be taken into account, and an appropriate sentence imposed after due consideration of that period. To say that the pre-sentence period of imprisonment must always be deducted in all cases under all circumstances would ouster the discretion of the court in the delicate balancing act that is involved in sentencing decisions.

[29] The most glaring example of the difficulties that would arise is the fact that the legislature has not spoken on the issue. Secondly it would be difficult to impose life imprisonment that is consonant with a compulsory deduction for a pre-sentence imprisonment. Thirdly, there is a statutorily ordained process of bail applications in which it is judicially determined whether it is in the interests of justice or not that

⁶ *Dlamini v S* 2012 (2) SACR 1 (SCA)

despite the presumption of innocence an accused person must remain in custody until his or her trial is finalized. In some cases the accused person, having been refused bail, is eventually acquitted, how should a court that acquits him deal with the obvious fact that he had been in prison and has now been acquitted. Must it automatically determine an appropriate compensation or as it is, that is left to the civil proceedings which may or may not be instituted. If so does that adequately serve the overarching interests of justice which courts are all about?

[30] On the facts of this matter I consider it appropriate to reduce the period of imprisonment in respect of count 2 to 11 years and 7 months in consideration of his pre-sentence incarceration. Besides the fact that the accused has been in prison for over three years, the vehicle was recovered and Mr Dingalibala's insurance claim was settled. In my view these facts must ameliorate the sentence imposed all things considered.

[31] In the result the accused is sentenced as follows:

1. The accused is sentenced to 11 years and 7 months imprisonment in respect of count 2.
2. The accused is sentenced to life imprisonment in respect of count 3.
3. The sentence in respect of count 2 shall run concurrently with the sentence in respect of count 3.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: L POMOLO

Instructed by: NDPP

MTHATHA

Counsel for the Accused: M SAKWE

Instructed by: LEGAL AID BOARD

MTHATHA

Matter heard on: 16 August 2019

Judgment handed down on: 19 September 2019