

ON RESUMPTION ON 29 JUNE 2012

APPEARANCES AS BEFORE

SENTENCE

ON 29.06.2012

COMBRINK J The twenty four accused have been convicted on one count of murder; nine counts of attempted murder; three counts of armed robbery involving aggravating circumstances, within the meaning of that phrase as contained in section 1 of the Criminal Procedure Act; one count of attempted armed robbery; four counts of motor vehicle theft; and, in respect of 13 of the accused, who shall be mentioned later, a further four counts framed under the Firearms Control Act relating to the prohibited possession of three automatic assault rifles and ammunition thereto. A relatively minor charge relates to accused 14, who was convicted of negligently handling his licensed firearm.

I pause to mention that we have three languages that require at times interpretation. I should appreciate it if you were to take a seat, as happened in the past, next or in the vicinity of accused 11, for whose benefit you are interpreting into Portuguese. The other two languages, I should appreciate also if the interpreters were just available in proximity of those accused. It appears that all of them understand Zulu to a large extent. Where they have any problems they shall indicate to the relevant official interpreter the need for further explanation. Would you do that? Otherwise this sentence is going to take until next week to deliver.

The facts and circumstances within the relevant offences were committed have been fully canvassed in the judgment of the Full Court and should be read in conjunction herewith. However, to provide contextual

perspective to the reasons for sentence currently being dealt with, an epigrammatical summary of the salient facts only will be furnished.

The accused were part of a larger group of criminals who, acting in concert, collaboratively planned to rob two cash in transit motor vehicles belonging to Fidelity Cash Management Services (referred to hereafter as "Fidelity"), the purpose being to rob those vehicles of the cash collected from Fidelity clients in Northern Zululand and were being conveyed back for banking purposes. That occurred along the N2 national road in Northern Natal.

Pursuant thereto, and in execution of the common objective, the accused, and a number of their accomplices, attacked the two cash vehicles during the early evening of 2 October 2006. The attacks occurred at two carefully selected locations along the N2 and took place simultaneously some 30 kilometres apart.

In the first instance the attack occurred at the vicinity of the Charters Creek turn-off and involved a HiAce panel van with a substantial amount of cash being conveyed in it. That became the subject matter of count 9 in these proceedings. 30 kilometres further south along the N2 and at Penicuik an armoured Dyna truck carrying cash was capsized and an attempt was made to rob it. However, the robbers could not gain access to the cash and departed thereafter. That became the subject matter of count 6 in this case.

In both these instances the attacks on the Fidelity vehicles were meticulously planned and executed with military-like precision. Each attack lasted no longer than 20 minutes or so. The same *modus operandi* were used at both scenes.

A 7 series BMW was used to forcibly collide into the Fidelity vehicle at high speed causing such to lose control and to capsize on the side of the road. Thereafter the robbers, armed with automatic assault rifles, descended upon the stricken vehicles firing shots into the air, it appears. That was not a direct attack upon the occupants of the vehicle, but clearly designed *in terrorem* to subdue the already disoriented crew.

However, at the Penicuik scene, where the attempted robbery occurred, a high-powered rifle was used to fire into the bin of the Dyna truck in order to persuade the guard, who was inside it, to open the door to the robbers. On the evidence that shot penetrated the bin and fragments of the bullet were recovered from within.

Contemporaneously other members of the gangs formed what has colloquially been referred to as stopper groups. Those consisted of armed groups who literally closed down for traffic the N2 immediately north and immediately south of each scene of attack. Those groups literally stopped the public travelling on the N2 at gunpoint.

It appears, and I presume that is human nature, that the first group of vehicles entering upon the scene were stopped at gunpoint. The remainder, however, stopped behind those that had come to a stop on the N2 presuming that an accident had occurred further on causing a blockage in the road.

It appears from the evidence that the robbers were possessed of detailed intelligence as to the movements and times and the nature of the vehicle carrying the cash in each instance. The knowledge of the vehicles to be attacked is also manifest in the fact that at each scene the robbers carried

with them implements suited to force open the vehicles in order to gain access to the cash being conveyed in it. At Charter's, where the panel van was the victim, the roof was smashed open with the use of a heavy axe and a hammer. Those implements were left on the scene. In the case of the armoured Dyna truck the hammer and axe were plainly unsuited for the job and a heavy motorised angle grinder, equipped with a specialised tungsten disc, was used in order to try to open the bin of the vehicle. It is clear that those implements were available suited to each vehicle encountered on the two different scenes. The angle grinder was, later that night, upon arrest, recovered from a taxi at the time being driven by accused 24.

It appears from the evidence as a whole that these two intended robberies were planned very carefully and long in advance, at least a month before the event. The robbery at Charter's and the attempted robbery at Penicuik served as the focal point for other offences which occurred relating to it and in its vicinities. The other charges which centred around those two locations were counts 1 and 4. Those counts deal with the theft of motor vehicles which were stolen for the purpose used during the robbery by the robbers and subsequently discarded on and in the vicinity of the scenes of crime. Counts 7 and 8 relate to the murder of the driver and crew of the Dyna truck. In the case of counts 10 and 11, these related to the attempted murder of the crew of the HiAce, being the driver and his co-member.

In both the attempted murders directed at the crew of the respective vehicles the offence of attempted murder is founded upon the risk of life to which the crew were put when the vehicle was forcibly capsized. The requisite intent to murder manifests in the form of *dolus eventualis*. In

respect of Ncwane, the crew member in the Dyna truck, who was ensconced in the bin thereof, a further act of attempted murder occurred when the shot was fired with the high-powered rifle which penetrated the skin of the bin and entered into the area where Ncwane found himself. Whilst, strictly analysed, it might be said that those actions would have given rise to two attempts on the life of Ncwane, however, in the circumstances, and properly, we believe only a single charge of attempted murder was lodged against the accused.

Counts 12, 13 and 14 relate to the attempted murder of three policemen who chanced upon the scene at Charter's in a marked police vehicle engaged in ordinary patrol. The driver, one Biyela, of the police vehicle believed that they had joined a queue of vehicles awaiting the clearing up of an accident that must have occurred further along the N2. However, the moment they arrived at the scene a vehicle pulled up immediately behind it blocking it in behind a Clover dairy truck. The occupants of the vehicle blocking the police vehicle in erupted from the vehicle and came up to the police vehicle and, at point-blank range, opened fire upon them with automatic firearms. That vehicle was literally shot to pieces. The groupings of the bullet holes in the vehicle were at a level and in positions which indicate, without any doubt, that the intention was to attack the policemen in it directly with intent to kill.

Count 21 relates to the murder of a security guard in the employ Maxim Security, one Gumede, at Penicuik. It appears that immediately after the abortive robbery of the Dyna truck was over, and whilst the vehicles used in the robbery were being dumped in a nearby plantation, Gumede and two of his security guard companions in a bakkie chanced upon the robbers as

they left the vehicles. In that instance too the robbers, without hesitation or warning, immediately opened fire with automatic rifles upon the occupants of the security vehicle. Again that vehicle was shot to ribbons.

The deceased died and his two companions escaped. As in the case of the three policemen at Charter's, the two remaining security guards at Penicuik were very fortunate to escape with their lives. Their survival was not due to any grace extended by the robbers firing at them. The attempts on the lives of the two security guards who accompanied the deceased became the subject matter of counts 22 and 23.

Count 15 relates to the armed robbery of a certain Msweli of his motor vehicle ignition keys. He was another member of the travelling public who was stopped by members of a stopper group, a firearm was put into his face and his keys forcibly removed from the vehicle.

Count 18 relates to the armed robbery of one Masangu of his motor vehicle in circumstances colloquially described as hi-jacking. This took place at gunpoint.

Counts 17 to 29 inclusive relate to the prohibited and unlawful possession of three automatic assault rifles.

INTERPRETER Count 17 inclusive, M'Lord?

COMBRINK No, count 27 to 29 both inclusive, in other words, 27, 28 and 29. Count 30 relates to the unlawful possession of the ammunition to the assault rifles. Count 31, this charge is preferred against accused 14 only and relates to his negligent handling of his licensed pistol.

The imposition of sentence is usually the domain of the trial Judge. After all, he presided over the trial and during the course thereof became

acquainted with every conceivable fact and nuance relevant to the commission of the offences and the nature thereof. Accordingly the trial Judge is best placed to decide what an appropriate sentence would be in respect of each offence. However, in the instance the murder and three armed robberies mentioned fall within the purview of section 51(1) of the Criminal Law Amendment Act, Act 195 of 1997. This measure prescribes that the Courts shall, in the case of murder, answering to certain requisites, and the robberies in question here, shall be visited with certain prescribed minimum sentences.

Relevant to these proceedings section 51(1) provides that, notwithstanding any other law, the Court shall, if it has convicted a person of the offence of murder, sentence such person to prison for life where the murder was planned or premeditated or where the death of the victim was caused in committing or attempting to commit or after having committed or attempting to commit robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act or where the murder was committed by a person, a group of persons or syndicate acting in execution of a common purpose or a conspiracy. Similarly, and in terms of section 51(2) of the Criminal Law Amendment Act, where a Court convicts a person robbery involving aggravating circumstances or involving the taking of a motor vehicle, hijacking, in other words, it shall impose a sentence of no less than 15 years in the case of a first offender, 20 years in respect of a second offender and 25 in respect of a third or further offender.

The convictions under count 21 in respect of the murder of security guard Gumede and counts 9, 15 and 18 in respect of the robbery with

aggravating circumstances, the facts fall squarely within the provisions of section 51(1) and (2) of the Criminal Law Amendment Act. As a consequence those convictions are visited, in the case of the murder, with imprisonment for life, and, in the case of the robberies in question, a minimum of 15 years' imprisonment.

At this point I should indicate that for the purposes of sentencing I have decided to treat all the accused as first offenders.

The only way in which this stark result can be avoided is if I were to find present, in the circumstances of each case, substantial and compelling circumstances which would justify the imposition of a lesser sentence than that prescribed in each instance. That relaxation is provided for in sub-section (3) of section 51. That provides that if a Court is satisfied that substantial and compelling circumstances exist which would justify the imposition of a lesser sentence than the prescribed sentence whereupon the Court shall enter those circumstances on the record and proceed to impose a discretionary sentence.

When this legislation first entered upon our statute books serious doubt existed as to its constitutionality. That doubt was premised upon the concept that the measures place a serious fetter upon the discretion of the Court, which is normally untrammelled, as to the exercise of its power to impose a sentence which it decides is suitable, bearing in mind that when it comes to sentencing the power to punish is peculiar to the trial Court, more so, considering that an independent judiciary is one of the weight-bearing pillars of our Constitution.

However, in a number of cases, including *S v Dodo* 2001 (1) SACR

594 (CC) the Constitutional Court, per ACKERMANN J, held that section 51(1) of the relevant Act was not *ultra vires* the Constitution. The rationale of that conclusion is persuasive and is founded upon the following. The separation of functions between the judicial, legislative and executory powers was not absolute and that the legislature had as much an interest in a proper sentence being imposed by the Courts in certain cases as the Courts itself will have. The result is that this legislation settled the benchmarks, as far as sentencing goes, in the case relevant to the instance of the murder of Gumede and the three robberies in question. Those counts fall squarely within the province of section 51(1) and 51(2).

Applied to the instance I am obliged by law to impose life imprisonment upon the accused in respect of the murder of the security guard Gumede and in the case of the three robberies involving aggravating circumstances a minimum of 15 years' imprisonment for each. The only way in which that result can be averted is if I were to find present, in the circumstances relating to each of the offences in question, substantial and compelling circumstances are apparent would justify a lesser sentence by the Court. That is the question I shall next turn to.

The Act in question is silent as to what circumstances would constitute substantial and compelling reasons not to impose the prescribed sentences. At the beginning that led to some uncertainty as to the approach a Court should take to the question of substantial and compelling circumstances and a number of tests were mooted by various Courts to find a way in which such circumstances could readily be isolated and noted. That uncertainty was laid to rest by the decision of the Supreme Court of Appeal

in a seminal judgment reported in *S v Malgas* 2001 (1) SACR 469 (SCA). In that decision it was pointed out that section 51 of the Criminal Law Amendment Act emphasised the public's need for effective penal sanctions against the escalation and prevalence of serious crimes singled out in that measure, including murder and robbery involving aggravating circumstances.

In considering whether substantial and compelling circumstances exist in the facts before it the Court must keep in mind that the sentence prescribed by section 51 must be regarded as ordinarily and objectively appropriate. Differently expressed, the Court must regard the prescribed sentences as the norm for punishment applicable in respect of the relevant crimes. It was stressed that the Court should guard against allowing its personal distaste for such legislative generalisation to justify an indulgent approach to the characterisation of circumstances as substantial and compelling. It was as if the Judge who delivered that judgment had me in mind as I have, before now, expressed my distaste for the what I consider invasive legislation when it comes to the trial Court's prerogative to impose sentence. However, that is the law and I am bound by it.

Turning to the question of the existence of substantial and compelling circumstances in the instance. More often than not substantial and compelling circumstances are immediately evident in the facts surrounding the commission of an offence.

A striking example thereof is to be found in this case. I refer in particular to the conviction of robbery involving aggravating circumstances of Msweli of his motor vehicle transmission keys at gunpoint. That is the subject matter of count 15. As mentioned, Msweli was travelling along the

N2 when he was stopped by members of a stopper group at the scene of crime at Penicuik where the Dyna was in the process of being robbed. A gun was put to his head and his motor keys were forcibly removed from his possession and taken.

When one asks oneself what an appropriate punishment would be for that robbery it is immediately apparent that the prescribed norm of 15 years would be glaringly inappropriate, due regard being had for the moral blameworthiness of his assailant or the reprehensibility of that conduct. It differs, for example, so dramatically in fact from the facts and circumstances surrounding the cash in transit robbery of the HiAce at Charters Creek. Whilst the conduct of his assailant was reprehensible, it certainly does not deserve punishment of 15 years' imprisonment.

By comparison to Msweli's robbery, the cash in transit robbery at Charter's and the hijacking of Masangu's vehicle at Penicuik, and also the murder of the security guard at Penicuik, do not, on the face of it, admit of substantial and compelling circumstances. Yet I have also found, in my experience over the years, that substantial and compelling reasons may exist in the facts of such cases also, you just have to find them, but you cannot find what there is not. Accordingly a careful and detailed analysis of the facts in question, relevant to the question of substantial and compelling circumstances, is required.

The approach to be taken by the Courts in such cases, in considering whether such circumstances are present, although not immediately evident, is meticulously outlined by the Honourable Mr Justice Marais in *Malgas* in paragraph 25 of that report. There MARAIS JA

suggested the following:

- A. Section 51 has limited but not eliminated the Court's discretion in imposing sentence in respect of the sentences to Part 1 in Schedule 2 or the imprisonment of other specified offences listed in other parts of Schedule 2.
- B. Courts are to approach the imposition of sentence conscious that the legislature has ordained life imprisonment or particular period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there are and can be seen to be truly convincing reasons for a different response the crimes in question are therefore required to elicit a severe, standardised and consistent response from the Courts.
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisonment for first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between the co-offenders are to be

excluded.

- E. The legislature has deliberately left it to the Courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all considerations are to be ignored.
- F. All factors, other than those set out in D above, traditionally taken into account in sentencing, whether or not they diminish moral guilt, thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
- G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response to that the legislature has ordained.
- H. In applying the statutory provisions it is inappropriately constricting to use the concepts developed in dealing with the appeals against sentence as the sole criterion.
- I. If the sentencing Court is, on considering of the

circumstances of a particular case, satisfied that they 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 the sentence it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the legislature has provided.”

So much for the quotation involved.

Without doing injustice to the care and meticulous detail outlined in the approach to be taken by MARAIS JA, the following exercise I believe best accommodates the essence of that approach. Recognising the benchmarks for the sentences prescribed by section 51 of the Criminal Law Amendment Act have been set in respect of the offences relevant here, I should determine what an appropriate punishment would be if I were to apply the settled legal principles usually applied by the Courts to determine sentence unfettered by statutory prescripts. I should then compare that notional sentence with the sentence prescribed by section 51. If the comparison reveals that a discrepancy between the two sentences exists indicating that it would be unjust to impose the prescribed punishment then substantial and compelling circumstances will reside in that fact. That would free my hands

to impose a sentence which I consider just.

The Court will take the short adjournment.

COURT ADJOURNED

ON RESUMPTION

SENTENCE (continued)

COMBRINK J I have dealt with the legal precepts that apply in respect of the compulsory sentences. I now have to indicate why the provisions of section 51(1) of the Criminal Law Amendment Act apply to the conviction of murder and why section 51(2) of that Act applies to the three counts of robbery involving aggravating circumstances.

The schedule to section 51(1) in the case of murder specify four grounds upon which the sentence of life imprisonment is attracted by that offence. Those facts are referred to as the jurisdictional facts which bring the provision into play. In the instance the death of the victim Gumede was caused by the accused having attempted to commit robbery involving aggravating circumstances of the cash in transit vehicle, the Dyna truck, at Penicuik. The second fact is that the offence was committed by a group of persons or syndicate in the exercise or furtherance of a common purpose. And finally that the murder was pre-planned in the sense that the trial Court held that it was foreseen that a situation might arise during the robberies which would necessitate, in the view of the attackers, that the firearms might be used to deadly effect. Whilst recognising that as a possibility the accused and their accomplices continued, in reckless disregard of the eventuation of that possibility, with their plans to rob. Given the circumstances in which

Gumede was murdered such possibility did in fact eventuate. The requisite intent for the murder is identified as *dolus eventualis*.

Accordingly, three of the four factors mentioned in the schedule to section 51(1) of the Act results in the prescribed sentence of imprisonment for life. As a consequence I am enjoined by law to send the accused to prison for life, unless, of course, I am able to find that substantial and compelling reasons exist not to do so in terms of the relief clause contained in section 51(3) of the Act.

Turning to the three armed robberies in question involving the cash in transit robbery at Charter's, the robbery of the car keys in respect of Msweli and the robbery or hijacking of the vehicle in respect of Masangu at Penicuik. In that case the jurisdictional facts are to be found in the aggravating circumstances in which the robbery at Charter's occurred as well as the robbery of Msweli's keys at Penicuik and finally the robbery of Masangu's vehicle at gunpoint. Both those matters have been specified as resulting in the attraction of the minimum of 15 years in respect of first offenders, as I have found the accused are.

Returning to the approach that I outlined above relating to the possible existence of substantial and compelling circumstances in respect of the murder and the robberies in question, I proceed as a first step to determine what the appropriate sentence would have been, but for the provisions of section 51 of the Act, that I would have imposed as adequate in the circumstances for the murder and the robberies in question.

In order that a sentence be a just one the Court usually takes into account three principles which it has to balance the one against the other and

weighed jointly. What is required is that the reprehensibility of the crime, the personal circumstances of the accused and the interest of the people of this country which they have in an effective penal system. These three considerations are also referred to as the triad of considerations usually applicable in the determination of sentence.

I proceed with the first of those considerations. The nature of the offences and the moral blameworthiness of the accused in committing them cannot be determined in isolation. Accordingly one cannot look at the circumstances in which Gumede died or the circumstances in which each robbery in question occurred. The offences in question should be viewed in context with all the offences of which the accused have been convicted in these proceedings and the conduct of the accused constituting such offences.

Relevant to the nature of the offences in question the following needs to be stressed again. As already mentioned, the attacks on the two cash in transit vehicles on the N2 were planned well in advance and were carried out with chilling efficiency by a small army of criminals armed to the teeth with a variety of armaments. The use of the firearms were clearly designed to overcome any resistance which stood between them and the cash which was their common aim. The attacks were brazen and took place on the N2, one of the busiest national roads in this province, with full appreciation of the risk to property and life. Any traveller who came upon the scenes of crime at the time was held up at gunpoint and where risk of capture was perceived summarily fired upon with deadly intent.

An example of the latter intent is to be found in the death of the deceased and the attempts made upon the lives of the two security guard companions

of the deceased. So too the three policemen on patrol who chanced upon the scene of the robbery at Charter's. The automatic rifle fire directed at those two vehicles was not aimed at scaring, but to kill the occupants. Gumede was not killed by accident, but deliberately shot to death because the security guards were perceived to pose a threat to the robbers at the time. In the evidence placed before us it was disclosed that in reality there was no threat to the attackers, but the deceased still died in a hail of bullets. The bakkie in which the deceased and his companions were travelling were literally riddled with bullet holes.

The same happened to the police vehicle at Charter's. There too it appears that the robbers perceived the police vehicle's presence and the police in it as a threat to them. That the policemen were directly fired upon is evidenced by the bullet holes in the vehicle itself. They were all centred at a height and in the area where the policemen were seated. In fact, Biyela, the constable who was the driver of the vehicle at the time, found two bullet holes in the seat which he had sat against moments before.

The attack on the police vehicle and the security vehicle stands in sharp contrast to the stopping by the robbers of Msweli. He manifestly posed no threat and was not fired upon at all. So too in the case of Masangu when his motor vehicle was taken at gunpoint. He posed no threat and no violence was offered to him, at least by a firearm. He was simply taken out of the vehicle and shots were fired to scare him off, which occurred. As he fled the scene he believed that he was being fired upon, but the evidence made it plain that he was not, those shots were there simply *in terrorem*.

It seems to me that the reprehensibility of these offences and the moral

blameworthiness of the accused who perpetrated them stands unabated. As mentioned, in weighing up a proper sentence those facts have to be taken into account.

I turn to the personal circumstances of the accused. This consideration is no less important than the other elements which determine an appropriate punishment. In weighing up the personal circumstances of the accused one should be on the lookout for indications of possible causes which could have moved the individuals to turn to such calculated and violent crimes as those under consideration here. Also, in examination of the personal circumstances of the accused, one looks for indications of contrition or remorse which might impact upon the rehabilitability of the person to be sentenced. Reform is one of the aims of a proper sentence.

Some of the accused testified and placed their personal circumstances before the Court whilst others remained silent. In the case of accused 13 his personal circumstances were placed before the Court by agreement. Those who testified revealed nothing of particular note, but to a man showed that they had been gainfully employed or conducted successful private business enterprises before the offences were committed. They all testified to the fact that their income was devoted to maintaining their families and extended families and that a long term of imprisonment would compromise those obligations. Notwithstanding the silence of the accused who did not testify, I accept in their favour that they too were self-reliant and economically active with support obligations.

The evidence did not reveal that their circumstances forced the accused into committing these offences. What became manifest in the evidence of the

accused who testified and the conduct of those who remained silent is that nowhere is a modicum of remorse shown. In fact, each of the accused who testified specifically stated that they do not have remorse because each one maintained that he is and remains innocent.

In any event, remorse is usually visible by conduct rather than words. Nothing in the conduct of the accused after their arrest to today manifests by conduct any remorse. In fact, some of the testimony that the State placed before me during the sentence proceedings reveals the opposite. Notwithstanding that the accused were all furnished with sufficient means and time during the court proceedings at court to make use of cell-phones provided for that purpose to communicate with family, friends or associates, yet on their persons, and, despite warnings not to bring in cell-phones into the cells, on the persons of some of the accused cell-phones were found. They were informed right from the outset that cell-phones were not permitted into the cells. Over the period of their incarceration 53 cell-phones were recovered which had been unlawfully obtained and used in the cells. The smuggling in of cell-phones into the cells of necessity required that some corrupt policeman or warder assist in obtaining the cell-phones in the cells. That conduct, it seems to me, is conduct which manifests a continued disregard for legal principles.

The evidence showed that in the case of some of the accused communications through unlawfully held cell-phones were made with a State witness, who, shortly after the cell-phonic contact had been made, refused to testify. In another instance some of the accused, through the use of unlawfully possessed cell-phones, made contact with one of the official court

interpreters on a number of occasions which resulted in that interpreter being taken off the trial.

I do not single out those accused aforementioned as I am of the view that the moral blameworthiness of the accused in the commission of the offences of which they had been convicted in this case is uniform and no differentiation in sentences to follow should be made between them. Counsel for the State and the accused are in agreement with this, namely that no distinction ought to be drawn between any of the accused as individuals.

A fair assessment of the accused as individuals appears to indicate that they were not indigent and that they took part in the crimes out of need. In fact, it was out of greed. Greed is the basest of motives. What is particularly disquieting is that the accused had ganged together in a meticulously planned and ruthlessly executed criminal enterprise resulting in a multiplicity of offences of which they have been convicted during the course of this trial. In the final analysis very little weight, it seems to me, can be attached to the individual personal circumstances of the accused. Those are outweighed by the nature of the offence and the interest which society have in a proper penal system.

That brings me to interests which the community have in the proper and effective administration of our penal justice system. Judges are not employed by the Government, but by the people of this country, and, as such, are the custodians of the civilised norms and values which apply in an ordered and peaceful society. In a country beset by a scourge of violent and organised crimes, which appears to be increasing exponentially, the people look to the Courts to suitably punish criminals whose crimes corrupt, disrupt

and sunder the community in which we live. If the Courts were to fail in that regard the people will increasingly take the law into their hands, which in turn would bring us to the brink of anarchy.

Statistics placed before me show that the murder of Gumede on 2 October 2006 was one of 5 000 murders that occurred during 2006 in the province of KwaZulu-Natal. The three robberies involving aggravating circumstances relevant to these sentence proceedings were among the 26 206 such offences which occurred in this province during the same time. The nine attempted murders, which are under sentence in these proceedings, are a fraction of 5 245 such offences during the same period in this province. With regard to the four counts of motor vehicle theft, it should be borne in mind that during that period, 2006, 37 motor vehicles were stolen every day in this province. During the year 2006 14 079 motor vehicles were stolen in this province. We are far removed from a peaceful and crime-free community.

When the heinousness and the reprehensibility of the offences of which the accused have been convicted in this case is considered in conjunction with the personal circumstances of the accused and the interests of the community I am driven to the conclusion that the sentence I would have imposed, but for the provisions of section 51, in respect of the murder and the robberies in question would have not been so disparate from the prescribed sentence that to impose the latter would constitute an injustice to the accused.

In the result I am unable to find that substantial and compelling circumstances exist which would entitle me to impose a sentence other than that prescribed in section 51(1) of the Criminal Law Amendment Act. As a

consequence I hold that the compulsory sentence for the murder of Gumede, count 1, as prescribed by section 51(1) applies.

In the case of the robberies involving aggravating circumstances relating to Msweli at Penicuik, Masangu at Penicuik and the cash in transit robbery at Charter's I wish to deal in the first place with the robbery involving the ignition keys of Msweli.

As mentioned earlier, the presence of substantial and compelling circumstances as contemplated by sub-section (3) of section 51 of the Criminal Law Amendment Act are immediately apparent. The actions of the accused, whoever they might be that were involved, was to put a gun to his head, Msweli's head, and force him to submit whilst his motor vehicle keys were removed. Technically that is robbery involving aggravating circumstances. However, the moral reprehensibility of that conduct is not even remotely comparable to the moral reprehensibility that is associated with the other two robberies. The only aggravating factor in that robbery is the fact that Msweli was a member of the public exercising his right to free travel on the N2 when he was stopped at gunpoint and his keys removed. However, that conduct falls far short from what I believe the legislature had in mind in enacting section 51(2) of that Act. Accordingly my hands are free to impose a sentence which is just in law.

In deciding whether substantial and compelling circumstances exist not to impose the minimum sentences in respect of the cash in transit robbery at Charter's, count 9, and the robbery of Masangu's motor vehicle at Penicuik, count 18, both involving aggravating circumstances, the same considerations apply as applied in the case of the murder of Gumede. When a balance is

struck between the reprehensibility of the conduct in those robberies, the personal circumstances of the accused and the interests of society I am of the view that I would not be able to impose a sentence which is so markedly different from the one prescribed by law that it would entitle me to find substantial and compelling reasons not to allow the law to take its course.

What remains is to determine the punishment to be imposed in respect of the convictions for the offences of attempted murder, the attempted robbery involving aggravating circumstances of the Dyna truck at Penicuik, the robbery of Msweli's ignition keys, the theft of the motor vehicles and the unlawful and prohibited possession of the automatic rifles and ammunition thereto, and finally also the sentence to be imposed upon accused 14 with regard to the negligent way in which he had handled his licensed firearm.

That will take some time individually and I understand that the accused might need some time to talk to their families and I require an opportunity to take a break also, so I shall take another short adjournment, the period can be discussed with counsel in chambers. The Court will rise.

COURT ADJOURNED

ON RESUMPTIONSENTENCE (continued)

COMBRINK J I have thus far referred briefly to the *optus reus* that constituted some of the offences. What remains is to refer to the actions which constituted the offences in respect of the remaining counts.

I have referred to count 6, that is the attempted robbery with aggravating circumstances of the Dyna truck at Penicuik. As mentioned earlier, that was one of the scenes around which certain of the other related offences centred. As far as that is concerned it will be recalled that that attack was one of the two that occurred on the N2. What needs to be highlighted is the way in which it developed.

The Dyna truck was a comparatively massive vehicle. The 7 Series BMW that was used to disenable it had to do so at great speed and the impact resulting, which caused the Dyna to spin across the road and capsize, was a tremendous one. The BMW was damaged to such an extent that it was undriveable thereafter and was jettisoned by the robbers where it came to rest after the collision.

I described the risk which the collision entailed to the occupants of the Dyna. In addition, when the Dyna came to rest attempts were made by the armed men at the vehicle to get the driver and the crew at the back to open the vehicle for them. They refused believing that they were safe behind the ... [indistinct]... and the reinforced front window. According to Thring, the driver, a shot was fired which struck the door of the cab in which he was. The photographic evidence revealed a blemish on the door which indicates that the bullet could not and did not penetrate the skin. The rifle used on the bin,

as mentioned earlier, was of such a high calibre that it did penetrate the armed wall of the bin.

When the crew refused to open the vehicle the attackers set about trying to cut it open, grind it open, by using the self-generated angle grinder. The photographic evidence in that regard also revealed the scars on the vehicle and gouges resulting from the use of the grinder. That forced the attackers to abandon their efforts and flee the scene. As there were apparently not enough getaway vehicles available the hijacking of Masangu's vehicle was necessitated. The attack upon that vehicle failed not through any fault of the accused, but simply because the reinforced bodywork of the Dyna did not allow access.

At this point I should mention the four counts of motor vehicle theft of which the accused have been convicted. Those vehicles were manifestly stolen with a view to using and abandoning them during and after the robbery. The BMW that had been used to disenable the HiAce at Charters Creek was abandoned there and forms the subject matter of count 2. The Avis car referred to in count 1 was used to block in the police vehicle which arrived on the scene. That is where the occupants were fired upon gratuitously. In that exchange of gunfire between Constable Biyela and the assailants accused 25 was shot and injured. That vehicle was abandoned right there and when the police arrived on the scene it was still idling. At Penicuik the two vehicles which form the subject matter of counts 3 and 4 were abandoned after they had been used during the robbery.

I have referred to the prevalence of motor vehicle theft earlier in these reasons. The theft of a motor vehicle causes grave inconvenience, prejudice

and financial loss to the owner thereof. In the case where the purchase of the motor vehicle was financed, and that is often the case, the monthly payments due by the purchaser still have to continue notwithstanding that the vehicle was no longer in his possession due to the theft. The sheer volume of such thefts have caused the Courts to impose stringent sentences which were designed to keep this type of offence at bay. The statistics that I mentioned earlier relating to motor vehicle thefts make for poor reading. In the result I shall impose the sentence that I find is usually imposed in such offences by the Courts in recent years.

That brings me to the crimes charged to the accused under counts 27, 28, 29 and 30. In respect of those counts accused 2, 3, 4, 6, 9, 11, 13, 15, 17, 18, 21, 23 and 24 were convicted. These accused were all in the vehicle driven by accused 24 on arrest. In it were recovered the three automatic assault rifles which, at the time, was in a black bag, together with ammunition thereto in it, it was fully loaded and ready for use and spare magazines for the automatic rifles were also found in the bag. The circumstances in which they were possessed at the time of its recovery suggests, and so it was found, that they were there ready for use should such an eventuality arise. The premise upon which the trial Court convicted all the accused of possession of those firearms was by virtue of the doctrine of common purpose.

That brings me to the final count, 31, relating to the negligent handling by accused 14 of his licensed pistol. Although that offence is frowned upon by the Courts, it is considered, from a moral reprehensive aspect, relatively negligible, and the sentence will reflect that.

Against that background I impose the following sentences. Will the accused

rise?

In respect of the theft of motor vehicles charged in counts 1, 2, 3 and 4 the accused are all sentenced to SEVEN (7) YEARS' IMPRISONMENT in respect of each count.

In respect of count 6, the attempted robbery involving aggravating circumstances at Penicuik, I indicated I would have sentenced the accused to 15 years, but with due regard being had of the time spent awaiting finality in this trial I shall impose a sentence of TEN (10) YEARS' IMPRISONMENT upon all the accused in respect of that count.

In respect of count 7, the attempted murder of crewman Ncwane at Penicuik, I sentence all the accused to SEVEN (7) YEARS' IMPRISONMENT. Compared to the attempts on the lives of the other crewmen there is an element of aggravation in respect of Ncwane in the sense that he was placed at serious risk by firing a shot into the bin of the vehicle.

Count 8, relating to the attempted murder of Thring, the driver of the Dyna truck at Penicuik, all the accused are sentenced to FIVE (5) YEARS' IMPRISONMENT.

In respect of count 9, the robbery involving aggravating circumstances of the HiAce at Charter's, I sentence all the accused in terms of section 51 of the Criminal Law Amendment Act to FIFTEEN (15) YEARS' IMPRISONMENT.

In respect of counts 10 and 11, the attempted murder of respectively ... [indistinct]... and Mnguni, all of the accused are sentenced to FIVE (5) YEARS' IMPRISONMENT on each count.

In respect of counts 12, 13 and 14 relating to the attempted murder of Biyela, Khoza and Mthethwa, the policemen on duty at Charters Creek, the

sentence in respect of all the accused is TEN (10) YEARS on each count. In respect of these three mentioned offences I consider it an aggravating feature that these were policemen on duty upon whose lives the attempt had been made.

On count 15, in respect of the robbery involving aggravating circumstances of Msweli at Penicuik, all the accused are sentenced to TWO (2) YEARS' IMPRISONMENT.

In respect of count 18, the robbery involving aggravating circumstances, in other words, the hijacking of Masangu's vehicle at Penicuik, all the accused are sentenced to FIFTEEN (15) YEARS' IMPRISONMENT, being the minimum sentence permissible in law.

In respect of count 21, the murder of Gumede, all the accused are sentenced to IMPRISONMENT FOR LIFE, being the only sentence option available under the Act.

In respect of counts 22 and 23, the attempted murder of respectively Nkabinde and Ntombela, the security guards, all the accused are sentenced to EIGHT (8) YEARS' IMPRISONMENT ON EACH COUNT.

In respect of counts 27, 28, 29 and 30 relating to the prohibited possession of the automatic assault rifles and ammunition thereto, those counts are taken as one for purposes of sentence. In that case accused 2, 3, 4, 6, 9, 11, 13, 15, 17, 18, 21, 22 and 23 are sentenced to FIFTEEN (15) YEARS' IMPRISONMENT.

In respect of count 31 relating to accused 14 only, he is sentenced to THREE (3) MONTHS' IMPRISONMENT.

Because the accused had been in prison for approximately six years, a

substantial portion thereof in difficult circumstances at Kokstad awaiting the conclusion of this trial, I have factored that into the sentences I have imposed and, because of it, in addition, I do not make any order stopping the accused from applying for, in due course and in accordance with the requisite provisions, for parole.

In conclusion, I do not deal with concurrency because that is dealt with *ex lege*, that is concurrency of the running of sentences.

COMBRINK J Will the accused be seated? Counsel had mentioned, I think it was the day before yesterday, that you have instructions to apply for leave to appeal.

MR MAREE Yes, that is correct, M'Lord.

COMBRINK J I am aware that the Legal Aid Board has placed certain impediments in your way. I undertook to get in touch with the appropriate person at the head office of that establishment and left messages, but my calls were not returned. Where do you wish to proceed from there bearing that in mind?

MR MAREE M'Lord, may it please you, I appear on behalf of accused 2, 3, 8, 14 and 25.

COMBRINK J Will you just give me a moment?

MR MAREE Yes, M'Lord.

COMBRINK J Yes, repeat the accused again.

MR MAREE Nos 2, 3, 8, 14 and 25. M'Lord, I crave leave to enrol two applications, the first is an application for leave to appeal against both convictions and sentences on behalf of these accused, such application to be adjourned for the filing of grounds of appeal to a date to be arranged. And secondly, M'Lord, applications on behalf of these accused to be admitted to bail pending the outcome of the application for leave to appeal. It is indeed correct, as Your Lordship pointed out, M'Lord, that there is an impasse with the Legal Aid Board and I am afraid that if that cannot be solved then this would be the end of my function in this matter, unless the accused who I represent see fit to instruct me properly through an attorney. As Your Lordship pleases.

COMBRINK J Mr Fraser.

MR FRASER M'Lord, I appear on behalf of accused 9, 18, 21 and 23.

M'Lord, as far as No 9 is concerned, I am unable to bring an application because I cannot get proper instructions from accused 9.

COMBRINK J So, what are you going to do?

MR FRASER I want to ask M'Lord to appoint me as *amicus curiae* to apply for the same applications Mr ...[intervention]

COMBRINK J It's been held on three occasions that he is deliberately malingering. I am satisfied, having watched him over a long period of time ... [intervention]

MR FRASER Yes.

COMBRINK J ... that he follows what is being said, but persists in his attitude that led you to believe that he was incapable of following the proceedings by properly instructing you as to a defence for him, and that resulted in three referrals in terms of the Criminal Procedure Act for mental observation. Normally matters would rest where they are. I take it, however, that you believe that there are prospects of success should he have applied properly instructing you thereto.

MR FRASER That is so, M'Lord.

COMBRINK J Yes, well, then in that case I appoint you *amicus curiae*, that's on behalf of accused 9. Whilst you are dishing out appointments to yourself, do you not wish to act *pro bono* for accused 13 in this regard?

MR FRASER M'Lord, I was about to address M'Lord on that because accused 13 at this stage still does not have a legal representative, so I will do that on a *pro bono* basis and apply on his behalf for the same applications as

my learned friend Mr Maree.

COMBRINK J Yes. Are you prepared to accept that offer that it appears to me you cannot refuse? Sorry, before you – let me just finish, if you accept that – allow that appointment on your behalf then the immediate can be done on your behalf, you are free at any stage to properly instruct Mr Fraser through your family or you yourself can instruct another legal representative to do what is necessary after today. I mention that because the necessary steps are set in motion today.

ACCUSED 13 I accept the offer, M'Lord.

COMBRINK J Yes. You are appointed, Mr Fraser. Now, what ...
[intervention]

MR FRASER Then I bring an application on behalf of accused 13 as well, M'Lord.

COMBRINK J Yes, I grant that. Are you lodging the same applications ...
[intervention]

MR FRASER The same one, M'Lord.

COMBRINK J ... for the mentioned accused, including accused 13, for leave to appeal and to be admitted to bail?

MR FRASER Yes, yes, M'Lord.

COMBRINK J Yes. You wish to note it and then postpone it in the same way?

MR FRASER Yes, correct, M'Lord.

COMBRINK J Yes, that is done.

MR FRASER Thank you, M'Lord, then that's my application.

MR BOTHA M'Lord, I appear for accused 4, accused 5, 15, 16, 17 and 26.

M'Lord, similarly I wish to bring the same applications as explained ...
[intervention]

COMBRINK J In all respects?

MR BOTHA In all respects, yes, thank you, M'Lord. Thank you, M'Lord.

COMBRINK J Yes.

MR PARMANAND M'Lord, with the greatest respect, and I am subject to correction, apropos counts 27, 28, 29 and 30, that would refer to the occupants of the white kombi.

COMBRINK J Yes.

MR PARMANAND M'Lord mentioned accused 22.

COMBRINK J That was a mistake.

MR PARMANAND As the Court pleases.

COMBRINK J I mentioned accused 21, 22 – 23 and 24.

MR PARMANAND Yes, M'Lord mentioned 22, so we will strike ...
[intervention]

COMBRINK J I am sorry, then it's ...[intervention]

MR PARMANAND As the Court pleases.

COMBRINK J ... 23 and not 22 and 24.

MR PARMANAND Yes. M'Lord, without repeating what Mr Fraser has said, save for his diversion in respect of accused 13, I bring the same applications, the application noting the application for leave to appeal in respect of conviction and sentence and admission to bail.

COMBRINK J And that it be postponed to a date to be arranged.

MR PARMANAND As the Court pleases. M'Lord, there is one other aspect that I have been instructed to bring to M'Lord's attention, whether it's within

the jurisdiction of M'Lord is another issue. The question of those I represent, accused 6, 19, 22 and 24, not being kept ...[intervention]

COMBRINK J Let me just note them because ...[indistinct] Just give me the accused again.

MR PARMANAND Accused 6, 19, 22 and 24 not being kept indefinitely at Kokstad but to be, to use the word, deployed to prisons that are nearer their homes, for example Johannesburg, etcetera. I believe my learned friend, Mr Fraser, has addressed a letter to ...[intervention]

COMBRINK J Can I just interrupt you? It is not within my power, because the moment they are sentenced the control over their freedom is transferred to the Department of Correctional Services to deal with under the prescripts of the legislation applicable to them. I understand that they have to go to Kokstad and there – I don't know whether it's aptitude tests or whatever performed, and then the prison will decide where they go. I presume that it is only sensible that they would, in exercise of their powers, solely their powers, and not subject to any order of mine, to do what they have to, but bear in mind the humanitarian aspects of family ties and the like.

MR PARMANAND As the Court pleases.

COMBRINK J But I cannot make any order.

MR PARMANAND As the Court pleases, I have no further submissions.

MR SEEDAT M'Lord, I bring the application for leave to appeal and the bail application. I note this application on behalf of accused 1, 7, 11 and 20.

COMBRINK J 1, 7, 11, 20?

MR SEEDAT Yes, M'Lord. Thank you, M'Lord.

COMBRINK J The applications are noted in respect of all the applications

and postponed to a date to be arranged with the Registrar.

MR MAREE As the Court pleases.

MR BOTHA As the Court pleases, M'Lord.

COMBRINK J Just a word of caution, an application for leave to appeal noted immediately is only a complete application once grounds upon which the appeal is being prosecuted is read into the record, that is the normal process. I appreciate that it's impossible for counsel, given the magnitude of the judgment and your hearing about the reasons for sentence only now, that you are not in a position to read such grounds into the record, unless you surprise me. Because the grounds are not read into the record now the applications will not be complete and pending properly until the grounds are filed on notice of motion or whatever you are advised to do, so that the time period prescribed by the Criminal Procedure Act for an application of this nature for leave to appeal to be lodged will continue to apply until the grounds are furnished, so bear that in mind when you take instructions for the necessary mandate to prosecute these applications to their natural conclusion. I think that the accused should be advised, I suggest that you confer with them in that regard, so that they are not late in bringing these applications to finality lest you be caught up with the time periods. If I might make an observation from the bench. I have, for so many years, seen the fruits of negotiations with the Legal Aid Board and I think that you will have to seriously press your case with them otherwise they will not react in time. I take it counsel will make use of this opportunity to confer with the accused. Yes. This has been an extraordinarily lengthy trial and the fact that it has come to a conclusion would, in varying degrees, be a sense of relief to all. I

wish to express the Court's indebtedness to a number of persons without whose best efforts that I saw being granted and given in these proceedings this trial would not have been one that ran as smoothly as it did. In the first place the accused. I know that a trial of this nature, given the extraordinary number of charges and the duration of the testimony, that frustration must have built up in you. I have had experience in the past occasions when that frustration led into recalcitrant conduct and disruptive conduct of the proceedings by the accused during the trials. I am indebted to you as a group that you kept your spirits high and did not become disruptive. Counsel for the State have done an extraordinary job and unravelled the most jumbled facts into an ordered charge sheet, indictment, and the way in which the evidence was placed before the Court. Counsel for the defence have been thorough and exemplary in what you did and the accused certainly have no reason to complain about the quality of services you rendered to them. Without your co-operation with counsel for the State and the requests of the Court this matter would not have proceeded as smoothly as it did to this point. The investigating officer, Colonel van Rensburg, did an exceptional job. This is one of the most thorough and competent investigations in presenting to the Court the requisite evidence through counsel for the State. Mrs Botha, arguably the best cell-phone analyst in the country, was available to the State, counsel for the defence and the Court to enable all of us to extract from the incredible volume of cell-phone evidence that which was pertinent to these issues. Without that assistance counsel for the State would never be able to place the necessary cell-phone communications before the Court, neither would counsel for the defence be

able to cross-examine on it. It would take years for individuals to extract that information. When I was instructed to preside in this trial I was informed that the accused were extremely high risk – escape risk awaiting trial prisoners. The conduct of the accused did not bear that out, but the necessary arrangements and management had to be put in place to secure the wellbeing of the accused as well as their detention and the wellbeing of the members of the court and the prosecution and defence teams. This venue was chosen as the most secure in the province of KwaZulu-Natal. A large contingent of police officials were appointed under the command of Colonel Slinger to make certain that security and all the requisite arrangements are in place always. His duties expanded far beyond that of the immediate safeguarding of the court's precincts and the persona involved. He attended to the accused's medical needs and made certain that they obtained professional services when needed. His services have been indispensable. He informs me that he experienced from the accused only goodwill and assistance where necessary. It didn't apply to the cell-phones. We have dealt with three languages to be interpreted throughout these proceedings. Fortunately, with the co-operation of the accused, we were able to make available specific interpreters to specific accused should it be needed, but we were able to expedite proceedings incredibly by using only interpretation into the Zulu language and to have the specific interpretation on standby for the cases when needed. Over a period of 25 years I have worked with many interpreters, some poor, some mediocre and some exceptional. Over the last few years we have had the best of services in that regard and I wish to extend my gratitude to our three interpreters. Finally, I

wish to single out Mrs Skead, my Registrar. She was throughout charged with the administration of the court, its sitting, the managing of the witnesses and the smooth running of the physical features of the trial itself. In a sense she was and is the court. She was not always present in the well of the court because she had too much work on the outside to perform to be in the well of the court every day, though I ought in this regard thank myself because I have been training her for 25 years. Finally I confess to find it extremely difficult to pass sentence as I am required by law to do because your faces have become familiar to me, even likeable. I wish you success. The Court will rise.

PROCEEDINGS ADJOURNED

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH EASTERN CIRCUIT LOCAL DIVISION**

HELD AT PONGOLA

CASE NO : CC169/07

DATE : 29th June 2012

STATE

versus

M V SHANGE & OTHERS

BEFORE THE HONOURABLE MR JUSTICE COMBRINK

ASSESSOR : MR I REID

ON BEHALF OF STATE : MR SELEPE
MR XABA

ON BEHALF OF DEFENCE : MR MAREE
(Accused 2, 3, 8 14 & 25)
MR FRASER
(Accused 9, 18, 21 & 23)
MR BOTHA
(Accused 4, 5, 15, 16, 17 & 26)
MR PARMANAND
(Accused 6, 19, 22 & 24)
MR SEEDAT
(Accused 1, 7, 11 & 20)

INTERPRETERS : MR [?]
MS [?]

REPORT ON RECORDING

Clear recording.

TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

STATE v M V SHANGE & OTHERS

CASE NO : CC169/07

COURT OF ORIGIN : PONGOLA

TRANSCRIBER : L J PICKLES

DATE COMPLETED : 09 AUGUST 2012

NO OF TAPES/CD : CD

NO OF PAGES : 41