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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: SS83/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO

03 June 2024

DATE

SIGNATURE

In the matter between:

THE STATE

and

NENE REATILE

ACCUSED 1

M[...] K[...]

Child Offender (ACCUSED 2)

HLUBI THABISO KUHLE

ACCUSED 3

SITHOLE ANDILE

ACCUSED 4

SITHOLE AYANDA

ACCUSED 5

SENTENCE

[1] This court is sitting as a Child Justice court in terms Chapter 9 and 10 of the Child Justice Act ('CJA') 75 of 2008. The court is satisfied the child offender is a "child" as defined in the section 1 of the Child Justice Act 75 of 2008. In terms of Sections 63(5) of the CJA, ***the proceedings were held in camera and the child offender was assisted by his guardian.***

[2] The Child Offender, Accused 4 and 5 were convicted by this Court of a plethora of charges, ranging from Murder¹ to Robbery with aggravating circumstances² (two counts). In addition, hereto, accused 3 was also convicted of Unlawful possession of a firearm³ (two counts) and Unlawful possession of ammunition ⁴(two counts). These convictions attracts a minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997. The prescribed minimum sentences may only be departed from:

"If the sentencing court on consideration of the circumstances of the particular case is 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 that sentence, it is entitled to impose a lesser sentence."⁵

[3] This court is mindful that In ***Malgas***⁶ where it was held:

"The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer '*business as usual*'.

¹ Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

² As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

³ Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 Of 2000.

⁴ Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

⁵ S v Malgas, 2001 (1) SACR 469 (SCA) at para [25]

⁶ 2001 (1) SACR 469 (SCA).

[4] This court is however mindful, pertaining to the child offender, that the purpose of the **Child Justice Act**⁷ (**"The Act"**) is to provide as much protection for children who have violated the law, as reasonably possible. This is clear from its preamble, which states in part:

"the Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right-

"not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;"

[5] In explaining this provision, Cameron J stated:

'The constitutional injunction that a child's best interests are of paramount importance in every matter concerning the child **does not preclude sending child offenders to jail**. It means that the child's best interests are more important than anything else, but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment'

[6] The courts are required to scrupulously adhere to the provisions of the Act unless reasons exist to depart therefrom. A wholesale departure or lackadaisical application of the provisions of the Act will not pass muster.⁸

[7] This court is mindful that sec 28 (2) of the Constitution provides that:

'A child's best interest are of paramount importance in every matter concerning the child'.

Section 28 of the Constitution therefore demands that children are accorded different treatment in Sentencing. A failure to do so is a constitutional failure.⁹

⁷ 75 of 2008.

⁸ J.A v S (20190063) [2019] ZAECHGHC 64 (3 June 2019).

⁹ Mfofu v Minister for Justice and Constitutional Development and Others 2013 (9) BCLR 1072 (CC);2013 (2) SACR 407 (CC).

[8] Further, that a minimum sentence should **not** be applicable to children aged 16 and 17, as was pertinently held in the Constitutional case of *Centre for law v Minister of Justice and constitutional development and Others*¹⁰.

[9] In *S v Lucas*¹¹ it was stated that imposing a sentence is one of the most difficult tasks a presiding officer has to grapple with and has been described as a painfully difficult problem, which involves a careful and dispassionate consideration of all the factors.

[10] In deciding on an appropriate sentence, the court, the court must have regard to the triad of factors that have to be considered as set out in the case of *S v Zinn 1969 (2) SA 537 (A)*. The Court must therefore take into account the personal circumstances of the accused and the person convicted of the crimes, the nature of the crimes including the gravity and extent thereof and the interests of the community. In determining such a sentence, the Court must cushion the sentence with a measure of mercy and strive to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation.

[11] The court should strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of or the exclusion of others. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and their circumstances and the impact of the crime on the community, its welfare and concern”¹²

[12] The infliction of punishment is pre-eminently a matter for the discretion of the trial court and it is a cherished principle that courts should, as far as possible, have an unfettered discretion in relation to sentence. The Court do, however, have the discretion in terms of Section 51(3) to impose a sentence lesser than the prescribed minimum if it is satisfied that **substantial and compelling** circumstances exist

¹⁰ 2009 (6) SA 632 (CC).

¹¹ (CC72/2019) [2022] ZAGPPHC 346 (13 May 2022).

¹² *S v Banda and others* 1991 (2) SA 352 (B) 355.

which, viewed cumulatively, justify the imposition of a lesser sentence. This court is however cognisant that a criminal sentence cannot, in the nature of things, be a matter of precise calculation.¹³

[13] It is however commonly accepted that there are many purposes of sentencing. Firstly, is the desire to punish a person who is the wrongdoer and who has offended against society and caused harm to others. Secondly is the intention to prevent the wrongdoer from committing a similar offence again. Thirdly is to send a message to other would be offenders not to engage in this kind of activity and lastly is the aspect of rehabilitation.

[14] Another factor to be borne in mind is the question of mercy.¹⁴

[15] The individualization of punishment requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law.¹⁵ Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

MITIGATION OF SENTENCE

Pre-Sentence Reports were handed in, in respect of all the accused. This court do not intend to repeat every detail of the respective Reports, save for the apposite aspects, which warrants reprise.

[16] The personal circumstances of **Mr M[...]**, the **Child Offender** was extensively set out in the Pre-Sentence Report, as compiled by Ms Antonette Mkhari (**“Exhibit UUU”**).

[16.1] Mr M[...] was an only child and his parents separated when he was still a baby. His mother had a substance abuse disorder and the family of his mother’s boyfriend raised him as their own child, in a warm and conducive

¹³ Crime and punishment in South Africa 1975 page 150

¹⁴ S v Rabie 1975 (4) SA 855 (AD) at 862:

¹⁵ S v Scheepers 1977 (2) SA 154 (A) at 158F – G

home. Later, his paternal family continued providing for his basic needs. According to them, Mr M[...] is used to wearing expensive clothes and as a result, the neighbourhood children would envy him.

[16.2] In 2010, Mr M[...]’s father was released from prison and he continued providing for his (Mr M[...]’s) basic needs. Mr M[...] enjoyed a positive relationship with his father, stepmother and sibling. His mother passed away in 2013 and his father was shot and killed in 2023. Mr M[...] indicated that he was deeply hurt by his father’s passing, as it occurred whilst he was in custody and he was unable to attend the funeral. His grandmother reported that even when both his parents were alive, she was the primary caregiver.

[16.3] In 2016, Mr M[...] transferred to Lavela Senior Secondary School and failed grade 10 twice as he started associating with negative friends and using dagga due to peer pressure. His grandmother said that he was an intelligent child and he aspired to be an Economist. Mr M[...] wrote his grade 10 exam while at Walter Sisulu Child and Youth Centre and managed to pass in 2019. He never presented with behavioural problems whilst at the centre and his performance was above average.

[16.4] Mr M[...] was diagnosed with Asthma but is physically stable and presented with no frailties or mental issues. He relied on drugs and used it as a coping mechanism in dealing with his anxiety. He confessed that he became addicted to dagga and found it hard to sleep without using. When under the influence, he would feel calm and forgets his problems. His family warned him against the use of drugs.

[16.5] Mr M[...] was 16 at the time of the commission of the offence, has no previous convictions or pending cases. Mr M[...] blames his friends for committing the offences.

[16.6] Advocate Taunyane in addressing this court stated that whether or not Mr M[...] demonstrated remorse, every sentence must be blended with mercy. At the time of the commission of the offence, the child offender was still a

minor and this offence was committed as part of a group to accumulate money to satisfy a drug addiction. Adv. stated that Mr M[...] in the Pre-Sentence Report, played open cards with this court, which is indicative of remorse.

The defence requests this court to deem the following factors important to impose an appropriate sentence:

- 1) Mr M[...] has been in custody since 2020.
- 2) Mr M[...] was still at the tender age of 16 when the offence was omitted.
- 3) A lengthy period of imprisonment may turn Mr M[...] into a hardened criminal.
- 4) Any term of imprisonment to be imposed, should run concurrently.

[17] The personal circumstances of Mr Hlubi Thabiso, accused 3 was extensively set out in the Pre-Sentence Report, as compiled by Ms Antonette Mkhari (“Exhibit VVV”).

[17.1] Mr Thabiso is the youngest of two children and his parents separated when he was still young. His mother, who was based in Johannesburg, provided for the families basic needs. He was raised by his maternal grandmother and was not exposed to any form of violence. The accused reported a pleasant upbringing and considers his mother to be the pillar of his life.

[17.2] Mr Thabiso’s father was not involved in his upbringing and did not play a fatherly role. Mr Thabiso looked up to his uncle for guidance into manhood. In 2016, the accused relocated to live with his father but as a result of abuse, moved to live with his mother in Soweto. His new environment was conducive and he was able to make friends easily. In 2022, the mother of accused returned to KZN and maintains telephonic contact with her son.

[17.3] Mr Thabiso enrolled at Lavela Secondary School in 2017 and adjusted well. His performance was satisfactory and he never presented with any negative behaviour. Later his performance deteriorated and he did not complete matric as he was incarcerated for the current offence.

[17.4] Mr Thabiso does not have physical or psychological health challenges. He occasionally used alcohol since 2017 and does not present with negative behaviour whilst under the influence. He indicated that on the day of the commission of the offence, he was sober minded. His mother suspected that he was using drugs, as he would come home with red eyes, stammering and talking slow.

[17.5] Mr Thabiso has no previous convictions and is adamant that he was wrongfully convicted.

[17.6] Adv. Skosana in address reminded this court that the plea of not guilty should not be seen as aggravating because Mr Thabiso elected to test the state's evidence. He stated that the following factors cumulatively constitutes substantial and compelling circumstances, warranting the imposition of a lesser sentence.

- 1) Mr Thabiso is relatively young.
- 2) He has been in custody for nearly five years.
- 3) His level of education.
- 4) His anti-social behaviour.
- 5) He was schooling at the time of the arrest.
- 6) This is his first brush with the law.

[17.7] Adv. Skosana stated that despite acknowledging that a person has died, the accused could not be sacrificed, under the circumstances. Vengeance or "an eye for an eye" is not what this court should strive for but rather to correct the ways of the accused, by imposing a sentence, which will also rehabilitate the accused. He requests this court to give accused 3 a second chance because young offenders in this country are in correctional facilities mainly due to their upbringing and family background, which led them onto this path of anti-social behaviour.

[17.8] Adv. Skosana submits that the accused only came up with this idea to commit the offence at the garage, demonstrating their immaturity and giving in

to peer pressure. Adv. Skosana prays for mercy and requests this court to deviate from the prescribed sentence. Acknowledging the seriousness of the offence and the fact that the deceased was also young, Adv request this court to bear in mind that the accused is a first time offender who should be afforded the opportunity to learn proper life skills that would assist him, rather than imposing the minimum sentence.

[18] The personal circumstances of Mr Andile Sithole, accused 4 was extensively set out in the Pre-Sentence Report, as compiled by Mr Andile Buthelezi (“Exhibit WWW”).

[18.1] Mr Andile has a twin brother, who is his co-accused in this matter. His parents separated shortly after his birth and he grew up in Soweto alongside his other siblings, who is also a set of twins. He was raised by his mother and never introduced to his father. From an early age, profound morals and values were instilled in him as he was raised in a religious background. His home-financial circumstances were not favourable but his mother tried to ensure that the family’s basic needs were adequately met. His mother opened a tuckshop, which they ran from home. As this was their only source of income, his mother also secured additional employment as a security guard at the school.

[18.2] In 2008, he was introduced to his paternal family when he attended his father’s burial but never developed a close bond. Mr Andile however shares a close and loving relationship with his siblings, especially his twin brother and co-accused. Prior his arrest, he assisted his mother to operate the tuckshop. In 2013, he commenced high school at Lavela Secondary School and dropped out in grade 10. He would pretend going to school and sit at the cemetery eating his lunchbox. His mother intervened but in 2017, but he dropped out again. Mr Andile aspired to become an aviation maintenance technician.

[18.3] Mr Andile struggles with Asthma and is currently not on any medication. He was however diagnosed with a chronic illness in 2019, whilst incarcerated and is receiving treatment.

[18.4] In 2013, Mr Andile started experimenting with alcohol which causes him to be more social and he enjoys the company of his peers. In 2017, he was introduced to dagga and to cocaine in 2018. When realising it was costly to support an addiction, he stopped on his own accord.

[18.5] Mr Andile's mother stated that if her son was involved in this offence, then she strongly believes that it was due to peer influence. Her health has deteriorated since her son's incarceration. Mr Andile informed the probation officer that this incident is known to him and that he had no intention to commit the offence. He however admits to snatching the lady's handbag, thus committing the act of robbery. Mr Andile is remorseful that someone lost their life.

[18.6] Adv. Phakula by way of written heads of argument (**Exhibit "RRR"**) submits that Mr Andile showed remorse during his consultation with the Probation Officer but recognises that there are aggravating factors which must be brought into reckoning at the sentence stage, namely:

- a) The seriousness of the offence and the harm caused.
- b) That the accused did not show remorse from the onset.
- c) The lives of the victims were negatively impacted.
- d) A life was lost.

[18.7] Adv. Phakula acknowledges that the deceased were killed in a cruel manner and that the accused should have acted differently, under the circumstances. He submits that the deceased did not deserve to die at that age but urges this court to consider as substantial and compelling the fact that the offence was committed out of peer pressure and in the heat of the moment.

[18.8] Adv. Phakula submits that Mr Andile is still young and capable of being rehabilitated. Referring to the case of *Malgas*, he argues that where this court has not merely an unease but a conviction that an injustice will be done by the imposition of the prescribed minimum sentence, or differently put, where the prescribed minimum sentence will be disproportionate to the crime, the criminal and the legitimate needs of society, that in itself brings about a substantial and compelling circumstance, warranting a departure.

[19] The personal circumstances of Mr Ayanda Sithole, accused 5 was extensively set out in the Pre-Sentence Report, as compiled by Ms Budaza (“Exhibit YYY”).

[19.1] Mr Ayanda, who is the twin brother to Mr Andile, accused 4, has four other siblings. They were raised by their mother and only met their paternal family when their father passed. His mother believes that she raised her children well and was able to meet their basic needs through her tuckshop business and working as a security guard. She is currently staying alone and is suffering with her health.

[19.2] Mr Ayanda started high school at Lavela Secondary School in 2011. He dropped out due to being bullied for his physical appearance. He assisted his mother in the tuckshop even though she encouraged him to return to school. Mr Ayanda went back to school in 2018, doing grade ten. He repeated grade ten in 2019 and was arrested for the current offence.

[19.3] Mr Ayanda was an epileptic sufferer as a child. He has an issue with his right leg causing him to limp, when walking. There is no history of mental illness and he is able to distinguish right from wrong. Mr Ayanda started consuming alcohol and smoking marijuana secretly in 2015. He would use both substances when attending concerts and school parties, with his friends.

[19.4] Mr Ayanda has no previous convictions. He pleaded not guilty because he did not participate in the commission of this crime. According to Mr Ayanda, it was the driver of the vehicle who decided that they should rob the

deceased. Mr Ayanda regrets his actions, as it was not his intention to kill someone.

[19.5] Adv. Mavatha by way of written heads of argument (**Exhibit “SSS”**) acknowledges that the conviction of the accused triggers the provisions of the minimum sentence act. He however specifically draws the courts attention to the cases of *Malgas*¹⁶ and *Director of Public Prosecutions, North Gauteng: Pretoria v Gwala*¹⁷ where the following were enunciated, respectively:

- a) All factors traditionally taken into account during sentencing, continues to play a role.
- b) That there is no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial.

[19.6] Adv. Mavatha respectfully submits the following factors constitutes substantial and compelling circumstances, necessitating a departure from the prescribed minimum sentence.

- a) The accused was 21 years old at the time of the alleged offence.
- b) The accused went to school up to grade 8.
- c) The accused awaiting period in custody is 4 years and 5 months.
- d) Based on the evidence before court, the accused was under the influence of a substance, marijuana or dagga.
- e) The role of accused 5 in the commission of the offence, namely that he remained in the car and never actively participated during the attack on the deceased and the complainants.

[19.7] Adv. Mavatha referred this court to a plethora of comparative case law, arguing that the accused is still relatively young and has a great future ahead, making him a suitable candidate for rehabilitation.

AGGREVATION OF SENTENCE

¹⁶ 2001 (1) SACR 469 (SCA).

¹⁷ 2014 (2) SACR 337 (SCA), S v Radebe 2013 (2) SACR 165 (SCA).

[20] In aggravation of sentence, the state by way of written heads of arguments (“Exhibit TTT”) pressed upon this court that there is no substantial and compelling circumstances, in the present case, which justify the imposition of a lesser sentence other than the one prescribed.

[20.1] Adv. Sinthumule referred this court to the cases of *S v Mhlakaza and another*¹⁸ where it was stated:

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

In *S v Swart*,¹⁹ it was stated:

“In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a relatively smaller role”

[20.2] It is further argued with reference to *Malgas* that the minimum sentences were not to be departed from for flimsy reasons, which could not withstand scrutiny, as the purpose of the Act should always be borne in mind. Further, that the essential question raised in *Malgas* is whether the sentence imposed, is in all circumstances just.

[20.3] Adv. Sinthumule submits that it must be borne in mind that the accused has shown no remorse and refused to take responsibility for their actions throughout the trial. The accused admitted to the probation officers that they were present at the scene of the crime however during the trial the accused

¹⁸ 1997 (1) SACR 515 (SCA) at 519d-e.

¹⁹ 2004 (2) SACR 370 (SCA) at 378 c-d.

denied being present and pleaded an *alibi* defence, showing that these accused could not be trusted.

[20.4] The fact that the accused are relatively young or first offenders cannot be regarded as substantial and compelling circumstances, neither the period spent in custody, on its own, with reference to the case of *S v Radebe*.²⁰

[20.5] The state argues that the aggravating factors outweigh the mitigating factors and justify long-term imprisonment. It is argued that the accused are dangerous and should be removed from the community, who are no longer walking freely on the streets of Soweto.

[20.6] In respect of the **child offender** the state draws the attention of this court to the objectives of sentencing a child in conflict with the law, as provided for in section 69 of the CJA. It is submitted that the probation officer in the present matter recommended a sentence in terms of section 77 of the CJA 75 of 2008. Subsection (4) provides that:

“A child referred to in subsection (3) may be sentenced to a sentence of imprisonment –

- a) for a period not exceeding 25 years; or
- b) envisaged in section 276 (1) (i) of the Criminal Procedure Act.

[20.7] Subsection 5 of the Act stipulates that a Child Justice Court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.

[20.8] The state submits that the offences for which the child offender was convicted are listed in Schedule 3 of the CJA and he acted in the furtherance of a common purpose, warranting direct imprisonment, namely:

- 1) the brutal attack on the deceased person,

²⁰ 2013 JDR 0578 (SCA) at 6.

- 2) the fact that the deceased was robbed of her items at gunpoint.
- 3) The fact that the other witness was also robbed at knifepoint.

[20.9] The state submits that in the circumstances, the aggravating circumstances outweigh the mitigating factors by far.

VICTIM IMPACT

[21] The victim impact statement as compiled by Mr Andile Buthelezi paints the picture of a responsible, hardworking young woman, who meant the world to her family. The deceased, at the time of her death was twenty (20) years of age and enrolled in an Assistant Learnership Programme at Netcare Park Lane Hospital.

[21.1] Prior to this incident, she had passed her examination and was about to sign a contract of employment. She was financially responsible at home and was described as a caring person who shared a close bond with her family especially her sibling Lerato, who was there at the time of her demise. Lerato is experiencing flashbacks and for months after the incident, avoided passing the scene of the incident. She suffers with panic attacks and has become withdrawn, after losing her sister. Having witnessed the incident, leaves her with many questions and maybe if she had reacted differently, she might have been able to protect her sister.

[21.2] It appeared that the deceased had a bright future and was planning a thanksgiving ceremony, for her achievements. The family has been negatively impacted by the offence as the sudden death of the deceased shocked them. They struggle with profound sadness, which has caused family strain as they experience different emotions, daily. As a family, they still experience the void of her absence and their lives are changed forever.

[21.3] Mr. Mphahlele indicated that he buried both his parents which was a painful and difficult experience, however it cannot compare to the pain of losing his daughter. He is experiencing sleepless nights and chest pains, resulting in him having to receive counselling. His work performance was

negatively affected and is he unable to concentrate, as he is easily distracted. He feels that he will struggle with the void caused by this incident, for the rest of his life.

[21.4] The actions of the accused has not only caused pain but destroyed and brought unprecedented change to the life of a family. The family indicated that they no longer enjoy special occasions, as it has become a constant reminder of her absence. The deceased was the one who made them feel special and had a way of bringing them together as a family. The family stated that whatever judgment the accused will receive, it would not heal them from the pain they endure nor will it bring back the life that was taken. They will never comprehend or understand why such a dreadful crime was perpetrated.

[22] Pertaining the prevalence and seriousness of this offence, there has never been a time when the words as enunciated in the case of *Chapman*²¹, rings truer than today:

"Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[23] This country is engulfed in a sea of violent crimes ravaging vulnerable sections of our society like women, with a never-ending scourge of GBV²², which continues to plague South Africa.

[24] This court is mindful of the case of *Mudau v The State*²³ where it was stated that:

²¹ 2020 JDR 0344 p5.

²² Gender Based Violence.

²³ (547/13) [2014] ZASCA 43 (31 March 2014).

“...violence (against women) has become a scourge in our society and should not be treated light, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of the fundamental rights such as equality, human dignity and bodily integrity” (emphasis added)

[25] The callousness of this brazen attack unleashed on the unsuspecting and defenseless deceased boggles the mind. It would be hard to imagine the utter anguish, fear and suffering the deceased endured, minutes before she was so mercilessly killed. The deceased having done nothing wrong, did not deserve to die in this manner. Her life was cut short, whilst walking home and going about her daily life. She offered no real resistance when she was robbed of her belongings. The irony being that the bag that was snatched from her person, did not even contain money, which appeared to be the reason why her life was ended in such a despicable manner.

[26] Goldstein J in the case of *S v Ncheche*²⁴, stated:

“I now deal with the interest of society. The unprecedented spate of violence, and especially ...against women ..., is escalating at an alarming rate. Helpless, defenceless women feel unsafe, even in the sanctity of their own homes, and look to these courts to protect their interests and the courts can protect these interests by meeting out harsh sentences.”

[27] The accused gained nothing of worth when they so robbed and killed the deceased. Communities are outraged and if we fail to take account of that outrage, we risk encouraging the breakdown of law and order and communities taking the law into their own hands.

[28] Indeed ordinary law-abiding citizens in this country are at their wits end about these ongoing and senseless crimes involving violence against women and sight should not be lost of the fact that society view these crimes as heinous and

²⁴ 2005 (2) SACR 386 (W) @ page 391, 395.

abhorrent. Society deserves to be protected against perpetrators of unprovoked violent crime. Our courts have held the view that those who commit violent crime should be made to account before the law and if found guilty, punished accordingly. In *S v Makwanyane & another*²⁵, the court stated:

"The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorize the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly, they should not; and equally clearly, those who engage in violent crime should be met with the full rigour of the law..."

[29] In an effort to curb the wave of violent crimes, which threatens to destroy our society, the legislature enacted section 51 of the Criminal Law Amendment Act 105 of 1997. Courts are reminded in *Malgas*²⁶ that the specified sentences were not to be departed from lightly and for flimsy reasons, which could not withstand scrutiny.²⁷

²⁵ 1995 (2) SACR 1 (CC), at paragraph 117.

²⁶ 2001 (1) SACR 469 (SCA).

²⁷ *Malgas* supra "Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending

Traditional mitigating factors *alone* cannot be considered substantial and compelling circumstances.²⁸

[30] This court is also mindful in assessing the proportionality of the prescribed sentence in a particular case; the sentencing court must determine what a ‘proportionate’ sentence would be, considering all the circumstances traditionally relevant to sentencing. The proportionality of a sentence cannot be determined in the abstract.

[31] In *S v Ganga*²⁹ it was stated that, a court must still seek to differentiate between sentences in accordance with the dictates of justice. Seeking guidance in *Malgas*, the court must be satisfied that the circumstances of the particular case render the prescribed sentence not unjust or, disproportionate to the crime, the criminal and the legitimate needs of society.

[32] In *S v Vilakazi*³⁰ Nugent JA said the following:

“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, and those seem to me to be the kind of “flimsy” grounds that *Malgas* said should be avoided.”

[33] This court had regard to the degree and extent of the violence used in the commission of this heinous offence, the nature and weapons used, the brutality and cruelty of the attack, the fact that the deceased were on her way from work, trying to build a better future for her and her family, the nature and character of the deceased who was defenseless at the time, the fact that the attack was unprovoked,

legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.”

²⁸ *S v Obisi* 2005 (2) SACR 350 (W).

²⁹ 2016 (1) 600 (WCC).

³⁰ 2009 (1) SACR 552 (SCA) para 58.

the fact that the deceased as a woman was regarded as a soft target, accused 3 acted with direct intent, the emotional and psychological trauma endured by the family of the deceased and the other two victims, the fact that the deceased and victim were robbed to sustain a drug habit, the death of the deceased was untimely and unwarranted.

[34] In *S v Rohde*³¹ the following was held:

“It is the lowered perception of women as human beings, all of whom are entitled to human dignity and equality, which results in the unhealthy social paradigm that they can be victims, and in fact end up as victims of crime because they are women. The judiciary must guard against such perceptions and creating the impression that the lives of women are less worthy of protection.”

[35] In my view the state correctly referred to the case of *Matyityi*³² in that this court should be mindful of the chasm between regret and remorse. Inasmuch as some accused expressed their remorse as referenced in their respective Pre-Sentence Reports, the state correctly points out that this is not genuine contrition as none of the accused acknowledged or took responsibility for their actions, during the trial. This court is cognisant of the case of *S v Makudu*³³ where it was stated that the behavior of an accused during trial may be indicative of a lack of repentance or intended future defiance of laws by which society lives and therefore be a relevant factor in considering sentence...”

[36] The argument advanced that the accused were relatively young at the time of the commission of the offence, cannot be equated with being immature. The court in *Matyityi* stated that:

“As to the question of age, a person of 20 years or more had to show by acceptable evidence that he or she was immature to the extent that the immaturity was a mitigating factor.”

³¹ 2019 (2) SACR 422 (WCC) para 54.

³² 2011 (1) SACR 40 (SCA).

³³ 2003 (1) SACR 500 (SCA).

[37] The fact that the accused was relatively young at the time of the commission of the offence does not reduce their moral blameworthiness, especially weighed against the manner in which the offence were perpetrated. This court found that it was by no means a coincidence that the deceased was attacked shortly after having withdrawn money. That the actions on the part of the accused suggested a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment.

[38] This court is mindful as stated in *S v Ro and Another*³⁴ that:

“To elevate the personal circumstances of the accused above that of society in general and the victims in particular, would not serve the well-established aims of sentencing, including deterrence and retribution”

[39] Regarding the child offender, the case of *S v Phulwane and others*³⁵ states:

“Every judicial officer who has to sentence a youthful offender has to ensure that whatsoever sentence she decides to impose will promote rehabilitation of that particular youth and have as its priority, reintegration of youthful offenders back into their family and community”

[40] In *S v Z en vier Andere*³⁶ Erasmus J observed as follows:

“Besondere omstandighede geld by die bestrewing van jeugdige oortreders, juis vanweë die feit van hul jonkheid. Die jeug is kenlik van kosbare waarde vir die gemeenskap soos weerspieël word in art. 28 van die Grondwet. Hulle is ons toekoms. Verbanhoudend hiermee is die feit dat jeigdiges se persoonlikhede in die algemeen nog nie ten volle ontwikkel is nie. Hulle is meer buigsaam as volwassenes en dus uiteraard meer vatbaar vir beïnvloeding, ten goede sowel as ten kwade...Dit is derhalwe die dure plig van elke person en instansie gemoeid met jeugdes, ook dan die howe, om te poog om jeugdige oortreders vir die gelede van wetsgehoorsames te win...”

³⁴ 2010 (2) SACR 248 (SCA).

³⁵ 2003 (1) SACR 631 (T).

³⁶ 1999 (1) SACR 427 (C) at 430-f.

[41] This is essentially the argument as advanced by the defence, that peer pressure is a relevant consideration, in deciding on an appropriate sentence. As intimated by Mr Andile Buthelezi, that the offences were committed at a stage of transition from adolescence to young adult. Between these stages peers play a huge role in each other's social and emotional development. Peers impact almost all aspects of adolescent lives, from the more trivial, such as taste in music and clothing to the more serious such as the use of illicit drugs... (Steinberg 2008). Further, adolescence is often the time where many emotional and behavioural problems arise, including anxiety, depression, substance misuse and dependence.

[42] Having regard to the aforementioned it warrants mentioning that in the view of this court, the child offender played a prominent role in the commission of the Offences and his conduct had reflected an awareness, presence of mind and sophistication not expected of an average sixteen (16) year old. The child offender was the person who brought the firearm from home. The child offender was armed with a knife when he robbed the complainant. The child offender was instrumental in the sale of the cellphone, which was used to purchase liquor.

[43] This court have considered the nature of the offences, which triggers the imposition of a minimum sentence, the interest of the community and victims and balancing that against the interest, needs and personal circumstances of the child offender and his co-accused. This court is of the view that the sentences to be imposed strikes a balance between the competing interests.

[44] On a balanced consideration of all factors, this court is of the view that direct imprisonment is appropriate, to send a clear message that offences of this nature cannot be tolerated in a society where the rights of all citizens warrants equal protection of the law. This court deems the sentences imposed, as just, and proportionate to the crime, the criminal and the legitimate needs of society.

[45] **IN RESPECT OF THE CHILD OFFENDER, ACCUSED 4 AND 5:**

The state proved intention in the form of *dolus eventualis*. This court is of the view that such a finding persuaded this court to conclude that **this would qualify as**

a substantial and compelling circumstance, which would warrant the deviation from the prescribed minimum sentence.

Further, this court is of the view that the time spent in custody, age at the time of commission of the offence, the impact of peer pressure, being first offenders and proportionality to the crime, the criminal and the legitimate needs of society, persuaded this court to conclude that **this would cumulatively qualify as a substantial and compelling circumstances**, which would warrant the deviation from the prescribed minimum sentence.

[46] **IN RESPECT OF THE ACCUSED 3:**

This court is of the view that the time spent in custody, age at time of the commission of the offence, the impact of peer pressure, being a first offender and proportionality to the crime, the criminal and the legitimate needs of society, persuaded this court to conclude that **this would cumulatively qualify as a substantial and compelling circumstances**, which would warrant the deviation from the prescribed minimum sentence.

[47] **THE ACCUSED ARE SENTENCED AS FOLLOWS:**

[47.1] **CHILD OFFENDER (Accused 2)**

COUNT 1: MURDER³⁷

Fifteen (15) years direct imprisonment.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES³⁸

Twelve (12) years direct imprisonment.

COUNT 3: ROBBERY WITH AGGRAVATING CIRCUMSTANCES³⁹

Twelve (12) years direct imprisonment.

In terms of section 280 (2) of the CPA 51 of 1977, it is ordered that the sentences imposed in respect of counts 1, 2 and 3 will run concurrently. **The**

³⁷ Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

³⁸ As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

³⁹ As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

child offender is effectively sentenced to Fifteen (15) years direct imprisonment.

[47.2] ACCUSED 3

COUNT 1: MURDER⁴⁰

Twenty (25) years direct imprisonment.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES⁴¹

Twelve (12) years direct imprisonment.

COUNT 3: ROBBERY WITH AGGRAVATING CIRCUMSTANCES⁴²

Twelve (12) years direct imprisonment.

COUNT 4: UNLAWFUL POSSESSION OF A FIREARM⁴³

Ten (10) years direct imprisonment.

COUNT 5: UNLAWFUL POSSESSION OF AMMUNITION⁴⁴

Three (3) years direct imprisonment.

COUNT 6: UNLAWFUL POSSESSION OF A FIREARM⁴⁵

Ten years direct imprisonment.

COUNT 7: UNLAWFUL POSSESSION OF AMMUNITION⁴⁶

Three (3) years direct imprisonment.

In terms of section 280 (2) of the CPA 51 of 1977, it is ordered that the sentences imposed in respect of counts 1,2,3,4,5,6 and 7, will run concurrently. **Accused 3 is effectively sentenced to Twenty Five (25) years direct imprisonment.**

[47.3] ACCUSED 4

⁴⁰ Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

⁴¹ As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

⁴² As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

⁴³ Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

⁴⁴ Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

⁴⁵ Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

⁴⁶ Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

COUNT 1: MURDER⁴⁷

Twenty (20) years direct imprisonment.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES⁴⁸

Twelve (12) years direct imprisonment.

COUNT 3: ROBBERY WITH AGGRAVATING CIRCUMSTANCES⁴⁹

Twelve (12) years direct imprisonment.

In terms of section 280 (2) of the CPA 51 of 1977, it is ordered that the sentences imposed in respect of counts 1,2 and 3 will run concurrently.

Accused 4 is effectively sentenced to Twenty (20) years direct imprisonment.

[47.4] ACCUSED 5**COUNT 1: MURDER**⁵⁰

Twenty (20) years direct imprisonment.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES⁵¹

Twelve (12) years direct imprisonment.

COUNT 3: ROBBERY WITH AGGRAVATING CIRCUMSTANCES⁵²

Twelve (12) years direct imprisonment.

In terms of section 280 (2) of the CPA 51 of 1977, it is ordered that the sentences imposed in respect of counts 1,2 and 3 will run concurrently.

Accused 5 is effectively sentenced to Twenty (20) years direct imprisonment.

[48] In terms of **section 103 (1) of the Firearms Control Act 60 of 2000**, the accused will remain ex lege **UNFIT** to possess a firearm.

⁴⁷ Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

⁴⁸ As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

⁴⁹ As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

⁵⁰ Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

⁵¹ As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

⁵² As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

- In terms of Section 103(4) of Act 60 of 2000, the court issues a search and seizure order for competency certificates, licenses, authorizations and permits, firearms and ammunition.
- The Assistant Registrar is ordered to inform the Registrar: Central Firearms Control Register in writing of this order.

[49] In terms of **Section 299A** of the CPA 51 of 1977, the immediate and extended family of the deceased, be informed that they have the right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

A AFRICA
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 26 April 2024 and 03 June 2024

Judgment handed down: 03 June 2024

APPEARANCES

For the State:	Adv. Sinthumule
Instructed by:	The Director of Public Prosecutions, Johannesburg.
On behalf of the child offender:	Adv. Taunyane
On behalf of accused 3:	Adv. Skosana
On behalf of accused 4:	Adv. Phakula
On behalf of accused 5:	Adv. Mavatha: Instructed by Legal Aid South Africa