

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MTHATHA)
PORT ST JOHNS CIRCUIT COURT

Case No.: CC20/2024

In the matter between
THE STATE

Reportable

and

NOLALINZIMA NDILA MALUNDANA

JUDGMENT ON SENTENCE

BROOKS J

[1.] Mr Malundana has been convicted of murder, attempted murder and the unlawful possession of an unlicensed firearm. He pleaded guilty to the charge by way of a written statement prepared in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977, (the statement). Together with the contents of the post-mortem report and the J88 medico-legal report prepared by the relevant medical personnel, both handed in as exhibits, the facts that gave rise to the conviction are set out in the statement.

[2.] Mr Malundana had very recently been employed at Mathafeni Junior Secondary School, Ntshamathe location, Mantusini Administrative area in the district of Lusikisiki, Eastern Cape. He was employed as a security guard.

[3.] On 23 May 2024 he commenced a night shift duty at 18h00, armed with a home-made firearm. Between 19h00 and 20h00 he heard some noise outside the classrooms and coming from the vicinity of the staff

room. Upon investigation he found a group of young boys next to the staff room where the wi-fi system was mounted on the wall. He shouted out, asking what they were doing and this caused the boys to run in different directions. He then fired one shot towards the deceased, (count 1), and the complainant, (count 2). The shot struck them and the deceased fell down.

[4.] Mr Malundana went to the deceased to investigate what was happening and discovered on arrival that the bullet from his firearm had struck him on the head. He tried to resuscitate the deceased, but all his attempts were in vain.

[5.] On hearing the voices of approaching members of the community he panicked and ran to his home. Immediately upon arrival there he reported the incident to his son. He then ran to the forest to hide himself and the firearm. There he received a phone call from the headman of the area who asked him to come to his residence. Mr Malundana asked the headman to phone the police, so that they could all meet at the headman's home.

[6.] Mr Malundana then went to the headman's home to meet the police. He narrated the details of the incident to the police and led them to the place where he had hidden the firearm. He discovered too that he had injured the complainant in count 2, the bullet causing an injury to his right arm.

[7.] In considering all the evidence placed before the court by way of the statement and other exhibits, the court concluded that the *mens rea* demonstrated in counts 1 and 2 was that of *dolus eventualis*. This is where an accused person can objectively foresee that his or her conduct is likely to cause the death of another but proceeds to act regardless of the consequences of that conduct. Accordingly, the unlawful consequence was not meant or intended to occur but came about as a consequence of reckless disregard of the potential therefor. *Ngobeni v S* (1041/2017) ZASCA127 (27 September 2018).

[8.] Both the deceased in count 1 and the complainant in count 2 were 13 year old boys. As a result, upon conviction, the prescribed minimum sentences that pertain to the convictions in accordance with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, (the Act), is that of life imprisonment. Less severe sentences may be imposed by the court in the event of there being substantial and compelling circumstances, as contemplated by the provisions of Section 51(3) of the Act, that would justify a deviation from the prescribed minimum sentence.

[9.] The enquiry into whether or not there are substantial and compelling circumstances, or truly convincing reasons, that would justify the imposition of less severe sentences is an integral part of the consideration of an appropriate sentence. It is necessary for the court to consider the nature and severity of the offences, the personal circumstances of the offender and the interests of society, and to strike a balance between these three aspects. *S v Zinn 1969 (2) SA 537 (A)*; *S v Scheepers 1977 (2) SA 154 (A)*.

[10.] The offences of murder and attempted murder rank amongst the most serious of the common law offences. Indeed there can be nothing more serious than the unlawful deprivation of another's constitutionally protected right to life, or an attempt at such deprivation. However, one must take care not to merely consider the category or the objective nature of the offence. What is required is a consideration of the offence that takes account of all the relevant facts that are peculiar to the incident that defines it.

[11] The principle is well expressed by Muso J in the *S v Mashaba* (Sentence) (CC29/2021) 2022 ZAMPMBHC 92 (7 December 2022), at paragraphs [5] and [6]:

“[5] The nature of the crime is of considerable importance. It may be of such significance or so far reaching that a lengthy period of imprisonment is the only adequate punishment. In passing sentence the trial court must take into account the moral and

ethical nature of the crime, and the gravity of the offence. It is accepted and is indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgment. A process of arid intellectualism is insufficient. Mere theorising is insufficient. What matters finally is how the court views the crime on its own merits, and all the relevant proven facts and circumstances must be carefully considered and assessed.

[6] Merely to find that a crime by itself is serious without regard to its setting and its factual context, and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate, and may result in a serious misdirection. The court does not and cannot rely on a catalogue of crimes. To do so would result in a purely mechanistic approach, whereby the court, in its judicial discretion, would fail to pay due regard to the facts and circumstances of the particular crime. The sentence therefore must be commensurate with the gravity or otherwise of the crime, and is a necessary concomitant of punishment. *S v Haasbroek 1969 (1) SA 356 (E).*”

[12] In considering the offender, due regard must be had *inter alia* to the following:

- his age and background;
- level of education;
- family circumstances;
- marital status;
- whether or not he has dependents;
- motive in committing the offence, whether for personal gain or being actuated by some moral or laudable objective;
- whether or not there are previous convictions;
- the effect of punishment on the offender, particularly if a sentence of imprisonment were to be imposed;
- the prospects of reformation and correction and becoming a useful member of society;

- the presence or absence of remorse or contrition. *S v Mashaba supra* at paragraph [7].

[13] When considering the interests of society, this factor too must take cognisance of the peculiar context, the nature of the offence itself and the personal circumstances of the offender. Whether or not the offender poses a threat to the community is a relevant consideration. So too is the extent to which the offender and the community may or not have become reconciled as a result of contrition on the part of the offender.

[14] Therefore, the feelings and requirements of the community, the protection of society against the particular offender and other potential offenders must be considered. The maintenance of peace and tranquillity within the community must be considered. Caution should be exercised to ensure that, in this regard, purely theoretical or notional needs for protection should not be overstressed to the detriment of the personal factors of the offender.

[15] The peculiar circumstances in which the death of the deceased in count 1 and the attempt on the life of the complainant in count 2 occurred, or the nature of the offences, are best described collectively as a tragedy.

[16] After years of unemployment and at the age of 62, Mr Malundana secured employment as a security guard at a local school. There is no evidence of him having received training or support in this capacity. He was armed with a homemade firearm and presented himself diligently for a shift of night duty. The aim can only have been the protection of the school premises against vandalism or theft.

[17] In the discharge of his duty, Mr Malundana responded to noises heard near the staff room after dark. He found a group of youngsters there and suspected that they were up to no good and shouted questioningly at them. When they ran away in response he must have believed that he was correct in concluding that they were engaged in unlawful activity and he fired a shot at them. He did not mean to kill or injure anyone, but viewed

objectively he must have foreseen such a possibility and proceeded recklessly to fire the shot. The extent of his error was apparent to him immediately and he tried to resuscitate the deceased. He panicked and ran home. He made a report to his son. Then he hid himself. Then he asked for the police to be there and immediately returned to the headman's homestead and told them everything.

[18] Mr Malundana has had a very challenging life. He was obliged to leave school after reaching only Standard 1 as the family could not afford to pay for his education. His father died when he was 10 years of age and his mother was always unemployed. The young Mr Malundana looked for employment when he was 15 years of age, leaving home to KwaZulu-Natal for that purpose. He was permanently employed from 1983 until he was retrenched in 1997. Thereafter he worked the land as a subsistence farmer in order to maintain his family. He is married and has eight children. They range in age from 34 years to 10 years. The youngest three are still schooling. The elder five show a mixed picture of education, basic employment and unemployment. He also has two grandchildren who are supported by State social grants. His wife is unemployed. His family is dependent upon him.

[19] Mr Malundana is a first offender. He appears to have met all the considerable financial and social challenges in his life by honest attempts at employment or subsistence farming. Only recently the latter status was relieved by obtaining the job as a security guard against the payment of a salary of R1 500,00 per month. This is a picture of an honest life that evinces the loyalty, pride and dignity of a law abiding *paterfamilias*. The aim in taking up new employment at the age of 62 was entirely honourable. The purpose was to continue to support his family. The aim of the employment was the protection of the local school property against vandalism and theft and was also laudable. It is indeed tragic that such an opportunity for such an honourable elderly man to derive an income to maintain his family should have produced such a devastating outcome for both his unintended victims, their families and himself. Had the youngsters not gathered at school after dark in such a suspicious way, the

incident would never have occurred. This reality is an integral part of the tragedy.

[20] It is now well established that in order to determine whether or not an offender demonstrates genuine remorse and contrition, it is to his or her deeds, rather than his or her words, that the court must have regard. See for example *S v Matyityi 2011 (1) SACR 40 (SCA)*.

[21] In an unchallenged address in mitigation of sentence, the court was informed that Mr Malundana had taken all possible steps to address the consequences of his reckless actions. He tried to resuscitate the deceased. He involved the police and cooperated with them. Whilst in custody after his arrest, he summoned members of his family and instructed them to approach the families of both his victims and to extend his apology for what he had done. He contributed an amount of R10 000,00 towards the costs of the funeral arranged for the deceased. Given the circumstances of his own relative poverty, this is an enormous and significant contribution to have made. The court was informed that all the families involved are now on good terms. Clearly Mr Malundana has taken full responsibility for his actions and has demonstrated without question that he is genuinely remorseful. This is the reason why he pleaded guilty to the charges and took the court into his confidence.

[22] The court holds the view that all the aspects referred to above constitute substantial and compelling circumstances that would justify the imposition of sentences less severe than the prescribed minimum. Given the irretrievable loss of life, count 1 in particular, calls for a substantial period of direct imprisonment. However, the identification of this principle in objective isolation is not the end of the enquiry. Uniquely, the interests of society in the context of the rural community in which the death of the deceased occurred do not necessarily require ongoing retribution for what has occurred. Nor do they require that the community be protected from Mr Malundana by his removal from their midst. He is not a person who has shown a predisposition towards a criminality that requires him to be rehabilitated or reformed. He poses no danger to his community or to

society at large. He has made the necessary overtures to make peace with those families whom he offended by his reckless action. Obviously the pain felt by the family of the deceased in count 1 is real and ongoing. Perhaps this will only dissipate with the gradual passage of time. It is not something that can be eradicated by the ongoing incarceration of Mr Malundana.

[23] Mr Malundana has spent nearly three months in custody as an awaiting trial prisoner. It is well known that the custodial conditions experienced by awaiting trial prisoners are tougher and harsher than those pertaining to convicted persons. See for example *S v Brophy 2007 (2) SACR 56 (SCA)*. This reality must be even more the case where the detainee is an elderly person.

[24] The question that arises, is whether it is necessary that Mr Malundana continue to be detained in custody as punishment for what has done. One of the main considerations in answering this question must be the age of Mr Malundana as a first offender. As the court has indicated, further detention in custody is not a requirement to bring about some form of reform or rehabilitation in his case. The vast majority of his life has demonstrated that he is a loyal, honourable and honest person. Nor is his further incarceration necessarily required as a means of retribution for wilful, unlawful acts. In his case there are none. The change in his status was brought about by a single, ill-considered over reaction to the circumstances in which he found himself. As a 62 year old man with the history I have described, the court is mindful of the negative impact that continued incarceration would have upon Mr Malundana, and the role that he has still to play in both family and community life.

[25] The court is also mindful of the overcrowded conditions in Correctional Services Centres that are best reserved for those who can benefit from the necessary period of incarceration therein. Mr Malundana is not such an individual. It is the view of the court that in the particular circumstances of this case, the appropriate measure of mercy in sentencing Mr Malundana would be to restore him to his family and his

community. That is the environment that can best ensure his complete rehabilitation. That is the environment in which he can continue to express his genuine remorse in whatever manner may be possible hereafter. This takes nothing away from the principle that a substantial period of imprisonment is called for because of the loss of the life of a young man and the injury of another. However, the circumstances of these offences and the unique personal circumstances of the offender do not require that he should undergo such a sentence. Indeed on a conspectus of all the relevant factors, the interests of society are best served in this matter by restoring the offender to his family and community.

[26] The three offences arise from a single incident. It is appropriate that the sentences imposed in respect of each offence should run concurrently with the other sentences to be imposed. For the reasons set out above, the court is of the view that the sentences to be imposed upon Mr Malundana should be wholly suspended for a period of 15 years on condition that he is not convicted of any offence involving violence committed during the period of suspension.

[27] The following sentences are imposed.

27.1 On count 1, the conviction of murder, the sentence imposed is that of **FIFTEEN (15) YEARS IMPRISONMENT.**

27.2 On count 2, the conviction of attempted murder, the sentence imposed is that of **EIGHT (8) YEARS IMPRISONMENT.**

27.3 On count 4, the conviction of possession of a unlicensed firearm, the sentence imposed is that of **FIVE (5) YEARS IMPRISONMENT.**

27.4 The sentences imposed on counts 1, 2 and 4 shall run concurrently with each other and shall be wholly suspended for a period of 15 years on condition that Nolalinzima Ndila Malundana is not convicted of any offence involving violence

that is committed during the period of suspension.

27.5 Nolalinzima Ndila Malundana is declared to be a person who is unfit to possess a firearm in terms of Act 60 of 2000.

RWN BROOKS

JUDGE OF THE HIGH COURT, MTHATHA

Appearances:

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Date Delivered:	19 August 2024
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