

**IN THE HIGH COURT FOF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHAHA**

CASE NO. 25/2018

In the matter between:

THE STATE

Vs

- 1. ANDANI MONCO**
- 2. KWANALE NDLWANA**
- 3. SIPHOSOMZI TSHEFU**
- 4.**
- 5. PHUMZILE MHLATYWA**

JUDGMENT ON SENTENCE

GRIFFITHS, J.:

[1] As you are aware the court is at this stage faced with the decision as to what sentences should be imposed in respect of the various counts on which you have been convicted. In the normal course, a court in considering sentence is obliged to consider your personal circumstances, the nature of the crimes committed and the

broader interests of society. However, as you are fully aware, the provisions of the Criminal Law Amendment Act (105 of 1997) are applicable to the robbery and murder counts.

[2] Pursuant to section 52 of that Act, the court is obliged to impose life imprisonment on the murder counts, and 15 years imprisonment on each of the robbery counts unless the accused can show that there exist what are referred to as substantial and compelling circumstances. The manner in which a sentencing court's discretion has been affected by the provisions of the Act was dealt with by the Supreme Court of Appeal in the case of **S v Malgas**¹. The effect of this decision has been aptly summarized by Plasket J in **S v Nkawu**² as follows³:

"... when sentencing for crimes specified in the Act, a court is required to 'approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed...'. While the Act shifted the emphasis to 'the objective gravity of the type of crime and the public's need for effective sanctions against it', discretion to deviate from the prescribed sentence was granted to courts 'in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may'.

[4] A court may deviate from the sentence as prescribed if 'substantial and compelling circumstances' are present. In *Malgas*, at paragraph 9, it was held that it is impermissible to deviate from the prescribed sentence 'lightly and for flimsy reasons which could not withstand scrutiny'. Apart from this, however, all factors relevant to determining sentence remain relevant when the Act applies and a sentencing court must look

¹ 2001 (1) SACR 469 (SCA)

² 2009 (2) SACR 402 (ECG)

³ At page 404, paragraphs 3 -4.

to the 'ultimate cumulative impact' of all of these factors in order to determine whether a departure from the prescribed sentence is justified."

[3] In ***S v Vilakazi*⁴ 2009(1) SACR 552 (SCA)**, the SCA dealt with the proper approach to determining whether there are substantial and compelling circumstances that warrant a deviation from the prescribed minimum sentence. It said that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence. In addition, in ultimately deciding whether substantial and compelling factors exist, one must look at the mitigating and aggravating factors and consider the cumulative effect thereof.

[4] In considering whether there are such substantial and compelling circumstances, the court has considered various factors. These include all the personal circumstances which have been placed before me by the accused themselves, and by Ms Magaleni, a social worker from the Department of Social Development who testified regarding her investigation of the accused and her findings in that regard. I do not intend to set out chapter and verse of all these personal circumstances as they are a matter of record and have been properly placed before the court. However, it should be made clear that I have considered each and every circumstance pertaining to the accused, including their cumulative effect.

[5] There are various factors which have been advanced as potentially being such substantial and compelling circumstances. In essence, these are their personal circumstances, the length of time they have been incarcerated awaiting finalization of this trial, the fact that they have been humble and respectful towards the court during the course of these lengthy and sometimes arduous proceedings coupled with the fact that, before these convictions, they were first offenders having no previous convictions.

⁴ 2009 (1) SACR 552 (SCA), at para 15

[6] In addition to these factors so advanced by the accused themselves, I have also taken into account a further factor which was indeed the purpose of obtaining pre-sentencing reports for each accused. Ms Magaleni has, as I requested in the earlier court order, provided a thorough and full report pertaining to the situation the accused found themselves in at the Mancoba compound. It has emerged from her evidence that indeed a type of cult existed at this compound which was deemed to be founded in Christianity. However, there is little doubt in my mind that each and every one of the accused were, to a degree, brainwashed into believing that the ethos and principles applied by this cult were steeped in Christianity and to be followed without question. In sentencing the accused therefore, I have taken this fact into account. However, as stressed by this witness, this aspect cannot be taken too far.

[7] Firstly, the accused themselves have denied any form of brainwashing in this regard. Secondly, even though certain of the accused did not receive full formal education, there is no doubt that each of the four accused before me are indeed highly intelligent. Not only are they intelligent, but they are fully alive to what is right and what is wrong. Thus, whatever influence may have been brought to bear on them during their time, or times, within the compound, this cannot be regarded as having affected their conceptualization of whether their actions amounted to activities of a criminal nature, or not. Having had the experience of watching and listening to the accused over an extended period of time in this court, coupled with the evidence Ms Magaleni, I have little doubt that they were fully aware of the fact that their various actions as described in this court amounted to serious offences.

[8] I have already touched on the nature of the offences. One only needs to read the judgment on conviction in this matter to conceive of the serious nature of these offences. Accused two and three, in advance of the attack upon the police at Ngcobo, committed extremely serious robberies on an innocent policeman and woman, the sole purpose of which was to steal their firearms. These firearms were not simply stolen for the joy of it, they were stolen for a distinct purpose. That purpose was for their employment in further serious criminal activity, the ultimate purpose apparently having been to obtain more funds for their cabal within the

Mancoba community. Indeed, thereafter further offences were carried out using these very firearms. Not only were they carried out, it seems they were carried out after deliberate planning over a period of time and indeed a form of training in the sense that they attempted to make themselves as fit as possible and trained themselves in the use of firearms for the very purpose of furthering their criminal activity.

[9] Then we have the activities at Ngcobo itself. A number of policemen were not only murdered, they were slaughtered. Others are lucky to be alive to tell the story today. It seems that these perpetrators had absolutely no compassion for the life or limb of those whom they attacked. Indeed, it seems one can liken this to certain military activities which are taking place in the Middle East today. At least, one hopes, those military activities are to some degree subject to the rules of war whereas the actions of that night, were not. What makes these activities worse was that there was ample time for any of the individual accused to withdraw from the enterprise as it occurred over an extended period of time. It seems that attempts were made to commence the attack earlier, but were cancelled due to reports made by accused five who was tasked with reconnoitring the town before the group embarked on their mission. As I have said, there was ample opportunity over an extended period of time for any one of the accused to have withdrawn, but none did so. In my view, these crimes cumulatively are of the most serious nature one can imagine, particularly as there were no less than five people murdered and seven serious robberies, nine in the case of accused two and three.

[10] I turn then to the question of remorse. Quite simply none of the accused have shown any remorse whatsoever. Remorse can only commence when one takes responsibility for one's actions. Each of the four accused pleaded not guilty and denied throughout the trial that they were involved in these crimes. As was said in **S v Matyityi**⁵ in a case where an accused pleaded guilty:

“There is, moreover, a chasm between regret and remorse.⁸ Many accused persons might well regret their conduct but that does not

⁵ 2011 (1) SACR 40 (SCA)

without more translate to genuine remorse.⁹ Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error.¹⁰ Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look.¹¹ In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.¹² Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

[11] In this case, all four accused have not even gone so far as to attempt to show remorse in this sense. They simply deny being involved. It is also difficult in the circumstances to believe that there is any real chance of rehabilitation. It has been said that rehabilitation is always possible, and I would like to believe that there is some possibility in this case.

[12] Then there is also the factor that whilst accused two and three do not have previous convictions, they indeed were involved in the robberies of 21 November 2017 and 5 December 2017 which preceded the attack on the police station on 21 February 2018. Despite this, they continued with the criminal activities of 21 February 2018.

[13] The social worker has also dealt with the family of the various deceased. They have suffered to the extent that they do not want to have anything to do with this trial. They have lost breadwinners and loved ones. Whilst the accused have

paid lip service to this, they have not taken responsibility for it. In addition to the families of the deceased, there are those who were caught up in the evening's terrible happenings and, I have no doubt, suffer the scars therefrom until today.

[14] Having considered all these aspects cumulatively and having considered the proportionality of the various offences when compared with the minimum prescribed sentences, I have little doubt that I am correct in coming to the conclusion that no substantial and compelling circumstances exist in this case.

[15] Regarding the remaining counts which are not subject to the provisions of that legislation, I take into account all the aggravating and mitigating circumstances which I have already set out in dealing with the question of substantial and compelling circumstances.

[16] Regarding all the counts, I have taken into account the cumulative effect of the various sentences and in this regard have taken into account, in particular, the fact that the accused have been in custody for a period of approximately six years and seven months. I have also considered the fact that, to a degree, they may well have been influenced by the prescriptive teachings and culture which prevailed within the compound and the various other factors which the accused have placed before me, in particular, that they have remained respectful to the court throughout these trial proceedings. I have furthermore taken into account, as far as accused five is concerned, that whilst he has been convicted on the various counts which are based on occurrences which happened after he had gone back to the compound, he was not actually present at these scenes and did not participate directly therein. These will be reflected in the effective sentences to which I will refer.

[17] **You are accordingly sentenced as follows:**

1. Accused one and five are sentenced on the various counts as follows:

Count 4:	Robbery with aggravating circumstances – 15 years imprisonment
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Count 5:	Robbery with aggravating circumstances – 15 years imprisonment
Count 6:	Murder – life imprisonment
Count 7:	Murder – life imprisonment
Count 8:	Robbery with aggravating circumstances – 15 years imprisonment
Count 9:	Robbery with aggravating circumstances – 15 years imprisonment
Count 10:	Robbery with aggravating circumstances – 15 years imprisonment
Count 11:	Robbery with aggravating circumstances – 15 years imprisonment
Count 12:	Robbery with aggravating circumstances – 15 years imprisonment
Count 13:	Murder – life imprisonment
Count 14:	Murder – life imprisonment
Count 15:	Murder – life imprisonment
Count 16:	Attempted murder – 10 years imprisonment
Count 17:	Attempted murder – 10 years imprisonment
Count 18:	Housebreaking with intent to commit an offence – 10 years imprisonment
Count 19:	Possession of a firearm with intent to commit an offence – 5 years imprisonment
Count 20:	Unlawful possession of a firearm – 5 years imprisonment
Count 21:	Unlawful possession of a firearm – 5 years imprisonment
Count 22:	Unlawful possession of ammunition – 5 years imprisonment

2. Regarding accused one, the sentences on counts 4, 5 and 19 will run consecutively and the sentences on counts 8, 9, 10, 11, 12, 16, 17, 18, 20, 21 and 22 will run concurrently with the cumulative sentence on counts

4, 5 and 19, and concurrently with each other. The effective sentence is accordingly 35 years imprisonment on these counts.

3. Regarding accused five, the sentences on counts 4 and 16 will run consecutively and the sentences on counts 5, 8, 9, 10, 11, 12, 17, 18, 19, 20, 21 and 22 will run concurrently with the cumulative sentence on counts 4 and 16, and concurrently with each other. The effective sentence is accordingly 25 years imprisonment on these counts.
4. As far as accused two and three are concerned, they are sentenced to 15 years imprisonment on count 1, and 15 years imprisonment on count 2. Their sentences on the remaining counts will be the same as accused one and five's sentences on those counts as set out in paragraph one hereof.
5. Regarding accused two and three, the sentences on counts 1, 2 and 16 will run consecutively and the sentences on counts 4, 5, 8, 9, 10, 11, 12, 17, 18, 19, 20, 21, and 22 will run concurrently with the cumulative sentence on counts 1, 2 and 16, and concurrently with each other. The effective sentence is accordingly 40 years imprisonment on these counts.
6. Although it may be unnecessary to spell this out, the effective sentences for each accused as spelt out in paragraphs 2, 3 and 5 hereof will run concurrently with the five sentences of life imprisonment, which sentences of life imprisonment automatically run concurrently with each other.

R E GRIFFITHS
JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE : Ms Mvandaba

INSTRUCTED BY : Director of Public Prosecutions

COUSEL FOR THE DEFENCE : ALL ACCUSED IN PERSON

DELIVERED ON : 16 OCTOBER 2024