



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **KS 19/24**

In the matter of:

THE STATE

and

J[...] J[...] L[...]

ACCUSED

Coram: Van Tonder, AJ

JUDGMENT

VAN TONDER, AJ

1. The accused was convicted of seven (7) charges on 28 January 2025:

- 1.1. Count 1: Murder;
- 1.2. Count 2: Assault with intent to do grievous bodily harm;
- 1.3. Count 3: Assault with intent to do grievous bodily harm;
- 1.4. Count 4: Assault with intent to do grievous bodily harm;
- 1.5. Count 6: Assault;
- 1.6. Count 7: Assault with intent to do grievous bodily harm;

- 1.7. Count 8: Premeditated murder read with section 51(1) of the Criminal Law Amendment Act, 105 of 1997;
2. Counts 1, 2 and 3 arise from the events of the 13th of February 2022, at the Chila Mati Tavern in Galeshewe.
3. Count 4 arises from the events of the 28th of July 2022, at the complainant, Jaynal Ahmed's tuck shop in Galeshewe.
4. Charge 5 against the accused was withdrawn by the State at the commencement of the trial.
5. Counts 6, 7 and 8, arise from the events of the 29th of April 2023, that took place in Galeshewe.

MITIGATING FACTORS

6. The accused is a 20-year-old male, who was 17 years of age when he committed the offences in counts 1 to 3 and was 18 years old when he committed the offences in counts 6 to 8.
7. The accused went to school until grade 7 whereafter he was referred to a facility for children with special needs due to learning disabilities.
8. The accused does not have any previous convictions and is a first-time offender, with no pending criminal cases against him.
9. He has been in custody for 11 months since his arrest.

AGGRAVATING FACTORS

10. Mr Rosenberg on behalf of the State argued that, despite the fact that the accused was a minor, when he committed the crimes in Counts 1, 2 and 3, that a substantial term of direct imprisonment is warranted, especially with regard to Count 1, the murder of Anthony Brooker.

11. The late Anthony Brooker's biological mother had passed away when he was 10 years old, and he was in the foster care of his maternal aunt, Cynthia Mosinki, who had also provided an impact report in the matter.
12. The grandmother of the late Anthony Brooker was unable to process his death and she had passed away three months after his funeral.
13. As also appears from the pre-sentencing report, the accused does not accept responsibility for his actions, and shows no sign of remorse.
14. Both the family members of the deceased and the victim of Count 2, Dion Mongale, are of the view that a prison sentence must be imposed on the accused.
15. Mr Rosenberg submitted that lack of remorse, is not *per se* an aggravating factor in respect of sentencing, although it is still a factor that has to be kept in mind when the court decides on a suitable sentence in respect of the accused.
16. He submitted that the accused was a violent person and that the accused could have walked away from all of the charges against him.
17. This was also confirmed in the impact report of Jessica Ngceza, as well as that of Mr Dion Mongale.
18. In this regard it should be kept in mind that in respect of Count 8, the murder of T[...] O[...], the deceased was merely standing at the gate in front of his yard, without any threat, animosity or argument with the accused.
19. The deceased, T[...] O[...] was only 16 years old when he was murdered, and his death had a devastating effect on his family, as is clear from the impact statement of L[...] K[...] R[...], his mother as well as I[...] P[...] L[...], his brother.

20. It had *inter alia* resulted in the late O[...]’s father resorting to alcohol to try and cope with the loss, to such an extent that he had lost his employment, and his passing had even led to his brother I[...], attempting to commit suicide several times.
21. The pre-sentencing report also recommended in its conclusion that the accused be sentenced to direct imprisonment.
22. Mr Rosenberg submitted that the only possible sentence in respect of counts 1 and 8, is a long term of direct imprisonment in order to remove the accused from society for a considerable period of time.
23. Count 8 also falls under the minimum sentences in terms of Section 51 of the Criminal Law Amendment Act 105 of 1997, in respect of the murder being committed with premeditation as set out in schedule 2, Part II, as an offence which warrants a minimum sentence of life imprisonment.
24. Mr Rosenberg pointed out that the lives of many people were negatively affected by the crimes committed by the accused.

THE LEGAL POSITION

25. It is trite law that a court will take cognisance of the dictum of Rumpff JA where the learned Judge stated that:
- “What has to be considered is the triad consisting of the crime, the offender and the interest of the society.”¹*
26. A balance has to be struck between the interest of the accused and that of society.
27. As stated by the Supreme Court of Appeal: *“Punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances.”²*

¹ S v Zinn 1969 (2) SA 537 (A) at 540G-H

² S v Rabie 1975 (A) SA 855 (A) at 863A-B

28. It is however also true that any sentence imposed must have deterrent and retributive force, as set out in the matter of **S v Crossley (1) SACR 223 (SCA)** at par [9].
29. This does however not mean that an accused person must be sacrificed on the altar of deterrence.³
30. Especially so when the court is dealing with a youthful offender.⁴
31. The Supreme Court of Appeal has also held the following with regard to minimum sentences in terms of Section 51 of the Criminal Law Amendment Act 105 of 1997:

“Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed 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.

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.

The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning 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 co-offenders are to be excluded”⁵

32. The Constitutional Court has also held that the approach set out in **S v Malgas** steers an appropriate path:

“which the Legislature doubtless intended, respecting the Legislature’s decision to ensure that consistently higher sentences are imposed in

³ S v Sobandla 1992 (2) SACR 613 (A) at 617G

⁴ S v Williams (3) SA 632 (CC) at par[85] also reported as 1995 (7) BCLR 862 (CC)

⁵ S v Malgas 2001 (1) SACR 469 (SCA) at 481i – 482a also reported as [2001] 3 All SA 220 (A)

*relation to the serious crimes covered by s 51 and at the same time promoting 'the spirit, purport and objects of the Bill of Rights'."*⁶

33. The SCA has however also stated the following:

*"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 unjust would be done by imposing that sentence, it is entitled to impose a lesser sentence."*⁷

34. It is trite that particular factors, whether aggravating and mitigating, should not be taken individually and in isolation as substantial and compelling circumstances. But that, in deciding whether these circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof.⁸

CONCLUSION

35. In respect of counts 1, 2 and 3, it should be taken into consideration that these three charges emanate from one series of events that took place on the 13th of February 2022, at the Chila Mati Tavern in Galeshewe.
36. Count 4 emanates from a separate event that transpired on the 28th of July 2022, at the complainant, Jaynal Ahmed's tuck shop in Galeshewe.
37. Counts 6, 7 and 8, emanates from one series of events on the 29th of April 2023, that took place in Galeshewe.
38. In view thereof, care should be taken in respect of the cumulative effect of the sentences imposed, in order to ensure that the aggregate penalty is not too severe.⁹

⁶ S v Dodo 2001 (3) SA 382 (CC) at 393C-D

⁷ S v Malgas 2001 (1) SACR 469 at para 25

⁸ S v Vilakazi 2009 (1) SACR 552 (SCA) also reported as 2012 (6) SA 353 (SCA) and [2008] 4 All SA 396 (SCA)

⁹ S v Muller 2012 (2) SACR 545 (SCA) at par [9]

S v Moswathupa 2012 (1) SACR 259 (SCA)

39. In respect of Count 1, a major factor that has to be taken into account is that the accused was a minor at the time that the murder was committed, and despite the fact that a substantial direct term of imprisonment is warranted due to the serious nature of the crime, this should not have the effect of incarcerating the accused for the remainder of his life.
40. As referred to above, count 8 falls under the minimum sentences in terms of Section 51 of the Criminal Law Amendment Act 105 of 1997, in respect of the murder being committed with premeditation as set out in schedule 2, Part II, as an offence which warrants a minimum sentence of life imprisonment.
41. In this regard Mr Biyela and Mr Rosenberg submitted that the young age of the accused, again needed to be considered in respect of the question whether the prescribed minimum sentence of life imprisonment would be disproportionate in the circumstances.
42. As stated by the SCA in the matter of **S v Malgas**:
- “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 unjust would be done by imposing that sentence, it is entitled to impose a lesser sentence.”¹⁰*
43. The Criminal Law Amendment Act 105 of 1997, demands the imposition of the prescribed minimum sentences unless a court is satisfied in a particular case that there are “*substantial and compelling circumstances*” that justify the imposition of a lesser sentence.
44. In this regard, the principle is formulated by Nugent JA, as follows:
- “15. It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it*

¹⁰ S v Malgas 2001 (1) SACR 469 at para 25

imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the “offence” in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise):

“consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.”

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas (supra), which said that the relevant provision in the Act:

“vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which ‘justify’...it.”¹¹

45. Despite the accused’s propensity to violence, I am of the view that the young age of the accused should be taken into account, together with the fact that he is a first-time offender, as an indication that he may be rehabilitated if given the opportunity.
46. 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 indeed proportionate to the particular offence.

¹¹ S v Vilakazi 2009 (1) SACR 552 (SCA) also reported as 2012 (6) SA 353 (SCA) and [2008] 4 All SA 396 (SCA)

47. In the matter of **S v Lekhooana** Cubungu AJ, held as follows:

*"When sentencing a court takes into account the offenders 'personal circumstances, however, only some of these carry sufficient weight to tip the scales in favour of the offender to impact on the sentence to be imposed. The fact that the offender is young and is a first offender has the effect of reducing a sentence, as there is potential for the offender not to repeat the crime and to be rehabilitated."*¹²

48. In view of the aforesaid, I am satisfied that in this particular case there are "substantial and compelling circumstances" that justify the imposition of a lesser sentence, than life imprisonment in respect of count 8.

49. However, as stated by the SCA regarding the youth of an accused and direct imprisonment:

*"The Constitution, read with the various international instruments that have a bearing on the subject of the rights of young people in conflict with the law, furnishes the backdrop of this approach. Section 28(2) of the Constitution provides: '(A) child's best interests are of paramount importance in every matter concerning the child.' That statement of general principle is the clearest indication that child offenders are deserving of special attention. More so it would seem, in the sphere of sentencing. The ideal is that no child should ever be caged, though in practice there will always be cases that are so serious that imprisonment would be the only appropriate punishment."*¹³

50. I am of the view that, despite the prescribed minimum sentence of life imprisonment not being appropriate in the circumstances of the matter, in view of the aggravating factors as set out above, a substantial term of direct imprisonment is warranted in respect of count 8 (and to some degree in respect of count 1).

¹² S v Lekhooana (CC1/2021) [2023] ZAECELLC 8 (19 April 2023)

¹³ S v B 2006 (1) SACR 311 (SCA) at par [13]

51. Having taken into account all the relevant factors, including all aggravating and mitigating factors, as well as the specific circumstances of the case, and having considered the cumulative effect thereof, I sentence the accused as follows:

51.1. Count 1: Murder, 15 years direct imprisonment.

51.2. Count 2: Assault with intent to do grievous bodily harm, 3 years imprisonment.

51.3. Count 3: Assault with intent to do grievous bodily harm, 2 years imprisonment.

51.4. Count 4: Assault with intent to do grievous bodily harm, 3 years' imprisonment.

51.5. Count 6: Assault, 12 months' imprisonment.

51.6. Count 7: Assault with intent to do grievous bodily harm, 12 months' imprisonment.

51.7. Count 8: Premeditated murder, 25 years direct imprisonment.

52. The aforesaid sentences will all run concurrently.

AG VAN TONDER
ACTING JUDGE

On behalf of the State: Adv. J.D. Rosenberg (oio The Director of Public Prosecutions)

On behalf of the Accused: Adv K. Biyela (oio Legal Aid South Africa)