

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE SIGNATURE

Case No: CC62/2021

In the matter between

The State

and

- 1. Sipho Goodwill Mthethwa** [deceased]
- 2. Khumbulani Mpofu**
- 3. Jabulani Jones Tshabalala** [acquitted]

SENTENCE

[1] Accused 2 is found guilty on the following charges:

1. Counts 1 and 2: The kidnapping of Ediemore and Sydney Ncube;
2. Count 3: Robbery with aggravating circumstances of a motor vehicle,

read with the provision of *section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997*, as per the indictment as well as the charge ultimately put to the accused;

3. Counts 4 and 5: The theft of R10 000 and R4 000 respectively;
4. Counts 6 and 7: The murders of Sydney and Ediemore Ncube read with the provision of *section 51(1) of Act 105 of 1997*.

[2] *Section 51(2) of Act 105 of 1997* provides for a minimum sentence of 15 years of imprisonment for a first offender of robbery with aggravating circumstances. *Section 51(1) of Act 105 of 1997* provides for a sentence of life imprisonment when certain circumstances are present; that is murder when it was planned or premeditated; or the death of a victim was caused while committing or attempting to commit robbery with aggravating circumstances.

[3] The prosecution did not allege in the indictment that the murders were planned or premeditated, and the Court did not find as such. The combination of charges however triggers life imprisonment in respect of the murder charges.

[4] In terms of *section 51(3) of Act 105 of 1997*, a court must impose a lesser sentence than the prescribed minimum, if a court is satisfied that substantial and compelling circumstances exist that justifies the imposition of a lesser sentence.

[5] In *S v Malgas 2001(1) SACR 469 (SCA)* the court held that sentences are not to be departed from lightly, and for flimsy reasons. It was left to the courts

to decide whether the circumstances of a particular case called for a departure from the prescribed sentence. All factors traditionally considered continues to play a role. When a sentencing court is satisfied that the circumstances of a case renders the prescribed sentence unjust in that it would be disproportional to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, a court is entitled to impose a lesser sentence.

[6] A pre-sentence report was submitted by the defence. The accused was born in 1968. He has two minor children aged 8 and 7 who are attending school. He is in a customary marriage. At the time of his arrest he was self employed as a motor vehicle mechanic, earning an income of between R10 000 to R20 000 per month. He was supporting his unemployed wife and children at the time of his arrest. The accused completed Form 5 in Zimbabwe, the equivalent of grade 12 in South Africa. The accused was arrested on 08 August 2019 and has been in custody since. He has one previous conviction for theft in 2016 and for which an admission of guilt fine was paid in the amount of R300. The pre-sentence report indicated that the accused had suffered from some unknown mental illness as a child, and that since he came to South Africa, he has not received medical attention for such illness, or sought any treatment.

[7] It was argued on behalf of the defence that the fact that he has two minor children to support, and the fact that he has been held in custody for the duration of the trial, amounts to substantial and compelling circumstances, justifying the imposition of a lesser sentence than the prescribed minimum.

[8] The prosecution presented the evidence of Tshugai Mongomrimbo, who testified about the emotional loss and trauma suffered by herself, her two daughters and the rest of the Ncube family after the death of the two brothers. She lost her employment after her husband's death, as she could not cope emotionally with his death. She further read out letters written by her daughters elaborating on the loss they suffered after being left fatherless.

[9] The prosecution argued that there are no substantial and compelling circumstances present. The prosecution further referred this court to numerous cases in which sentences of life imprisonment was upheld on appeal. She argued that the lengthy delays caused by the accused cannot justify the imposition of a lesser sentence. Further, that it was only during consultation with the social worker, that the accused had made mention of mental illness and that no proof was presented to the court regarding this alleged mental illness. It was further pointed out that the pre-sentence report was limited to the personal circumstances of the accused, and did not account for the trauma suffered by the victims, nor the impact on the community.

[10] In reply, on behalf of the accused, it was argued that not all of the delays were caused by the accused. Further, that the pre-sentence report was specifically requested on behalf of the accused in order to deal with his personal circumstances. The defence argued that it was for the prosecution to obtain victim impact reports for sentencing purposes.

[11] The pre-sentence report is the first mention made as to the mental health

illness of the accused. The prosecution placed in dispute that the accused suffers from a mental health illness, after which the court refused another postponement for the defence to seek proof of this averment in the pre-sentence report. The following was held in *S v Olivier 2010(2) SACR 178 (SCA)* in this regard:

“Held, that during the sentencing phase as much information as possible regarding the perpetrator, the circumstances of the offence, and the victims, was to be placed before the court. Material factual averments ought, as a general rule, to be proved on oath. Minor and uncontentious issues could readily be disposed of in oral argument, but any ex parte averments by the defence which were at variance with the State's information ought to be unequivocally disputed. An accused or his or her legal representative should be alerted timeously about disputed facts, so as to enable them to adduce oral evidence if necessary. The practice, whereby prosecutors sometimes permitted defence averments that were at variance with information in the docket to remain unchallenged, was to be deprecated.”

[12] The accused has had three counsel representing him. None of the counsel raised his mental health as an issue since this court commenced with the trial on 05 May 2022, and neither did the accused himself. He allegedly suffers from a mental health illness, but is unable to provide the name of the illness he suffers from, according to the pre-sentence report. He further did not seek medical treatment for the alleged mental health illness since he took up residence in South Africa.

[13] It was never raised that the accused suffers from a mental health illness, or that he may not be able to follow court proceedings as a result of such mental health illness. It was also not his defence that he acted or failed to act due to him suffering from a mental health illness. The accused's version is in any event that he was not involved in this matter.

[14] The accused was for some time during the trial representing himself. He is fluent in English and came across to the court as a very intelligent individual. He did not raise any alarms with the court during the period in which he had represented himself, in that there may be a mental health issue. He asked relevant questions to witnesses, answered questions appropriately, and called a relevant witness in his defence regarding his eye sight. The court observed that the accused took notes throughout the trial, and had handed in his own typed arguments at appropriate stages during the trial. These arguments were well thought through, and did not raise any alarm with the court that the accused was not fit to stand trial, or that he did not follow court proceedings.

[15] In *Radebe v The State (A219/2015) [2015] ZAGPPHC 792 (23 September 2015)* the court held at par [9] with regards to pre-sentence reports:

"It is evident that pre-sentence reports are meant to provide guidance to the exercise of the discretion which a court has to exercise properly and judicially when sentencing a convicted offender. The reports assist a presiding officer to understand the offender and the reasons for the crime -this being one of the triad of factors that the court has to consider when deciding on an appropriate sentence. These reports are called for

where a court feels the need to be better informed about the character and the possible future of the offender. An ideal pre-sentence report must embody all the necessary information relevant to the offender, the victim and the community. To be able to decide on an appropriate sentence the sentencing court needs to have sufficient information such as information relating to mitigating and aggravating factors.”

[16] The pre-sentence report in the matter before this court, was requested by the defence. It follows that such a report will therefore mostly deal with the personal circumstances of the accused. It seems to this court that the request that was made for the report was limited to the personal circumstances of the accused. Even though the pre-sentence report only deals with the personal circumstances of the accused, it does not follow that it carries no weight. The defence requested the report and was presented during the case for the defence in mitigation of sentence. It was for the prosecution to decide whether or not to obtain victim impact reports for sentencing purposes, which would deal with the impact of the crimes on the victims. The prosecution in any event called a witness in aggravation of sentence, and submitted letters.

[17] In *S v Zinn 1969(2) SA 537 (A)* the court established the ‘*triad*’ of factors to be considered during sentencing: that is the nature of the crime, the personal circumstances of the offender, and the interests of society. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.

[18] The personal circumstances of the accused are nothing more than the traditional factors. It is the view of this court that the only relevant circumstance to consider is the period which the accused has already been in custody. It is a lengthy period that he has been held in custody awaiting the finalisation of the trial. In *S v Mqabhi 2015(1) SACR 508 (GJ)* the court formulated the following guidelines:

“(a) Pre-sentence detention was a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of the CLAA. (b) Such period of detention was not to be isolated as a substantial and compelling circumstance but had to be weighed as a mitigating factor, together with all the other mitigating and aggravating factors, in determining whether the effective minimum period of imprisonment to be imposed was justified in the sense of it being proportionate to the crime committed. If it were not, then the want of proportionality constituted the substantial and compelling circumstances required under section 51(3). (c) The reason for the prolonged period of pre-sentence detention was a factor. If the offender were responsible for unnecessary delays then this might redound to his detriment. (d) There was no mechanical formula or rule of thumb to determine the period by which a sentence was to be reduced. The specific circumstances of the offender, which might include the conditions of his detention, were to be assessed in each case when determining the extent to which the proposed sentence should be reduced. (e) Where only one serious offence was committed, and assuming that the offender had not been responsible for unduly

delaying the trial, then a court might more readily reduce the sentence by the actual period in detention prior to sentencing.”

[19] In *S v Ludidi and others* 2025(1) SACR 225 (SCA) it was held that:

“Where a sentence of life imprisonment was to be imposed in terms of the Criminal Law Amendment Act 105 of 1997, the period in custody as awaiting trial prisoners was not in itself a substantial and compelling circumstance justifying deviation, unless this was an exceptionally long period of time to which the conduct of the accused persons had not materially contributed.”

[20] The court is of the view that this factor alone does not justify a departure from the minimum sentences, and therefore find no substantial and compelling circumstances. It is so that the accused did not cause all of the delays, but when compared to the number of crimes committed and the seriousness of the crimes, the period held in custody prior to sentence, pale in comparison.

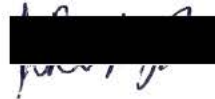
[21] The court however has to consider proportionality of the prescribed sentences as well. In this matter the two deceased were kidnapped. Their hands and feet were tied. The deceased were tied and posed no threat to the accused. They were however killed and the vehicle taken. One deceased was shot from the back in the neck, while the other was shot in the back. Their bodies were found in a veldt. An attempt was made to sell their vehicle, and money was withdrawn from two of their bank accounts. In the view of this court, an effective period of life imprisonment, when considering the number of

charges and the seriousness of the charges, is not disproportional.

[22] The accused, Mr Mpofu, is therefore sentenced as follow:

1. Count 1: Kidnapping – 5 years of imprisonment;
2. Count 2: Kidnapping – 5 years of imprisonment;
3. Count 3: Robbery with aggravating circumstances – 15 years of imprisonment;
4. Count 4: Theft – 12 months of imprisonment;
5. Count 5: Theft – 12 months of imprisonment;
6. Count 6: Murder – life imprisonment;
7. Count 7: Murder – life imprisonment.

[23] The accused is declared unfit to possess a firearm.



LA van Wyk AJ
Acting Judge of the High Court of South Africa
North Gauteng Division, Pretoria

Appearances:

For Accused 2:	Adv Mogale
For the State:	Adv D Ngobeni, DPP Pretoria
Date of delivery:	29 July 2025