



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

~~Reportable~~/Not Reportable

Case no: A29/2025

In the matter between:

SIBONGILE PATU

APPELLANT

and

THE STATE

RESPONDENT

Coram: V C SALDANHA J *et* SALLER AJ

Heard: 18 June 2025

Delivered: 3 September 2025

JUDGMENT

INTRODUCTION

- [1] On 1 July 2013 the appellant, Mr Sibongile Patu, together with Mr Luzuko Zembe (“accused 1”), approached two men on the streets of Khayelitsha. They were Mr Manelisi Ntwaiko and Mr Athenkosi Nteyi.
- [2] Accused 1 approached Mr Nteyi, robbed him of his cell phone and in the course of the robbery, stabbed him with a knife. Mr Nteyi managed to run away after being stabbed, but later died as a result of his injuries at the Khayelitsha Day Hospital.
- [3] While accused 1 dealt with Mr Nteyi, the appellant went to Mr Ntwaiko, held and searched him, and took his phone and some coins. When accused 1 joined them and aggressively demanded more goods, including by attempting to stab Mr Ntwaiko as well, the latter was able to free himself and run away. Despite a chase by the two accused, Mr Ntwaiko escaped and later testified at the trial.
- [4] The cell phones were recovered the next day from the accused by members of the South African police.
- [5] On 3 March 2020, the two accused were convicted in the regional court in Khayelitsha on two counts of robbery with aggravating circumstances, and one count of murder, after the trial court found that they had acted in common purpose.
- [6] The provisions of the Minimum Sentence legislation (the Criminal Law Amendment Act 105 of 1997) are applicable to the charges, and were explained to the accused.
- [7] In sentencing the accused on 15 October 2020, the trial court found there were substantial and compelling circumstances to deviate from the prescribed minimum sentences. The court sentenced them both to 12 years imprisonment

on counts 1 and 2 (the robbery charges) and to 15 years imprisonment on count 3 (the murder charge). The court further ordered that seven years of the sentence on counts 1 and 2 should run concurrently with that on count 3, sentencing the accused to an effective 20 years' imprisonment.

- [8] Before us, the appellant appeals against sentence only, with the trial court's leave. Accused 1 has not appealed.
- [9] The appellant appeals on the grounds that the circumstances of the case were such that, considered cumulatively, they called for a further deviation from the prescribed minimum sentences; and that the court misdirected itself in balancing the factors relevant to sentencing. The factors on which the appellant relies and which he says were not properly taken into account can be grouped as follows: (a) the appellant's personal circumstances; (b) the limited participation by the appellant in the offences; (c) the length of the appellant's incarceration awaiting trial; and (d) the lack of proper treatment of the deceased Mr Nteyi by the Hospital.
- [10] The appellant further submitted that the court attached too little or no weight to rehabilitation in the course of sentencing, and overemphasised the prevalence of the crimes of which the appellant was convicted as a factor in sentencing.
- [11] We invited counsel to submit additional written submissions dealing with the following: first, the trial court's finding that the Hospital had been negligent in treating the deceased, and whether and to what extent this should be taken into account for the purpose of sentence; second, whether the trial court erred in failing to distinguish between the two accused for the purpose of sentence despite their conviction on the basis of common purpose; and third, whether the trial court misdirected itself when it ordered only part of the sentences it imposed on the various charges to run concurrently. Counsel did so, and we are grateful for their cogent submissions.

THE TEST ON APPEAL

- [12] The powers of an appeal court in relation to sentencing are well established. In *Bogaards v S* (CCT 120/11) (2012) ZACC 23; 2013 (1) SACR 1 (CC) para 41, the Constitutional Court explained this as follows (authorities omitted):

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by the courts below is circumscribed. It can only do so where there has been an irregularity that results in failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. ...

- [13] It will not suffice for us to merely disagree with the sentence imposed by the trial court, or the manner in which the trial court balanced the various factors in arriving at the sentence imposed. We may only interfere if we conclude that the trial court has materially misdirected itself, or the sentence is otherwise disturbingly inappropriate, disproportionate or such that no reasonable court would have imposed it (see *S v Giannoulis* 1975 (4) SA 867 (A) at 873G-H; *S v Kibido* 1998 (2) SACR 213 (SCA) at 216G-J; *S v Salzwedel & Others* 1999 (2) SACR 586 (SCA) para [10])

- [14] In that case, as explained in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12, “[w]here material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large.”

- [15] With these principles in mind, I turn to the trial court’s determination of the sentence.

PROPER DETERMINATION OF SENTENCE

- [16] The trial court's discussion of the factors it considered in the determination of sentence is not extensive. After referring to well-established principles first set out in *S v Zinn* 1969 (2) SA 537 (A), *S v Khumalo* 1973 (3) SA 697 (A), and *S v Swart* 2004 (2) SACR 370 (SCA), the trial court found that the circumstances of the case were too serious to consider any other sentence than direct imprisonment. This was because of the seriousness of the offences of which the accused were convicted; the importance of according the principles of retribution and deterrence their due weight in such cases; and the fact that the stabbing took place as part of the kind of robbery with which our society is plagued, for little gain but with great violence and with no regard for the sanctity of human life.
- [17] Despite this, the trial court went on to find that special and compelling circumstances existed which justified a departure from the minimum sentence periods prescribed in legislation. The most significant of these was the fact that the accused had been imprisoned awaiting the conclusion of their trial for a period of seven years. The court also took into account the relative youth of the accused, and the fact that they did not have relevant previous convictions.
- [18] At the outset, it is necessary to comment on a particularly concerning aspect of the trial court's reasons. When referring to the testimony of the deceased's mother in aggravation of sentence, the Magistrate brought his evidently very personal experience and loss to bear: "*Ten years ago my daughter was killed by an unknown person who is still out there and we do not know who. So I understand what you feel.*" That was inappropriate. Sentence must be passed in a manner that is dispassionate and objective. Every accused, no matter the gravity of the offence, is entitled to be judged in this manner, and must be seen to be so judged.
- [19] Many years ago already, Corbett JA in *S v Rabie* 1975 (4) SA 855 (A) at 866 A cautioned that "*a judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that*

delicate balance between the crime, criminal and the interest of society which his task and the objects of punishment demand of him.” The manner in which the trial court approached the appellant’s sentencing amounts to a misdirection that opens the door for a reconsideration of the appellant’s sentence on appeal.

[20] Under sections 51(1) and (2) of the Criminal Law Amendment Act, 105 of 1997 read with relevant parts of Schedule 2, prescribed minimum sentences apply to the offences of which the accused were convicted. They are 15 years imprisonment in respect of the convictions for robbery with aggravating circumstances, and life imprisonment in respect of the murder convictions because the murder was committed during a robbery and was also committed by the accused in the execution or furtherance of a common purpose. Under section 51(3), a lesser sentence may be imposed if substantial and compelling circumstances exist warranting a departure.

[21] As regards the question whether there are substantial and compelling circumstances to depart from the minimum sentences prescribed in the Criminal Law Amendment Act 105 of 1997 in respect of the accused’s offences, in *Radebe and another v S* 2013 (2) SACR 165 (SCA) Lewis JA addressed this question as follows (my emphasis):

"[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also S v Seboko 2009 (2) SACR 573 (NGK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in S v Dlamini 2012 (2) SACR 1 (SCA) para 41.)

[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is

justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."

- [22] Further, in *S v RO and Another* 2000 (2) SACR 248 (SCA) para [30], Heher JA said the following (my emphasis):

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence, invariably there are overlaps that render the process unscientific, even a proper exercise of a judicial function allows reasonable people to arrive at different conclusions."

- [23] It follows that in determining an appropriate sentence on appeal, our aim is to balance the well-established trifecta of the crime, the offender, and the interests of the community. The aims and purposes of punishment are relevant considerations. And as explained by Lewis JA quoted above, these factors must be considered against the backdrop of the mandated sentences.

THE APPELLANT'S CIRCUMSTANCES

- [24] The trial court's assessment of the gravity of the crime and the interests of society cannot be faulted. It is the assessment of the appellant's circumstances that requires reconsideration.

- [25] In its judgment on sentence, the trial court somewhat tersely sets out the personal circumstances of the two accused as reflected in the correctional services reports admitted into evidence for that purpose.
- [26] With reference to those reports, the trial court records that accused 1 was 32 years old at the time of sentencing, which makes him 25 at the time of the offence. He was born in the Eastern Cape. Accused 1 was not married and had one child of nine years old. He dropped out of school in grade 10 due to financial constraints. At the time of his arrest, he was working as a security guard in Montague Gardens.
- [27] The trial court records that the appellant was 27 years old at the time of sentencing, and therefore 20 years old at the time of the offence. He was born in Cape Town. He was not married and had no children. He passed grade 10 and was employed at a local tavern in Khayelitsha.
- [28] It is a well-established principle that sentence must always be individualised, with the circumstances of a convicted accused constituting one of the three essential elements of sentencing (see the oft-quoted dictum of Majiedt JA in *Mudau v S* (764/12) [2013] ZASCA 56, 2013 (2) SACR 292 (SCA) at para 13). This is so regardless of whether the accused committed the offence in common purpose with another perpetrator.
- [29] Appellant's counsel submitted that the appellant should be considered a 'young person' – a concept that appears in sentencing guidelines of Scotland to which he referred us, on the basis that a person under the age of 25 will generally have a lower level of maturity and greater capacity for change and rehabilitation. That is not a concept formally adopted in South Africa. Legislative protections for young people in the criminal justice system (notably the Child Justice Act 75 of 2008) generally do not apply to persons over the age of 18, unless the Director of Public Prosecutions having jurisdiction directs otherwise under section 4(2) of the Child Justice Act.

- [30] In *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 14, Ponnann JA dealt with this question as follows:

“Turning to the respondent's age: ... The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.”

- [31] The appellant's age alone does not constitute a mitigation. However, there is another aspect to this. There is a five-year age difference between the two accused, a significant difference at that stage in life. The age difference likely goes some way to explaining the evident lead which accused 1 took in the commission of the offences. Although the appellant made common purpose with accused 1 for the purpose of the robbery, and did not disassociate himself from events after he saw accused 1 take out the knife – even joining in on the chase of Mr Ntwaiko when he ran away – it is significant that he did not actively participate in the stabbing of the deceased Mr Nteyi.

- [32] It is also relevant that the appellant apologised to the deceased's mother, for the emotional loss of her child and also the loss of her son's future support. The trial court was critical of the fact that the appellant did not take full responsibility for his actions. It is correct that when he addressed the court in mitigation, the appellant highlighted the actions of accused 1 and described himself as witnessing rather than participating the events which led to Mr Nteyi's death. But on a closer consideration of his testimony, it is clear that the appellant's focus on the actions of accused 1 were not an effort to distract from his own responsibility but rather to dispute the version put up by accused 1 with whom he was found to have acted in common purpose – accused 1's version was that it was another person altogether, with whom the appellant had no association, who stabbed the deceased. By emphatically denying that

version, the appellant clearly implicated himself. There is no indication that his remorse at the stabbing and the death of Mr Nyathi is not genuine.

THE LENGTH OF THE APPELLANT'S PRE TRIAL DETENTION

[33] The accused spent seven years awaiting trial. As mentioned, this is a part of the totality of factors that must be weighed in order to determine whether substantial and compelling circumstances exist to reduce the sentence from the prescribed minimum.

[34] The delay is an extraordinarily long one. It cannot be placed at the appellant's door, but arose, in the main, from the State's repeated unsuccessful attempts to place evidence before the court regarding the medical treatment the deceased received at the hospital at the urging of the Magistrate.

[35] In those circumstances, the length of the accused's pre-trial detention is a substantial and compelling circumstance to be taken into account, and must feature in our determination of the appropriate sentence.

CONCURRENT SENTENCE

[36] The appellant was convicted of three counts (counts 1 and 2 relating to the robbery of Mr Ntwaiko and Mr Nteyi, respectively, and count 3 relating to the murder of Mr Nteyi). Counsel for the appellant urged us to have the sentences for all three counts run concurrently *in toto* on the grounds that they originated from the same incident, that they were committed at the same place and at the same time, and that two of the charges (relating to Mr Nteyi) have the same victim.

[37] I agree that the offences arose in the context of a single chain of escalating events, and it is appropriate that the sentences should run concurrently.

THE TREATMENT WHICH THE VICTIM RECEIVED AT THE HOSPITAL

- [38] Lastly I consider the trial court's finding that the Hospital which treated the deceased, the Khayelitsha Day Hospital, was grossly negligent in treating the deceased.
- [39] It is not clear precisely what happened when Mr Nteyi ran away after being stabbed by accused 1. In a statement of his brother admitted into evidence by the State, the brother says he was contacted by their mother around 2am in the morning and told where to look for Mr Nteyi. The brother found him, heavily bleeding, in a taxi which later took him to the hospital. There, Mr Nteyi died around 6am the same morning.
- [40] The post-mortem report admitted into evidence raised questions in the mind of the Magistrate whether the (lack of) treatment provided to Mr Nteyi at the Khayelitsha Day Hospital constituted a *novus actus interveniens* – an intervening act breaking the causal chain leading from the stabbing to Mr Nteyi's death. Despite several attempts by the State to call the doctors treating Mr Nteyi's injuries, only the pathologist was eventually available to give evidence. Based on her testimony, the trial court concluded that there had been gross negligence on the part of the Hospital, but held, with reference to *S v Tembani* 2007 (2) SA 291 (SCA), that even gross negligence on the part of the Hospital could not relieve the accused of their criminal liability for the death of Mr Nteyi.
- [41] I agree on the legal principle. A later event can only break the chain of causality if it is a completely independent act, having nothing to do and bearing no relationship to the accused's unlawful act. See *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* 2017 (3) SA 152 (SCA) paras 48-49.
- [42] We are, however, concerned here with sentence. The question is whether the inadequate treatment which the deceased received constitutes a relevant factor for sentencing. For the reasons that follow, it does not.

- [43] In *S v Tembani* 2007 (2) SA 291 (SCA) the SCA was seized with an appeal against conviction for murder on the basis of intervening negligence by the treating hospital. Cameron JA found that the hospital's negligence in that matter did nothing to lessen the appellant's legal culpability. It did not lessen the perpetrator's "*moral culpability*" and in no way diminished "*the burden of moral and legal guilt he must bear*" (para 26). That reasoning is equally applicable to the determination of sentence.
- [44] Second, contrary to the trial court's approach of supposing an "*ideal situation*" against which to measure the outcomes in present matter, Cameron JA went on to explain at para 27 that in a country like South Africa "*where medical resources are not only sparse but grievously maldistributed, it seems to me quite wrong to impute legal liability on the supposition that efficient and reliable medical attention will be accessible to a victim, or to hold that its absence should exculpate a fatal assailant from responsibility for death. ... To assume the uniform availability of sound medical intervention would impute legal liability in its absence on the basis of a fiction and this cannot serve the creation of a sound system of criminal liability.*"
- [45] On the established facts, it is thus far from clear that there was negligence on the part of the Hospital that contributed to Mr Nyathi's death. The only shortcoming clearly established is the lack of adequate records of the treatment which he received. The evidence of the only medical expert witness, forensic pathologist Ms Chong, was to the effect that where, as here, the liver is pierced it would generally be difficult for a surgeon to stem the bleeding. Even if the liver's membrane could be stitched, Ms Chong was not prepared to say that Mr Nyathi's life could have been saved through blood transfusions.
- [46] In the face of Ms Chong's reticence, the trial court proceeded to speculate on the possible outcome of medical interventions, based on the Magistrate's "*experience having dealt with a lot of these things*". The trial court concluded that there was a possibility that the deceased could have survived, had the Hospital provided him with treatment in accordance with what the Magistrate

said would have been the “*normal procedure that Khayelitsha Hospital should have taken*”.

[47] Ms Chong appears to have felt compelled to agree with the Magistrate’s speculation after his questioning of her that can be fairly described as akin to cross-examination. But her evidence preceding this concession makes clear that she regarded herself as neither having the medical specialist skills, nor factual knowledge of the medical treatment which the deceased received, to arrive at such a conclusion. The trial court’s conclusion in this regard must therefore be rejected.

[48] For all these reasons, the deceased’s medical treatment is not a relevant factor for sentencing the appellant.

CONCLUSION

[49] I am in full agreement with the trial court that a lengthy period of incarceration is manifestly appropriate, given the seriousness of the offences, the disregard for human life shown by the appellant and his co-accused, and the scrounge of violent robbery on the community.

[50] Having regard to the above, however, I find that there are nevertheless substantial and compelling circumstances to depart from the mandated minimum sentences, that the two charges of robbery on counts 1 and 2 be taken together for the purpose of sentence, and that the sentences ought to run concurrently.

[51] The appellant is accordingly sentenced to twelve years imprisonment in respect of the robbery charges on count 1 and 2, and to fifteen years imprisonment in respect of the murder charge on count 3. The sentences are to run concurrently, resulting in an effective period of direct imprisonment of fifteen years.

K S SALLER
ACTING JUDGE OF THE HIGH COURT

I agree

V C SALDANHA
JUDGE OF THE HIGH COURT

Appearances

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