REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30/08/2020
DATE

SIGNATURE

CASE NO:SS118/19

THE STATE

V

MBATHA SPHAMANDLA MANDLENKOSI

JUDGMENT

MTATI AJ

Introduction

[1] The accused, Sphamandla Mandlenkosi Mbatha, faces four charges against him, to wit, housebreaking with intent to rob and robbery with aggravating circumstances

as intended in section 1 of Act 51 of 1977 and further read with the provisions of section 51(2) and schedule 2 of the Criminal Law Amendment Act, 105 of 1997 as amended in that on or about 16 May 2019 at or near Tshepisong, the accused unlawfully and intentionally broke and entered the house of Johannes Maabane and Irene Monye with the intent to rob and did intentionally assault Johannes Maabane and then and there with force took from his possession a Plasma Television set which was in his lawful possession, the aggravating circumstances being that Johannes Maabane was shot with a firearm during the commission of the offence.

[2] The second charge is murder read with section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended, in that upon the same date and place mentioned in count 1, the accused did unlawfully and intentionally kill Johannes Maabane, an adult male person.

[3] The third charge is contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the Firearms Control Act, 60 of 2000 and section 250 of the Criminal Procedure Act 51 of 1977 in that upon the date and place as mentioned in count 1, the accused did unlawfully have in his possession a firearm, the calibre of which is 9mm, without being a holder of a license, permit or authorisation to possess such firearm.

[4] The fourth and the last charge preferred against the accused is contravention of section 90 read with sections 103, 117, 120 (1)(a) and 121 read with schedule 4 of the Firearms Control Act, 60 of 2000 in that upon the date and place mentioned in count 1, the accused did unlawfully have in his possession ammunition, namely three cartridges of a 9mm calibre without being a holder of:

(a) a licence in respect of a firearm capable of discharging that ammunition;

(b) a permit to possess ammunition;

(c) a dealer's licence, manufacture's licence, gunsmith's licence, import or export or in-transit or transporter's or permit issued under this Act; or

(d) authorised to do so.

[5] The accused was represented by Mr Mthembu on the one side and Mr Makoa represented the State.

[6] The provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 in respect of possible sentences in case of a guilty finding were explained to the accused. Mr Mthembu also confirmed that he thoroughly explained the provisions of section 51 of Act 105 of 1997 to the accused before commencement of the trial.

[7] The accused pleaded not guilty to all charges and same was confirmed by Mr Mthembu to be in accordance with his instructions. Mr Mthembu proceeded to provide a plea explanation on behalf of the accused and the following was stated:

- The accused was at his place of abode during the alleged commission of the offence and as such was not involved in the commission of the alleged crime;
- Between late April 2019 and early May but before 16 May 2019, the accused did get inside the house of the deceased and there and then stole a Plasma Television set;
- This Plasma Television set was later recovered by the deceased family from him.

[8] With no objections raised by the defence, section 220 of Act 51 of 1977 admissions were handed in by the State and these can be summarised as:

(a) identification of the deceased, the date of death, the person who conducted the post mortem examination and the cause of death which was marked exhibit **A**;

(b) the post mortem report determining the cause of death as a perforating gunshot wounds to the chest and right upper arm which was marked exhibit **B**; and

(c) a photo album which was marked exhibit **C**.

The evidence

[9] The first witness for the State was Ms Irene Monye who testified that Mr Johannes Maabane, the deceased, was her husband. In the early hours of 16th May 2019 she was at her home at house number 2072 Tshepisong within the Kagiso area. She was sleeping and woken by her husband (the deceased) who heard the sound of people outside. She dismissed this and said there were no people they should continue sleeping.

[10] The deceased heard a sound of people in the dining room (also referred to as a lounge by other witnesses) proceeded to check what was happening and she just heard gunshots. The deceased retreated at the passage way and she went out to seek help and people contacted the police and an ambulance.

[11] When she returned back to her house from seeking help she found her daughter there. The police and paramedics later arrived and the deceased was lying on the passage way. The paramedics examined the deceased and they advised her that her husband has died. They were four in the house before the shooting incident, namely, herself, the deceased and her two children aged 13 and 14 years old respectively.

[12] When she went out to seek help she did not see any person other than the broken window. She also realised that their Plasma Television set was missing. She testified that before going to bed all the windows were closed and the doors were locked.

[13] She clarified that they no longer open the front windows as they are facing the Street and they do not have a fence in the front part of the yard. She confirmed that around February 2019 there had been a housebreaking in the house and entry to the house was gained through the same window. When the first housebreaking took place, the culprit did not break the window but the window handle. It is only the Plasma Television set that was stolen during that break-in.

[14] After the first housebreaking they did not open a criminal case. The reason for failure to do so was that they received information from a person who did not want his/her identity to be known. As a result of the information they received their Plasma Television set. She testified that the accused has never been to their home nor does she know the accused. After the first incident of around February 2019 when they lost their Plasma Television, they washed the windows and that was around March 2019.

[15] In cross examination she conceded that she may have been mistaken about the exact date when the windows were washed after the first incident. She also conceded that the brand name of the television set was not a Samsung but LG. It also became apparent that the police did not correctly take her statement. Her testimony was that her statement was never read back to her and that she told the police that she is not in agreement with some of the contents in her statement. In one of her statements she was asked questions in Afrikaans but her mother interpreted for her. She confirmed that she told the police that she washed the windows in April 2019. She further stated that the windows are washed every two months.

[16] The next witness called by the State was Warrant Officer Mfanafuthi Malevu who testified that he is employed at the South African Police Service (SAPS) and has 27 years' experience in the employ of SAPS. He is stationed at Kagiso. On 16 May 2019

he was on duty working night shift and doing patrols. At around 3h45 he received a complaint through radio control and was given details of the complaint and an address within Kagiso.

[17] On arrival at the scene there were already a number of people outside the house. He approached a lady inside the house and asked her what happened. The lady explained to him what happened and showed him a male person who was lying down. He saw three cartridges and a broken window. He then called all the relevant officers including finger print expert, photographer and others to the scene and he cordoned the scene. The three cartridges were inside the lounge. The lady told him that a television set was stolen. There was no cross-examination by the defence for this witness.

[18] The next witness called by the State was Constable Asanda Kenqu who is also employed by the SAPS and stationed at Kagiso and his function at the time was to conduct preliminary investigations. He has 16 years of service. He testified that on the 16th May 2019 around 3h45 he attended a crime scene. On his arrival at the scene he found some of his colleagues already on the site.

[19] He testified that Warrant Officer Malevu took him through the scene where he observed one black male who was lying on the passage. He also observed two cartridges and one projectile inside the house as well as a broken window. He then summoned his colleagues from the Criminal Record Centre. On the arrival of his colleagues, he then handed over the crime scene. He confirmed the identification of a broken window in photo 2 of exhibit **C**.

[20] Thereafter the State called Sergeant Thabiso Steven Molefe who is also a member of the SAPS with an experience of 19 years. He is attached to the Criminal

Record Centre unit for the last 13 years. His speciality consists of crime reconstruction and lifting of fingerprints. He is also a craftsman and a photographer. He was trained by experts and after training they get certified as knowledgeable in a particular field. He mentioned to the Court that he is not an expert but a fingerprint investigator.

[21] On 16 May 2019 he received a call from Kagiso police station and was dispatched to the scene at 2072 Milbit Street, Tshepisong. At the scene he found Constable Kenqu who took him around the scene.

[22] He testified that during the investigation he found a fingerprint that he could develop. He said that he found this fingerprint on the window inside the lounge. It was on the fixed window on the broken pieces. He then developed the print using aluminium powder and marked same 667/05/2019. He also marked same with case number 330/05 2019. Constable Kenqu witnessed the origin of the fingerprint and they both signed. The print that was lifted was handed in and marked exhibit **D**.

[23] Three identifiable prints were lifted according to Sergeant Molefe but only used one for purposes of his testimony. Other prints were lifted on the broken window in the neighbouring house but these were not of the accused before Court. He explained that photo 2 of exhibit **C** shows the broken widow and a curtain protruding to the outside of the house. In his testimony he stated that all the fingerprints he lifted were "fresh" meaning they were not yet contaminated. He further testified that if the windows were washed after the incident, he would not have been able to lift a print on the window. The prints were not exposed to the sun, wind or rain hence he said that they were fresh prints.

[23] In cross-examination he stated that if the hand was moving then he would not have lifted the print. In other words, according to him the hand had to be still for him

to be able to get a print. Upon being asked if he was exposed to the writings of Simon Bunter, who wrote about fingerprints, his response was in the negative. He agreed that fingerprints could still be identifiable after a period of six months. His evidence was that fingerprints could be identifiable up to a period of forty years in a controlled environment but you use different methods to uplift same as a result of lack of fatty acids and water.

[24] The fingerprint that he lifted from the window was made by someone who was outside trying to get inside the house and it was still fresh. On a question if the fingerprint was made three days before the incident would it still be fresh and his response was that there would be a difference on the prints outside but not on the inside print.

[25] It was put to him that the accused will say that between the end of April and beginning of May the accused entered the house of the deceased and used the same window. His response to that statement was that the fingerprints were fresh through the naked eye and that is made by extra fat in a person's hands. He stated further that the other prints outside were also recent. He conceded that a print could be lifted after a period of three weeks in a controlled environment. In re-examination he testified that the print that he lifted was not in a controlled environment since the window was facing the East and exposed to the sun. He could not give a timeframe on how long it will take to uplift a print that is facing the sun except to mention that it will be difficult to uplift same.

[26] The last witness called by the State was Ms Tlaleng Jeanette Monye, a 54 year old mother of Irene Monye. She testified that she is aware of the first housebreaking incident that took place at the deceased's house. She was not present when the

incident took place but was informed by her daughter Irene. Irene requested her to come assist in cleaning the house and she took off the curtains and washed all the windows. The washing of the windows was the week before Easter Friday. She remember this because she stayed there the whole week and attended church on Good Friday. The date when she washed the windows was around 17 April 2019. She and her grand-daughter, Boitumelo washed all the windows.

[27] In cross-examination she testified that she was asked by the police if the windows were washed and she confirmed same and at the time Irene was present. On a question if Irene told her how did she testify in this Court a few days earlier, her response was that Irene just collapsed and slept on arrival at home. Insisting with the question whether the witness and Irene discussed her testimony she responded by saying Irene just cried when asked about the case. She conceded that there was no statement taken from her by the police, she was just asked about the washing of the windows.

[28] This completed the evidence for the State and an application was made in terms of section 86 of the Criminal Procedure Act to amend the charge sheet to reflect the calibre of the cartridges found on the scene to be 9mm cartridges. There being no objection from the defence, the application was granted. The defence did not object to the handing in of a section 212 affidavit by Warrant Officer Malehu Rosina Mbiza which was handed in and marked exhibit **E.** Warrant Officer Mbiza is employed by the SAPS at their Forensic Laboratory attached to their Ballistic Section. She received three cartridges in sealed form with a reference number PA6500384413 which she analysed and confirmed to be that of a 9mm parabellum calibre. Thereafter the State closed its case.

[29] The defence called the accused, Mr Sphamandla Mandlenkosi Mbatha, to the witness stand. He testified he is well vest with all the charges preferred against him and denied that he committed the offence. On the day of 16 May 2019 he was at his parental home sleeping. He stays with his mother and within a yard there is a structure at the back of the house where he stays. His mother cannot confirm his whereabouts since he stays in the outside structure. He knows the house where the shooting incident took place. It is about the 3rd street away from their home.

[30] He confirmed that his fingerprint could have been retrieved from the deceased's place as a result of a previous incident. His testimony was that around end of April 2019 and beginning of May 2019 he was passing the house of the deceased during the night and he was alone. Whilst passing the devil tempted him and he approached the window, got inside the house and stole a Plasma Television set.

[31] He testified that he gained entry through lifting the window handle. It was not in good working condition and co-incidentally the window opened and he gained entry. It was dark inside the house and he just wanted anything of value. He unplugged the television set and as he was to leave the house the occupants woke up. He did not see the occupants but just saw the lights switched on and went straight to the door and ran to the veld with the television set.

[32] Mr Mbatha further testified that he sold the television set to somebody owning a tavern. This television set was later retrieved by the owner thereof. According to his evidence, the owner of the television set approached him and asked about the whereabouts of the television set and he offered the information. The buyer of the television set confronted the accused and demanded his money back which the

accused did not have. The buyer and the accused then entered into some arrangement that the accused will work for him in lieu of the money paid.

[33] The accused stated that he learned about the shooting at the deceased's place the following day. Before hearing the news though he met his uncle at a funeral of his cousin and the uncle said to him he should go to Kwa-Zulu Natal (KZN) to help him look after the cattle. He left for KZN on the 19th May 2019 which was a Sunday. The accused emphatically denied any involvement in the shooting incident of 16 May 2019.

[34] In cross-examination he insisted that the first break-in incident took place at the end of April 2019 or the beginning of May but could not remember the exact date. He stated for the first time that the incident took place after Good Friday. He confirmed that he entered the deceased's place through the same window as depicted in photo 2 of exhibit **C**. He normally goes to sleep after 21h00 and wakes up between 9h00 and 10h00. He was alone on the 16th May 2019 on the day of the incident and has no one who can confirm that he was asleep.

[35] Mr Mbatha confirmed that the fingerprint that was lifted by Sergeant Molefe was indeed his but it got to the scene as a result of an earlier break-in. He did not dispute that Ms Monye washed the windows on 17 April 2019. He also said that his fingerprint was on the frame and he cannot tell if Ms Monye also washed the frame.

[36] The State asked for a conviction in all four counts. It was argued by Mr Makoa that the circumstantial evidence indicate that it can only be the accused who committed the offence. The State also argued that this case is a classical one where the Court should make use of section 210 of the Criminal Procedure Act 51 of 1977 (Similar fact evidence) on the basis that the accused committed the crime of

housebreaking; entry was gained through the same window; and that a television set was stolen.

[37] Mr Mthembu on the other hand argued for the discharge of the accused. He submitted, correctly so in my view, that the State bears the onus to prove its case beyond a reasonable doubt. His submissions were based on the fact that the accused offered a reasonable explanation on the reason why his fingerprints were found on the scene. Mr Mthembu submitted further that the evidence of Sergeant Molefe was beyond reproach but stated that he was not an expert but a fingerprint investigator. Mr Mthembu argued that there is no person who could definitely provide an answer on when exactly the windows were cleaned. The lacuna in providing the exact date entitles the accused to be discharged so submitted Mr Mthembu.

Issues for determination

[38] In my view, the only issue for determination is whether the accused's fingerprint that was lifted from the window bears any reference to the incident that took place on the 16th May 2019. If this fingerprint can be linked to the incident of 16 May 2019, then the accused is guilty of an offence/s but if his explanation on how his fingerprint got to be on the window then, in my view the accused should be given the benefit of doubt and be discharged on all counts.

Evaluation

[39] It is true that the State has to prove its case beyond reasonable doubt as alluded to by Mr Mthembu. The evidence before Court is circumstantial in nature and the Court has to carefully evaluate the evidence in its totality to assess if the State has indeed proven its case beyond a reasonable doubt. In the matter of ***S v Chabalala 2003 (1) SACR 134 (SCA) at 139i – 140b Heher AJA*** as he then was said the following:

"the correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case of either party was decisive but that can only be an ex post facto *determination and a trial court should avoid the temptation to latch on one obvious aspect without assessing it in the context of the full picture presented in evidence".*

[40] The criminal standard of proof beyond reasonable doubt is expressed in different ways in different cases but all boils down to evaluating the evidence of the State without ignoring what could be reasonably possible true from the side of the accused. It remains so that the State has to prove the guilt of the accused beyond reasonable doubt. Whereas the Court does not look at the version of the State in isolation, so too does the Court not look at the exculpatory evidence of the accused in isolation. I cannot over-emphasize the need to look at the evidence in its totality. In ***S v Mbuli [2002] ZASCA 78 para 57 Nugent JA*** as he then was had the following to say:

"*It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (R v Difford 1937 AD 370 at 373, 383). In S v Van der Meyden 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in S v van Aswegen 2001(2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does*

not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in Moshephi and Others v R (1980-1984) LAC 57 at 59 F-H, which was cited with approval in S v Hadebe & Others 1998 (1) SACR 422 (SCA) at 426 f-h:

> *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."*

[41] The complainant (Irene Monye) was the only witness that was present during the break-in and when the shooting took place. Her testimony was clear in all material

respects. She was logical and made concessions where she could have been mistaken. She did not implicate the accused in any way. Her version was that she was in the bedroom when the shooting took place and as such she did not see the perpetrator. When confronted about the date of the initial incident of a break-in that it may have taken place at the end of April 2019 she accepted that she may be mistaken but she is certain that it took place soon after they moved from their residence at Braam Fischer moving to Tshepisong. The defence did not critic her evidence. I find that her evidence was consistent and reliable in all material respects.

[42] The evidence of Warrant Officer Mfanafuthi Malevu and Constable Asanda Kenqu was formal in nature and the Court accepts their evidence as true reflection of their observations. The defence also did not have any questions for these witnesses. The evidence of Sergeant Thabiso Steven Molefe whilst also formal in nature, deserves some commenting upon. He testified that the fingerprint that was lifted was on the inner part of the broken window. This version was not disputed. This becomes important when evaluating the evidence of the accused. Furthermore, he testified that this print was fresh meaning it was recent. On being confronted on his meaning about freshness of the print he the testified that the fingerprint was visible through the naked eye and was made by extra fat in the person's hands. The defence did not critic his evidence and in fact conceded that he knows his portfolio.

[43] The next portion of the evidence to be evaluated is that of Ms Tlaleng Jeanette Monye. I could not find that this witness is in any way attempting to fill the gaps or of intent to impute wrongdoing to the accused. Her evidence was crisp and to the point. She did not know anything about the incident except that she was called to wash the windows. She only heard about the first break-in from her daughter Irene. When she

was probed about discussing the case after Irene had testified, she told the Court that her daughter slept and just cried when asked about the incident.

[44] The next evidence to be evaluated is that of the accused. The accused remembered that on the 16th May 2019 he was asleep. He normally sleeps around 21h00 and wake up between 9h00 to 10h00. It is strange though that when he committed the first housebreaking, according to his own evidence, it was around 00h00. On this particular day he went astray of his usual patterns and does not explain why.

[45] When evidence was brought up that the windows were cleaned during the week of Good Friday, he then was certain in his testimony that he broke into the deceased's house after Good Friday. This aspect was never put to Ms Tlaleng Monye when she testified. The accused was clearly timing the period when the windows were washed with his initial break-in. Furthermore, when Sergeant Molefe testified about finding the fingerprint on the broken window, it was never put to him that the print was actually on the window pane and not on the glass. The accused in his testimony said that his print was on the window pane and he does not know if when washing the windows they also washed the window panes. That was opportunistic of the accused to say the least.

[46] The accused was not an impressive witness in the eyes of the Court. He was changing the details of his exculpatory version to fit it in the evidence of different witnesses. He was not very astute to succeed in the attempt to exculpate himself. In the *locus classicus* case of ***R v Blom 1939 AD 188 at 2002 – 3, Watermeyer JA*** considered the test to be applied in drawing inferences and said that there are two cardinal rules of logic which cannot be ignored when it comes to reasoning by inference and these are:

"(1) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. These rules have been adhered to and applied by the courts almost as if they were statutory enactments".

[47] The State requested the Court to consider relevancy of similar fact evidence in that the same accused visited the same premises in the past; he gained entrance through the same window; during the evening (early morning); and that the same television set was stolen. Section 210 of the Criminal Procedure Act provides that:

"No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point of fact at issue in criminal proceedings".

[48] The general principle has always been that evidence of similar fact is inadmissible because it is irrelevant. In the matter of ***Mathews v S 1960 (1) SA 752 (A) at 758 B – C Schreiner JA*** had the following to say:

"Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible..."

[49] The question to be answered is whether, when looked at in its totality, the evidence of similar facts has sufficient probative value to outweigh its prejudicial effects and that is a matter of degree in each case. In the matter before Court, it is not

in dispute that the accused had in the past broken into the house of the deceased. It is not in dispute that he gained entrance through use of the same window. Lastly, it is not in dispute that he stole a television set.

[50] In other words, the accused knew that the television set he had once stolen is still in the same premises. Similar fact evidence, whilst inherently prejudicial, cannot always be irrelevant. The pattern used to gain entrance into the deceased's house is the same. I am inclined to accept these facts as relevant in considering the guilt of the accused.

[51] Even if I am wrong in finding similar conduct of the accused to be relevant, the totality of the evidence persuade me to infer that the only reasonable inference to be drawn on the proven facts is that the accused is the one who committed the offence. I am persuaded that all the proven facts prove the guilt of the accused. I have carefully considered the exculpatory evidence of the accused and find that his version cannot be reasonably possibly be true.

[52] As a result, the accused is found guilty on all counts as charged.

Sentence

[53] After convicting the accused of all charges, the State proved two previous convictions against the accused and these were the following:

i. Housebreaking with intention to steal and theft – the offence was committed on 18 November 2015 and the accused was found guilty on 7 March 2016 and was sentenced to three years imprisonment half of which was suspended for a

period of five years on condition that the accused is not convicted of an offence of housebreaking with intent to steal and theft during the period of suspension; and

In terms of section 103(1) of Firearms Control Act, the accused was declared unfit to possess a firearm.

ii. Contravening Drugs and Drug Trafficking Act 140 of 1992 by being in possession of dangerous dependence-producing substance – the offence was committed on 4 October 2018 and the accused was found guilty on 19 October 2018 and sentenced to R 4000.00 (four thousand rand) or four months imprisonment wholly suspended for five years on condition that he is not convicted of contravening section 4(b) of Act 140 of 1992.

[54] The State proceeded to call the complainant (Ms Irene Monye) to testify in aggravation of sentence. She confirmed that the deceased was her husband. He was a breadwinner at home. He left two kids aged 14 and 13 years. The deceased was self-employed and earning an amount of R4000,00 per month through washing motor vehicles of Standard Bank Limited. The deceased was taking care of his household, buying clothes and taking care of school requirements of the children.

[55] The complainant testified that they have now been left destitute. She is struggling to make ends meet. They live through SASSA grant money which has been recently increased to R1300.00 with the commencement of the COVID 19 pandemic.

[56] The deceased had also bought a house before his demise. This the current premises wherein they stay. Unfortunately, the deceased had only paid a deposit of R10 000.00 and not the full purchase price. The total purchase price is R30 000.00.

The complainant and the kids have been informed to vacate the premises since they cannot afford to pay the remaining amount of R20 000.00.

[57] The children are not emotionally stable. The one child attends special needs school and the other child is doing grade 9. The children always whine about the death of their father stating that if he was still alive they would not be struggling as they do.

[58] The accused did not testify in mitigation of sentence but Mr Mthembu addressed the Court on his behalf. The following information came to the fore:

i. The accused is 33 years of age;

ii. He has two children aged 3 and 6 years respectively and they stay with their mothers;

iii. He has been in custody for a period of almost 1 year;

iv. He passed grade 10 at school;

v. He lived with his mother since his father passed away when he was 4 years of age.

[59] The Court must look at all objectives of sentencing including retribution, deterrence, rehabilitation and prevention.[1] In ***S v Ndlovu 2007 (1) SCA*** the court stated that sentences must be individualised in order to take into account the unique facts of each offender and the crime.

[60] The accused in this matter committed an offence of housebreaking during or around April 2019. The television set that he stole was retrieved through caring members of the community. The informant who informed the deceased of the

[1] S v Duku (246/2010) ZAFSHC 78

whereabouts of the television set was risking his/her life by disclosing the information. Clearly the informant was afraid hence he/she advised that his/her identity should not be disclosed.

[61] As if the first incident was not enough, the accused broke into the premises for the second time and this time prepared to thwart any resistance. Indeed he used a semi-automatic firearm to thwart the resistance thereby killing the deceased. The accused come before Court with previous convictions. The previous conviction of housebreaking bears relevance in considering sentence.

[62] The second count against the accused is that of murder attracting life imprisonment. Counsel for the accused requested the Court to consider portion of the sentences to run concurrently and the State was not opposed to the submission.

[63] The crime committed by the accused is very serious. The accused had the audacity of entering the premises of the deceased well knowing that there are occupants in the house. He was well prepared to shoot and kill anyone appearing on his way. The deceased has left behind small children who still require his attention, maintenance and guidance. His wife is also left as a widow. All this takes place because of greed from the accused.

[64] Act 105 of 1997, the often referred to as the Minimum Sentencing Act, requires the Court to sentence the accused to life imprisonment unless substantial and compelling circumstances exist. The information proffered by the defence Counsel is normal and nothing appears to be compelling to persuade me to grant a sentence other than that of life.

[65] Having considered all the factors in both mitigation and aggravation of sentence, I find the following to be an appropriate sentence for the accused:

1. Count 1, 5 years direct imprisonment;

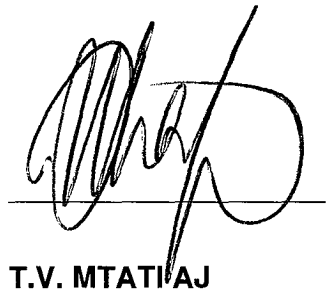
2. Count 2, Life imprisonment;

3. Count 3, 8 years direct imprisonment; and

4. Count 4, 3 years imprisonment

Counts 1, 3 and 4 are ordered to run concurrently with the sentence on Count 2.

The accused has already been declared unfit to possess a firearm and such status has not changed. He remains unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act.



T.V. MTATI AJ

Acting Judge of the High Court,

Gauteng Division, Johannesburg

APPEARANCES

ON BEHALF OF THE ACCUSED: ADV MTHEMBU

INSTRUCTED BY: LEGAL AID SA, JOHANNESBURG

ON BEHALF OF THE STATE: ADV MAKUA

INSTRUCTED BY: NDPP, JOHANNESBURG

DATE OF HEARING: 3 – 12 AUGUST 2020

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