IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: SS87/2021
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED.
DATE: 18 July 2022

In the matter between:

THE STATE

and

NORMAN MAKGOPA First Accused

TUMELO MAKGOPA Second Accused

DENNIS PASHA ` Third Accused

Summary

Sentencing – Murder when premeditated and committed in the furtherance of a common purpose – Vigilantism – Life imprisonment the only appropriate sentence despite the accused persons' relative youth – Time spent in pre-trial incarceration not a substantial and compelling circumstance justifying a lesser sentence – Period to be served on a life sentence incommensurable with period of pre-trial detention – Subtraction of period served awaiting trial accordingly impossible – Correctional

Services Act 111 of 1998 precluding a court from shortening the ordinary non-parole period of 25 years – Consideration should be given to amending the Act.

SENTENCE

WILSON AJ:

1 On 4 April 2022, I found each of the accused persons, Norman Makgopa, Tumelo Makgopa and Dennis Pasha, guilty of the murder of Pitso R [....]. It is now my duty to pass sentence.

The progress of the sentencing hearing

2 At the outset, it is unfortunately necessary to say something about the delays in producing the presentencing reports and victim impact statements that were required before argument on sentencing could be heard. Evidence and argument on sentencing were originally scheduled for 10 May 2022. However, on that date, Mr. Mthiyane, who appears for the State, informed me that none of the reports had been prepared. By agreement between the parties, he asked me to postpone the sentencing hearing until 13 June 2022.

3 On 13 June 2022, the matter was called again. This time, I was informed from the bar that the presentencing reports had not been prepared, because the relevant probation officers in the Department for Social Development had understood that the matter would not be heard until 5 July 2022. This misunderstanding was apparently based on the fact that the wrong date for the hearing had been entered on a form that had to be generated before the presentencing reports could be produced. Again, at the request of all parties, I postponed the matter to 5 July 2022.

4 When the matter was called on 5 July 2022, the reports had still not made it to court. I was, however, told that they were on their way. I stood the matter down to allow them to be delivered. They arrived at court mid-morning. It would not have

been fair to require argument on sentence to proceed there and then. Counsel were entitled to absorb the reports and take instructions from their clients.

5 To allow that to happen, I postponed the matter again to 7 July 2022, when the reports were formally handed-in by agreement between the State and counsel for the three accused persons.

6 To produce a presentencing report, the relevant accused persons must be interviewed, and the probation officer responsible for compiling the report must reduce the interview to writing, offering an analysis of the facts and circumstances surrounding the offence, and the accused person's life and background. To produce a victim impact statement, the probation officer must consider the circumstances of the offence, interview those affected by it and offer an analysis of the facts found.

7 I accept that these can be difficult tasks, that require great sensitivity and thought. They will naturally take time. However, the time required to produce the reports has to be balanced against the needs of the accused persons, and those of the victims of the crime and their families, who in this case have been brought to court on three separate occasions, expecting some degree of closure, only to be told that the matter must postpone to another day. Everyone involved is entitled to a promptly produced set of reports and to the reasonable expectation that the matter will come to an end on the day that it is scheduled to finalise.

8 On top of this, it is also necessary to consider the costs associated with serial postponements, and the waste of court time in scheduling hearings that serve no useful purpose other than to roll the matter over. These costs are important, but they pale in comparison to the emotional anguish that must be caused to all involved by the build-up to a hearing that does not proceed.

9 I will ask the National Prosecuting Authority and Legal Aid South Africa, together with the Registrar of this court, to draw the attention of the relevant staff in the Department for Social Development to this judgment, in the hope that steps will be taken to avoid future delays of the nature experienced in this matter.

Evidence on sentence

10 Three presentencing reports, one each for Norman Makgopa, Tumelo Makgopa and Mr. Pasha, were handed in by consent. A victim impact statement was also handed in by consent. But counsel for the accused persons cross-examined its author, Ms. Tinyiko Mahungele, on an aspect of her victim impact statement that implied a different motive for the murder of Mr. R [....] than had been led in the State's evidence at trial.

11 The victim impact statement reproduced a rumour that Mr. R [....] was better known to the Makgopa family than the evidence led at trial suggested. Mr. Mavata, who appeared for Mr. Tumelo Makopa and Mr. Pasha, asked me to disregard that part of the statement. He need not have worried. The rumour was just that: a rumour. It is irrelevant for that reason, and has played no part in my deliberations on sentence.

12 In my judgment convicting the accused persons, I found that Mr. R [....]'s murder was premeditated. I also found that the murder was committed by each of the accused persons acting in common purpose with each other, and with others in the crowd who kidnapped, assaulted and killed Mr. R [....]. Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 requires me, on reaching either of those conclusions, to sentence each of the accused persons to life imprisonment, unless there are substantial and compelling circumstances that justify a lesser sentence. I will accordingly turn to consider the circumstances placed before me in mitigation and aggravation of sentence, before assessing whether they are, individually or in any combination, substantial and compelling.

Norman Makgopa

13 Norman Makgopa is 32 years old. He has two young children, aged 8 and 3. He was employed as a driver at the time of his arrest, but has obviously lost that job during his pre-trial incarceration. His family was dependent on his income, and has left Johannesburg to live with relatives in Limpopo since Mr. Makgopa's arrest. Mr.

Makgopa's background and circumstances are modest, but he benefitted from a loving home and family life. He has no previous convictions.

14 Mr. Makgopa maintains that he did not participate in Mr. R [....]'s murder, and was not at the scene of the crime when Mr. R [....] was killed. His presentencing report appears to suggest otherwise, however. At page 8 of the report, it appears that Mr. Makgopa told the probation officer that – contrary to his evidence at trial – he was in fact at the scene of the crime, but had arrived after it had taken place.

15 Mr. Pakula, however, confirmed that Mr. Makgopa had not changed his version, and that the probation officer's record of the interview must be mistaken. The probation officer's report is quite obscurely worded. It may be that neither he nor Mr. Makgopa had intended to create the impression that Mr. Makgopa's version had changed. It seems to me that, if I am left in any doubt about this, I must assume in Mr. Makgopa's favour that there is no change in his version. I shall make that assumption.

Tumelo Makgopa

16 Tumelo Makgopa is Norman Makgopa's brother. He is 24 years old. He has no children. He has no previous convictions. He worked as a plumber at the time of his arrest. He maintains that he played no part in Mr. R [....]'s kidnapping and murder. It is hard to reconcile the starkness of this denial with the version given on Tumelo Makgopa's behalf at trial: that he was present when Mr. R [....] was first apprehended and assaulted, and that, at least initially, Tumelo Makgopa chased after Mr. R [....] and detained him. In the face of these admissions, I would have expected a more careful account of Tumelo Makgopa's conduct. None was forthcoming at trial, or in the probation report.

Dennis Pasha

17 Dennis Pasha is 27 years old. He has two young children, aged 8 and 4, who live with Mr. Pasha's mother in Limpopo. Since Mr. Pasha's arrest his partner has

moved to Limpopo to live with Mr. Pasha's mother and the children. Mr. Pasha was employed at the time of the offence, but has since lost his job.

18 Mr. Pasha identifies as a Christian, and maintains that he did not commit the offence of which he stands convicted. Again, however, the probation officer's report adds nothing to Mr. Pasha's version at trial – that he was present when Mr. R [....] was initially detained, but that he did not participate in Mr. R [....]'s assault, kidnapping and subsequent murder.

The offence

19 The offence was repeatedly described before me, and in the presentencing reports, as an instance of "mob justice". But this is a wholly unsatisfactory term. Mr. R [....] was not killed by a faceless mob. Individuals within the crowd, the three accused persons before me included, decided that he had to die. They each decided to detain him, to punch him, to kick him, to set him alight, and to hold him down under a mattress while he suffered one of the most horrific deaths imaginable. To refer to a "mob" is to obscure the individual responsibility that each person in the crowd that attacked Mr. R [....] had for that result. Doubtless there were those in the crowd who did no more than look on. But they too, while not legally culpable, bear the moral responsibility of having done nothing to help Mr. R [....]. That responsibility cannot, and ought not, to be elided by bland reference to the "mob". Mobs are made up of people, and it is people who chose to act, or not to act, as they do.

20 Mr. Pakula made the unfortunate submission that Mr. R [....] was not, as he put it, "a saint". The implication of this, which Mr. Pakula, to his credit, could not quite bring himself to press, is that Mr. R [....] somehow deserved what happened to him. But that is wholly wrong. It may be that Mr. R [....] was trying to steal from the Makgopas. It may be that his presence in their home was both wrongful and distressing to the Makgopas. But nobody deserves what happened to Mr. R [....] after he was discovered. If, as I have found, there was no "mob" in any meaningful sense, then neither was there anything that we can call justice.

21 The effect of Mr. R [....]'s death on his family was devastating. Even if Mr. R [....] was indeed the petty thief described at trial, he was also more than that. Mr. R [....] was 25 years old when he was killed. He had lost both his parents to illness by the time he was 12. His maternal aunt raised him to adulthood. Mr. R [....] sang in a choir. He played football. He danced. His natural shyness vanished when he went to church. Communal worship gave him a sense of community, and perhaps a sense of the divine.

22 The manner of Mr. R [....]'s death haunts his family. Both the imputation of criminality and the cruelty of the violence inflicted on him are obviously very difficult to come to terms with. Mr. R [....]'s aunt often imagines what would have happened had she asked Mr. R [....] to stay at church with her on the day of his death. These emotional injuries may never heal.

The needs of society

23 It bears emphasis that the two most aggravating features of this offence are that the accused persons bypassed the social arrangements made for the investigation and prosecution of crime, and that they did so in such a cruel and violent manner. All the presentencing reports accepted, quite realistically, that a lengthy custodial sentence is inevitable. Society demands nothing less for a crime of this nature.

Substantial and compelling circumstances

24 Mr. Pakula and Mr. Mavata likewise accepted that a lengthy custodial sentence is inevitable. However, they both asked that I depart from the statutory norm for crimes of this nature. Mr. Mavata suggested that I impose a sentence in the range of 14 to 18 years.

25 It was argued that a term of that length is justified by two features of this case which, if considered together, are substantial and compelling enough to depart from the prescibed sentence. I address each of these features in turn.

The accused persons' relative youth

26 Both Mr. Pakula and Mr. Mavata accepted that in cases as serious as this one "the personal circumstances of the offender, by themselves, will necessarily recede into the background" (*S v Vilakazi* 2009 (1) SA 552 SCA, para 58). Mr. Mavata nonetheless submitted that the relative youth of the accused persons ought to be considered when deciding whether a life sentence is proportionate. Absent parole, which is potentially available after 25 years, a life sentence means just that: the offender will spend the rest of their natural life in prison. As I understood the submission, the younger the offender, the more likely it is that a life sentence would be disproportionate, and the greater the likelihood of rehabilitation.

27 I accept the logic of the submission. I also accept, at least notionally, that the burden of justifying the imposition of a life sentence on a 19 year-old is likely heavier than it is on a 50 year-old. But this reasoning cannot be applied in a vacuum. The question is whether, given all the circumstances of the case, including the offender's age, a life sentence ought to be imposed.

28 The accused persons in this case are not particularly young. The offence of which they have been convicted is of the worst kind, both in terms of the level of cruelty involved, and the amount of time each of them had to re-assess their conduct and pull back from inflicting the fate that Mr. R [....] ultimately suffered. I see nothing inherently disproportionate in a life sentence for this sort of crime being imposed on people ranging in age, as the accused persons do, from their mid-twenties to their early thirties.

29 Accordingly, I cannot accept that the accused persons' relative youth is either substantial or compelling.

Pre-trial incarceration

30 Each of the accused persons has spent 21 months in prison awaiting trial. Mr. Mavata submitted quite strenuously that the accused persons are entitled to credit for this pre-trial incarceration. Taken together with their relative youth, he argued,

this justified a departure from the prescribed statutory penalty. Mr. Mthiyane accepted that the accused persons were entitled to credit for their pre-trial incarceration, but nevertheless urged me to impose a life sentence and reflect the term of pre-trial incarceration in a reduced non-parole period. This would, in effect, reduce from 25 to 23 years the period the accused persons will have to serve before they are considered for parole.

31 I would ordinarily agree that the least that I should do is give the accused persons credit for the period of their pre-trial incarceration. However, it seems to me that, where, as in this case, the ordinary statutory penalty is life imprisonment, the law does not recognise that pre-trial incarceration is, in itself, a substantial and compelling circumstance, or a basis on which to reduce the non-parole period that attaches to the penalty.

32 The Supreme Court of Appeal has stated, definitively, that "a preconviction period of imprisonment is not, on its own, a substantial and compelling circumstance" for the purposes of the Criminal Law Amendment Act (*S v Ngcobo* 2018 (1) SACR 479 (SCA)). While I have some difficulty with this as a general conclusion, in the context of a life sentence, which is what the Supreme Court of Appeal was addressing, the proposition must be correct.

33 Life sentences are reserved for the most serious offences, in respect of which pre-trial detention is likely to be very common, if not the norm. While bail is granted to people who face charges of aggravated forms of murder, it is only available in "exceptional circumstances" (see section 60 (11) (a) of the Criminal Procedure Act 51 of 1977). It follows that, if pre-trial incarceration were, on its own, enough to depart from a statutory life sentence, a life sentence would never be imposed where bail had been denied – that is, in the great majority of cases for which the sentence had been prescribed as the norm. That would defeat the purpose of the minimum sentencing legislation.

34 Whatever the wisdom of prescribed minimum sentencing regimes such as those embodied in the Criminal Law Amendment Act, courts are bound to give effect to them. I am not empowered to subvert the regime applicable to this case, even if I

think it leads to some unfairness: such as the unfairness of effectively preventing credit being given for pre-trial detention.

35 It is true that Section 12 (1) (e) of the Constitution, 1996 requires me to avoid imposing a disproportionate sentence, and I may depart from the minimum sentencing norms if to do otherwise would result in such a sentence (see *S v Dodo* 2001 (1) SACR 594 (CC), para 40 and *S v Malgas* 2001 (1) SACR 469 (SCA) para 25). But I cannot conclude that the failure to credit the accused persons in this case for 21 months of pre-trial detention would, in itself, render a life sentence disproportionate. Once it is accepted that a life sentence is otherwise appropriate, the fact that there has been pre-trial incarceration is irrelevant. It makes no sense to give credit for that period of incarceration in the context of a sentence which is, by its nature, to be served indefinitely – for rest of the offender's life. There is no meaningful way to subtract the determinate period of the pre-trial incarceration from the indeterminate period an offender under a life sentence will serve.

36 In addition, I cannot accede to Mr. Mthiyane's very fair and helpful suggestion that I reduce the non-parole period applicable to a life sentence to reflect a period of pre-trial detention. It seems to me that neither the Criminal Procedure Act nor the Correctional Services Act 111 of 1998 can be read to permit this result.

37 Section 276B of the Criminal Procedure Act permits a court to set a non-parole period not greater than two thirds of the period of imprisonment, or 25 years, whichever is shorter. The purpose of this provision is generally understood to allow courts to lengthen ordinary non-parole periods rather than shorten them (see SS Terblanche *A Guide to Sentencing in South Africa* (3 ed), page 259), but there is nothing in the section that prevents a court from setting a lower non-parole period than would normally attach to a particular term of imprisonment.

38 Section 73 (6) (a) of the Correctional Services Act requires that a prisoner serves at least half the court-imposed sentence, or the whole of the non-parole period set in terms of section 276B of the Criminal Procedure Act, before being considered for parole.

39 However, this is subject to section 75 (6) (b) (iv) of the Act, which prescribes that the non-parole period for a life sentence is 25 years. Unlike section 73 (6) (a) of the Act, section 75 (6) (b) (iv) leaves no room for the operation of a lesser non-parole period set in terms of section 276B of the Criminal Procedure Act. It does not seem to me, therefore, to be open to a court to reduce the non-parole period for a life sentence – whether to reflect a period of pre-trial incarceration or otherwise. To do so would run contrary to the plain text of the Act, which appears designed to insulate non-parole periods associated with life sentences from judicial adjustment.

40 In addition, trial courts are not entitled to antedate the sentences they impose (see *Director of Public Prosecutions Gauteng Division, Pretoria v Plekenpol* [2017] ZASCA 151, paragraph 21). That method of giving credit for a period of pre-trial detention is accordingly unavailable.

41 There is a strong argument for the Correctional Services Act to be amended to provide for the reduction of the non-parole period of a life sentence to reflect any time spent in pre-trial incarceration. However, there is presently no such provision. This is not the first time that the statutory regime has been found wanting for that kind of oversight (see *S v Mqabhi* 2015 (1) SACR 508 (GJ), para 59). However, absent a challenge to the validity of the Act, which is not before me, I am constrained by the Act's plain language and clear purpose.

42 I am not empowered to reduce the non-parole period the accused persons in this case will serve.

The sentences to be imposed

43 The overall question remains whether it would be disproportionate, in all these circumstances, to impose a life sentence on each of the accused persons in this case. For the reasons I have given, I cannot see any disproportion in the statutory penalty. The crime was one of the worst imaginable. There is nothing in the presentencing reports that suggests that a life sentence would operate too harshly, or that it would not appropriately respond to the offence, the circumstances of the offenders or the needs of society.

44 The only lawful sentence is that Norman Makgopa, Tumelo Makgopa and Dennis Pasha should spend the rest of their natural lives in prison, unless the parole authorities consider them fit for release in the fullness of time.

45 Each of the accused persons was convicted on one count of kidnapping, and one count of premeditated murder. Because the kidnapping and the murder were part of the same continuous sequence of acts, because my sentencing jurisdiction in respect of both counts is the same, and because any sentence I impose on the kidnapping counts will, by operation of section 39 of the Correctional Services Act, run concurrently with the life sentences I intend to impose on the murder counts, I will take each accused person's convictions together for the purposes of sentencing (see, in this respect, *S v Fourie* 2001 (2) SACR 118 (SCA), para 20).

46 For all these reasons –

46.1 I sentence accused number 1, Norman Makgopa, to LIFE IMPRISONMENT.

46.2 I sentence accused number 2, Tumelo Makgopa, to LIFE IMPRISONMENT.

46.3 I sentence accused number 3, Dennis Pasha, to LIFE IMPRISONMENT.

S D J WILSON
Acting Judge of the High Court

HEARD ON: 7 July 2022

DECIDED ON: 18 July 2022

For the State: SK Mthiyane
Instructed by National Prosecuting Authority

For the First Accused:	Mr. Pakula Name of instructing attorney not supplied
For the Second and Third Accused:	A Mavata Instructed by Legal Aid SA