IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION FUNCTIONING AS MPUMALANGA DIVISION, (ERMELO)

CASE NO: CC84/16

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

23 November 2016

In the matter between:

THE STATE

and

DHLAMINI, THABISO THEMBINKOSI MBULI Accused

JUDGMENT ON SENTENCE

MUDAU J:

[1] The accused was arraigned for trial before this court on an indictment that consists of a total of three counts, as follows: one count of murder (count one), one count of robbery with aggravating circumstances (count two), as well as entering and or staying in South Africa illegally in contravention of section 49 (3) and other

relevant provisions of the Immigration Act 13 of 2002 (count three). He has since been convicted only on count one (murder) and count two (robbery with aggravating circumstances). Sentence must now of necessity be imposed.

[2] In determining an appropriate sentence, the personal circumstances of the accused, the nature of the offence and the interests of the community have to be considered. The element of mercy is not left out of equation. Sentencing is also directed at addressing the traditional purposes of punishment. These are deterrence, prevention, retribution and rehabilitation of the offender.

[3] The accused's sentence is subject to the relevant provisions of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA") which prescribes a variety of mandatory minimum sentences to be imposed by the courts in respect of a wide range of serious and violent crimes. In this matter the provisions of Section 51(1) and (2) read with Section 51(3) of the CLLA are applicable. The accused was warned of this at the commencement of the trial and I have no doubt that his legal representative conducted the accused's defence with this in mind and would have been prepared accordingly. The consequences hereof are that the accused faces a minimum sentence of life imprisonment in respect of count one and 15 years imprisonment in respect of count two, unless I find there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentences.

[4] The minimum sentence of life imprisonment in this case is applicable because the death of the victim (a) was caused by the accused in committing or after having committed robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and (b) the offence was committed by a group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

[5] In mitigation the accused testified that he was 23 years of age, born on [....] 1994 and was 22 years old when the crimes were committed. The indictment reflects his age as 21 by the time he was charged. A brief calculation if the birthdate is correct however, puts him a few months short of his 21st birthday at the time, and

a little over 22 years of age by the time he was convicted on 21 November 2016. The difficulty in this regard is that the State maintains the accused is an undocumented foreigner.

[6] The accused further testified he passed matric, was not married but a father to a minor child, aged six, who remains in the care and custody of the biological mother and grandmother. At the time of his arrest, he was a labourer in the building industry where he was paid R500-00 to R600-00 per project. The salary he earned varied and was dependant on the size of the project. He had been in custody for approximately one year and four months since his arrest. He has no record of previous convictions. The accused expressed remorse for his conduct. He apologised for telling lies during his trial regarding his involvement in the crimes. However, when it was put to him by the State, that he was not genuinely remorseful but said so as a result of his conviction, the accused had no response.

[7] The defence submitted that a combination of all this factors constitute substantial and compelling circumstances which justifies a maximum sentence of 20 years imprisonment, in particular the fact that the accused was “lured” to commit the offences. The State disagreed and called for the maximum prescribed sentences. The State argued the accused could have, if he was genuinely remorseful, pleaded guilty as he was implicated by finger prints and cell phone evidence which caused a lengthy trial and a withdrawal of two of his previous legal representatives.

[8] The facts regarding the case are simple. The deceased, a Chinese national was the owner of a clothing store. He lived on the premises attached to the store. Two sisters (the accused’s sisters), Zanele and Phumzile worked for the deceased, albeit in a different store. A section 204 witness, who had befriended the sisters and the deceased, worked in an office nearby. A plan was hatched to rob the deceased of his money days or weeks before the incident. The accused, who was in Swaziland, was roped in as they needed a male hand. The accused carried out the murder in the cause of the robbery. In the process a little over R800-00 in cash, two cell phones and a bag with clothing were stolen.

[9] The accused’s sisters and the section 204 witness were known to the

deceased and the former were therefore at risk of being exposed. It would therefore have been necessary, from the perspective of the perpetrators, to murder him. The deceased died a brutal, painful and undignified death whilst naked gagged and tied up by a belt, electric cable, clothes and bedding materials. Brake fluid had been mixed with his wine to drug him. The life was squeezed out of him whilst he lay on the floor writhing in pain, defenceless and bleeding through his nose until he succumbed. This was murder in its most barbaric form, preceded by assaults and with acid poured over his naked body. The post mortem report indicates that his left eye was swollen and bluish. The body had multiple abrasions, cuts and contusion. The murder of the deceased was completely unnecessary, as he was immobile and not a danger to them in that state. They could have stolen whatever they could find and fled the scene.

[10] In this case there is very little to mitigate the seriousness of the offences other than the relative youthfulness of the accused and that he had been in custody for one year and four months and a first offender. The robbery was carefully planned and the accused went to the house of the deceased armed a knife which he did not hesitate to use. The motive behind the torture was in order for the deceased to disclose where his safe was. The premises were ransacked but no safe could be found. Armed robbery and ensuing death is gloomily an extremely disturbing feature of our lives in this country. Shop owners are particularly vulnerable to this pandemic in crime as they are targeted for what is seen to be quick and easy money. The deceased foreigner had a right to life like all South African citizens, as enshrined in our Constitution, which required protection for as long as he was within our shores similar to the accused, a Swazi, whose real identity remains suspect.

[11] The accused, in my view, did not demonstrate any immaturity, nor was it evident that he was subjected to peer or undue pressure by one or the others involved in the crime. By his own version he was “lured”. But, he had enough time to ponder and reflect on this matter. Not only did he suggest the brake fluid with alcohol with which to drug the deceased a day before, but he played a pivotal role in the murder. On the contrary, the manner in which he gained entry to the deceased’s house, the brutal nature of the murder, as well as the fact that he maintained his innocence right up to the end, showed a complete lack of remorse, and are all

indicative of a calculated bloody-mindedness, belying his relative youthfulness (see ***Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and others***[1]). In ***Ngcobo and others***[2], the accused ranged in age of between 20 and below 22 years at the time the crimes were committed, on appeal to the Supreme Court of Appeal their sentences were increased to life terms of imprisonment on charges of murder and robbery.

[12] In ***S v Malgas***[3] it is set out how a court is to approach the minimum sentence regime, and in particular, how the enquiry into "substantial and compelling circumstances" is to be conducted. The following passage is of particular relevance:

> *"The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."*[4]

[13] Offences of this nature in this country are often committed by people in the accused's age category. As Ponnan JA stated in ***S v Matyityi***[5] regarding the role that an accused's age plays when imposing an appropriate sentence:

> *"…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."*

In the instant case I find no such evidence by the accused who by his own version was a father of a six year old child.

[14] It was further held in ***S v Matyityi***[6] that genuine remorse and regret are two wholly different concepts: —

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[1] [2009] 4 All SA 295 (SCA) at paragraph 18.
[2] *Supra.*
[3] 2001 (1) SACR 469 (SCA).
[4] At paragraph [9].
[5] 2011 (1) SACR 40 (SCA) at 48A-B.

> "*There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."*

I find that the accused expressed no genuine remorse as demonstrated by his overall conduct in this matter but undoubtedly deeply regrets that he was caught and eventually convicted and now faces the prospects of a life sentence. He could not explain the change of heart on his part in this regard and his motivation for the commission of the offences other than that he was lured.

[15] But as Nugent JA stated in ***S v Vilakazi***[7] that:

> *"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again".*

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[6] S*upra* at 47A-D.
[7] 2009 (1) SACR 552 (SCA) at paragraph [58].

This is such a case. The accused is in my view a danger to society. The accused's personal circumstances reveal nothing out of the ordinary and recede into insignificance against the gravity of the offences. I accordingly find that the accused's personal circumstances as placed on record do not constitute substantial and compelling circumstances that justify the imposition of lesser sentences than those prescribed in terms of the CLLA.

[16] In the result the accused is sentenced as follows:

16.1 On count one (murder): life imprisonment;

16.2 On count two (robbery with aggravating circumstances): 15 years' imprisonment.

In terms of S 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment on count two are to run concurrently with the term of life imprisonment imposed on Count one.

TP MUDAU

JUDGE OF THE HIGH COURT

Date of Hearing: 22 November 2016

Judgment Delivered: 23 November 2016

APPEARANCES

On Behalf of The State: **Adv D Pudikabekwa**

Instructed By: Director of Public Prosecutions
Nelspruit

On Behalf of the Appellant:	**Adv N.R Rasivhaga** (Previously Adv Malanguti and before him, Adv Erasmus)
Instructed By:	Legal Aid South Africa ,Nelspruit