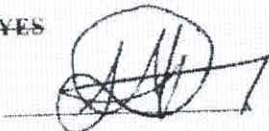


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: A164/2021

(1)	REPORTABLE: NO/ YES
(2)	OF INTEREST TO OTHER JUDGES: NO/ YES
(3)	REVISED: NO/ YES
<div style="display: flex; justify-content: space-between;"> <div style="width: 40%;"> <u>07 JUNE 2022</u> DATE </div> <div style="width: 50%; text-align: center;">  SIGNATURE </div> </div>	

In the matter between:

**Sipho Bongani Maseko
Musawakhe Zimbomvu
Juba Mike Ndlovu**

**First Appellant
Second Appellant
Third Appellant**

And

The State

Respondent

JUDGMENT

MAKHOB A J

1. The appellants were convicted and sentenced in the South Gauteng High Court on the following charges:

Count 1: Murder read with 51 (1) read with part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997

Count 2: Attempted Robbery

Count 3: Robbery with aggravating circumstances read with 51(2) of the Criminal Law Amendment Act 105 of 1997

Count 4: Kidnapping

Count 5: Kidnapping

Count 6: Kidnapping

Count 7: Unlawful possession of firearms

Count 8: Unlawful possession of ammunition

2. The first and third appellants were acquitted on count 7 and 8 whereas the second appellant was convicted on all counts.

3. On the 24 April 2007 the appellants were sentenced as follows:

Count 1: Murder – Life imprisonment

Count 2: Attempted Robbery- 15 years' imprisonment

Count 3: Robbery with aggravating circumstances- 15 years imprisonment.

Count 4,5 and 6: Kidnapping- 5 years' imprisonment.

Counts 7 and 8: the second appellant was sentenced to three years imprisonment. It was ordered that sentences on counts 1 to 8 to run concurrently with count 1.

4. On the 13 September 2012 the South Gauteng High Court Johannesburg granted the appellants leave to appeal against sentence to the North Gauteng High Court in Pretoria.
5. It is submitted on behalf of the appellants that the trial court misdirected itself by not attaching sufficient weight to the fact that the appellants played a secondary role in the commission of the offences and were convicted on the basis of common purpose and *dolus eventualis*.
6. It is further submitted that the trial court misdirected itself in not ruling that substantial and compelling circumstances were present in respect of all the applicants. The sentence of life imprisonment is excessively very severe.
7. The bone of contention by the appellants is that none of them shot the deceased. The evidence in the trial court is that the second appellant was

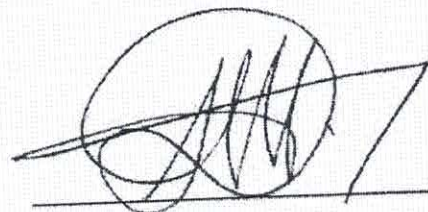
guarding the security officers and the first and third appellants only provided transport to the scene of the crime.

8. On behalf of the respondent counsel contends that the appellants acted in furtherance of a common purpose with a pre-mediated plan to rob the Broadacres Spar in Fourways. They were armed in order to eliminate whatever threaten them.
9. The evidence lead in the trial court is that the appellants were part of a group of five armed men who subdued the security personnel at the Broadacres shopping centre. They undressed the said security officers of their uniform and dressed themselves up with their uniform in order to disguise themselves.
10. In order to facilitate an easy understanding of the legal issues involved herein, a brief resume of the salient facts of this case is necessary. The deceased was a manager at Broadacres Spar in Fourways. On the 5th November 2005 at about 04H10, the deceased arrived at the Spar Broadacers shopping centre and was accosted by a man wearing a security uniform. This man pointed a firearm at the deceased and shot at him. The deceased fired back at this man. A second man also fired shots to the deceased. The deceased sustained a gunshot wound and one of the assailants also got shot but was removed by his accomplices from the scene. The wounded gunman's firearm was left behind on the scene.
11. The deceased at the time of his death was 33 (thirty-three) years old married with two children who were than 3 (three) and 8 (eight) years old respectively. On the other hand the appellants did not testify in mitigation of sentence.

12. In *S v Anderson* 1964 (3) 494 (A) the appellate division held that a sentence can be altered on appeal only if the court finds that no reasonable man ought to have imposed such a sentence or is grossly inappropriate, or inadequate that there was an improper exercise of his discretion by the trial judge.
13. The correct legal approach to an appeal on sentence imposed in terms of the Act is set out as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) para 1.2 *"a court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion and appellate court is of course entitled to consider the question of sentence afresh"*.
14. The deceased was murdered in cold blood and he left behind his very young children who will grow up without a father and a bread winner.
15. The trial court in sentencing the appellant in my view did consider whether there were substantial and compelling circumstances in respect of each appellant and found none.
16. The personal circumstances of the appellants as well as the application of the doctrine of common purpose does not amount to substantial and compelling circumstances.
17. The aggravating features in this matter far outweigh the mitigating factors. I am unable to find that the trial court erred in finding that there were no substantial and compelling circumstances to justify any sentence other than

the one statutory prescribed by the legislature namely life imprisonment. It follows that this court is not at large to interfere with the sentence and the appeal must fail.

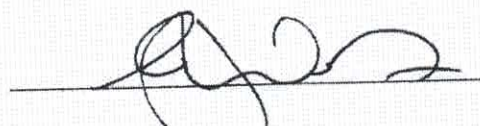
18. In the result the appeal against sentence is dismissed.



D MAKHOBA

JUDGE OF THE GAUTENG DIVISION PRETORIA

I agree,



C.J VAN DER WESTHUIZEN

JUDGE OF THE GAUTENG DIVISION PRETORIA

I agree,



J.S NYATHI

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the first second&

Third appellant Mr H.L Alberts

Instructed by: Legal Aid Board South Africa

For the respondent: Advocate Z. Peck

Instructed by: National Prosecuting Authority

Date heard: 30 May 2022

Date of Judgment: 07 June 2022