



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: CC76/2022P

In the matter between:

THE STATE

and

**LINDANI THEOPHILUS HLONGWA
FANELE DLOMO
MLUNGISI INNOCENT BAXTER**

**FIRST ACCUSED
SECOND ACCUSED
THIRD ACCUSED**

Coram: Mossop J
Heard: 2, 3, 4, 5, 6, 11, 12, 16, 17, 18 October 2023
Delivered: 18 October 2023

JUDGMENT ON SENTENCE

Mossop J:

[1] The boot of a motor vehicle is intended to accommodate goods and objects. It thus has no windows and permits of no ventilation. It is not intended to accommodate human beings. Mr Osama Mohamed Zaky Taha Elbitawu (the deceased) had a terrible death. He was squashed into the boot of his motor vehicle

together with his companion, Mr Shaker Samieer (Mr Samieer). There could not have been much room for two adult men in that confined space as a Toyota Corolla is not a particularly big motor vehicle. It would have been hot in the boot because of the men's body heat and because of their exhaled breath and there would not have been any fresh air for them to breath in. The deceased would undoubtedly have been terrified. He did not know how the nightmare that he was experiencing would end. He may have believed that these were his final moments on this earth. If he did, he, unfortunately, was correct. For he was taken from the vehicle and executed by you by being shot in the head and he died as a consequence.

[2] The experience for Mr Samieer would have been no less terrifying. He was taken from the boot and stabbed in the back and then shot in the stomach. It is a wonder that he is still alive, for the intent by the three of you was to make sure that he died so that there would be no one to identify you.

[3] I do not know which of you did what. But as Ms Franklin conceded yesterday, it does not really matter what each of you did because I have found that a common purpose existed between you to carry out this vile plan. I found that all three of you were involved in the events tried before me. That there was a common purpose is further revealed by the fact that if the person who was shot by Mr Samieer when he struggled with the man who had shot him is the person who stopped the motor vehicle, then the person who stabbed Mr Samieer and the person who shot him, assuming that the person who had the firearm did not also have the knife, have to have been accused 2 and accused 3. In other words, all three of you had some part to play in the terrible events that occurred in the plantation on the evening of 15 July 2022. This is simply further evidence of your common purpose and that all three of you were committed to the furtherance of that common purpose.

[4] The State indicated at the commencement of the trial that it sought the imposition of certain minimum sentences upon you. You stated that you understood this. The minimum sentences are prescribed by the provisions of the Criminal Law Amendment Act 105 of 1997 (the Act) and the schedules attached thereto. In respect of murder, the minimum sentence prescribed is life imprisonment where the death of the victim was occasioned by the accused while committing, or attempting to commit,

the offence of robbery with aggravating circumstances or where the death of the victim was caused by a group of persons acting in the execution of a common purpose. In respect of robbery with aggravating circumstances, the minimum sentence prescribed is imprisonment for 15 years for a first offender and 20 years' imprisonment for a second offender.

[5] While the State continues to ask for the imposition of the minimum sentences upon you, I indicate to you that I am not compelled to impose those minimum sentences. I am entitled to impose a lesser, shorter sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of such a lesser sentence.

[6] Each of you has submitted through your respective legal representative that the details of your upbringing and your life constitute proof of substantial and compelling circumstances that entitle this court to avoid imposing the prescribed minimum sentences.

[7] What are substantial and compelling circumstances? The Act does not define what they are. This is left to the courts to determine. A leading case on this issue that is often referred to, indeed, it was referred to yesterday when submissions were made by your legal representatives on sentence, is the matter of *S v Malgas*.¹ It is necessary to quote from that judgment at some length. The court stated, with regard to the words 'substantial and compelling' that:

'Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. 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 to 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. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly

¹ *S v Malgas* 2001 (2) SA 1222 (SCA).

taken into account by courts when sentencing offenders. The use of the epithets “substantial” and “compelling” cannot be interpreted as excluding *even from consideration* any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative *impact* of those circumstances must be such as to *justify* a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that.’²

[8] The court in *Malgas* went on to state that courts are required to approach the imposition of sentences conscious of the fact that the Legislature has ordained the particular prescribed period of imprisonment should be the sentence that is ordinarily imposed. In the absence of any other persuasive, weighty factors that may properly be considered, the minimum sentence should therefore be imposed.

[9] So your personal circumstances may be taken into account when determining whether the minimum sentences should be imposed or not and they may constitute substantial and compelling circumstances that may allow you to escape those prescribed minimum sentences. Before considering what was said on your behalf regarding your personal circumstances, it is important, in my view, when considering the appropriateness of the sentence to be imposed upon you, not to start with the mind-set that the minimum sentence that is prescribed is also a just sentence. All the circumstances of the case must be identified, considered and evaluated and then it should be considered whether the sentence is disproportionate to the crime, the offence and the legitimate needs of the community. That will require the court to consider what a just sentence would be in all the circumstances of the case. If a just sentence falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence.³

[10] I have listened carefully to what your respective legal representatives have submitted regarding your personal circumstances:

² Ibid, para 9.

³ *S v GK* 2013 (2) SACR 505 (WCC) para 14.

(a) Accused 1, Mr Hlongwa, you are 42 years of age. You reached grade 10 at school. You were raised by your mother and your brother has predeceased you. You have earned a living in the Greytown area as a brush cutter and gardener. You earned approximately R2 200 per week from these endeavours. While your income was modest, your genetic output was not as you are the father of 9 children whose ages range from 6 to 17 years. You have been in custody since 19 July 2022. You have a lengthy criminal history. It commenced in 2003 with an assault conviction, progressed to a robbery conviction in 2011, then followed several convictions for possession of drugs in 2015 and 2016 and then a final assault conviction in 2017. All these convictions, save for the two drugs convictions, are relevant considerations and will have to be brought into the reckoning when formulating an appropriate sentence for you. In the past, you were treated lightly by the law: you never received a prison sentence but were either fined or received a suspended sentence. I am afraid that will come to an end today;

(b) Accused 2, Mr Dlomo, you are 23 years of age. You also passed grade 10 before you left the educational system. You were raised by your grandmother, your father having died in 2008 and your mother having relocated to Johannesburg. You are single but have a child aged 3 years. You have no previous convictions; and

(c) Accused 3, Mr Baxter, you are 41 years old. Your educational career ended in grade 8. You are single but have six children whose ages range from 1 year to 18 years. You were self-employed and earned approximately R3,500 per month. You have a single criminal conviction which occurred 24 years ago and which involved the offence of using a motor vehicle without the owner's consent. Unlike your co-accused, you advanced a version under oath in which you admitted your presence at the scene of the crime. You, however, denied any voluntary participation in the criminal activities that then occurred but I am left with the residual feeling that your evidence was intended to explain away your palm print and not an attempt to take the court into your confidence.

[11] From what your legal representatives have said to me, I think it is fair to deduce that none of you have had an easy life. But there are millions of people in this country who have been born into unfortunate circumstances and who have struggled to make their way in life who have not broken the law.

[12] Mr Stuurman, who appears for accused 2, submitted that a mitigatory feature that ought to be considered is the youthfulness of accused 2, Mr Dlomo, whom he represents. Mr Dlomo, it is true that you are substantially younger than the other two accused with whom you share the dock. It is so that Mr Stuurman, in the same breath that he used to make the submission, withdrew it. The reason for doing so, so he explained, was the existence of *S v Mabuza and others*.⁴ In my view, any factor that may possibly and legitimately justify the imposition of a sentence other than the prescribed minimum sentence must be investigated and I accordingly continue to consider whether there is any merit in that submission notwithstanding that it was withdrawn.

[13] In *Mabuza*, there were three appellants aged 20, 19 and 18 respectively. They were thus younger than you Mr Dlomo. The Supreme Court of Appeal stated that: 'Youthfulness almost always affects the moral culpability of juvenile accused. This is because young people often do not possess the maturity of adults and are therefore not in the same position to assess the consequences of their actions. They are also susceptible to peer pressure and adult influence and are vulnerable when proper adult guidance is lacking. There is therefore compelling justification for the view that youthfulness, at least before the advent of the minimum sentencing regime, was *per se* a factor mitigating sentence.'⁵

[14] But the court went on to note that the institution of the minimum sentence legislation indicated that the Legislature intended that youthfulness should no longer be regarded as a mitigating factor *per se*. The court stated that: 'So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer *per se* a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption.'

⁴ *S v Mabuza and others* (174/01) [2007] ZASCA 110; [2007] SCA 110 (RSA) (20 September 2007).

⁵ *Ibid*, para 22.

[15] I must, therefore, consider your age and determine whether that constitutes sufficient justification for me to depart from imposing the minimum sentence. It appears

that there are degrees of maturity. The, younger the accused person, the less mature he or she is likely to be.⁶ *Mabuza* focussed on juveniles – so much is evident from the extract to which I have just referred. You, however, are not a juvenile. You are a young adult. You have embraced an adult lifestyle because you have fathered a child. You have an education of sorts and it is safe to assume that you know what is right and what is not right. You would have learnt that crime is wrong at school, if not at home. According to the State witness Mr Zakwe, you worked with him at the municipality. I know very little about you, but what I do know indicates that you conduct yourself as an adult. Mr Khathi indicated in his argument on sentence that it has not been suggested that you were influenced by your co-accused to do what you did. That is correct, but you could not make such an allegation because your version, falsely advanced, was that you were not there.

[16] Ms Citera in her address to me yesterday pleaded for mercy for her client, accused 3. The dictionary definition of mercy is:

‘compassion or forbearance shown especially to an offender or to one subject to one’s power.’⁷

You are offenders and the law has subjected you to the powers with which I have been endowed. In my view, mercy should have a place, and be evident, in every sentence imposed by a court. I agree with the words of Abraham Lincoln when he said:

‘I have always found that mercy bears richer fruits than strict justice.’

I point out, however, that it is easier for a court to be merciful where wrongdoing has been admitted. It is less easy to be merciful where this has not occurred. None of you have admitted any wrongdoing. Despite your failure to do so, I shall strive to blend an element of mercy into the sentences that I am required to impose upon you.

[17] But even as I strive to be merciful, I would be failing in my duty if I did not acknowledge that society is sick and tired of the rampant crime in our country. There

⁶ *S v Lehnberg* 1975 (4) SA 553 (A).

⁷ Merriam-Webster Online Dictionary: <https://www.merriam-webster.com/dictionary/mercy>.

is a general lawlessness afoot in the country. Human life is no longer viewed as being sacrosanct. Human life is routinely taken by those who seek to avoid the consequences of their unlawful conduct. Those wrongdoers very often evade detection and arrest. When wrongdoers are actually apprehended, the community needs the reassurance of appropriate sentences being imposed upon those who will not obey the law.

[18] When considering your personal circumstances, it appears to me that there are common features in all of your backgrounds. None of you have persevered in your educational careers. None of you earn a liveable wage and none of you are married but you are all fathers of children. Unfortunately, your personal circumstances appear to be the norm in our present unequal society. The mere fact that there are these common themes demonstrate that your lived experience is, largely, the norm. There is therefore nothing substantial and compelling in those life experiences that would merit the avoidance of the minimum sentences relied upon by the State. Insofar as Mr Dlomo is concerned, I have considered your relative youthfulness but have come to the conclusion that it does not constitute sufficient grounds for me to depart from the minimum sentences. And, in my view, the minimum sentences prescribed would be just sentences in the particular circumstances of this matter. Accordingly, after reflection, I cannot find that there are any substantial or compelling circumstances that justify the prescribed minimum sentences to be departed from.

[19] During the course of my interaction with your legal representatives when they addressed me on sentence yesterday, I indicated that because of the defences that you have falsely raised it is not possible to find that you are remorseful for your conduct. Remorse is a hopeful sign that there is a redeemable quality in the person that exhibits it. While you may now perhaps regret your conduct, as Ponnar JA stated in *S v Matyityi*⁸ there is:

‘... 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

⁸ *S v Matyityi* 2011 (1) SACR 40 (SCA).

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.’⁹ (Footnotes omitted)

[20] I have no idea what motivated you to commit the offences for which you have been convicted. I am inclined to believe that it was simply greed in the absence of any explanation. You have not taken the court into your confidence in this regard. Because of this I cannot find that any of you are remorseful or have acknowledged the error of your ways.

[21] At the commencement of this judgment I referred to the horror that your victims must have felt when placed in the boot of the Toyota Corolla. You are the persons responsible for that. You need to acknowledge that and reflect upon that. If you have a conscience, it will be plagued by that knowledge for the rest of your days. While I intend imprisoning your bodies, your minds will forever be imprisoned with the knowledge of your own capacity for wickedness.

[22] In sentencing you, I must be mindful of the fact that multiple sentences must shortly be imposed upon you and I must insure that that the cumulative burden of those sentences should not operate unfairly upon you.

[23] I am of the view that because of your different criminal histories, I should treat accused 1 differently to accused 2 and 3, where possible. While accused 2 has no prior criminal convictions, I intend treating accused 3 as a first offender because of the age of his only criminal conviction. Having considered all the relevant factors, including the representations made to me by your legal representatives on your

⁹ Ibid, para 13.

behalf, the nature of the offenses that you committed and the demands of society as a whole, I am satisfied that the following are appropriate sentences for each of you:

1. Accused 1:

(a) Counts 1 and 2 (kidnapping):

Each of these counts are taken as one for the purpose of sentence and you are sentenced to 4 years' imprisonment.

(b) Count 3 (murder):

You are sentenced to life imprisonment.

(c) Count 4 (attempted murder):

You are sentenced to 15 years' imprisonment;

(d) Count 5 (robbery with aggravating circumstances):

You are sentenced to 15 years' imprisonment.

(e) The sentences imposed on counts 1, 2, 4 and 5 will run concurrently with the sentence imposed on count 3 in terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977.

(f) No order is made in respect of accused 1 in terms of the provisions of section 103(1) of the Firearms Control Act, 60 of 2000.

2. Accused 2:

(a) Counts 1 and 2 (kidnapping):

Each of these counts are taken as one for the purpose of sentence and you are sentenced to 3 years' imprisonment.

(b) Count 3 (murder):

You are sentenced to life imprisonment.

(c) Count 4 (attempted murder):

You are sentenced to 12 years' imprisonment;

(d) Count 5 (robbery with aggravating circumstances):

You are sentenced to 15 years' imprisonment.

(e) The sentences imposed on counts 1, 2, 4 and 5 will run concurrently with the sentence imposed on count 3 in terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977.

- (f) No order is made in respect of accused 2 in terms of the provisions of section 103(1) of the Firearms Control Act, 60 of 2000.

3. Accused 3:

- (a) Counts 1 and 2 (kidnapping):

Each of these counts are taken as one for the purpose of sentence and you are sentenced to 3 years' imprisonment.

- (b) Count 3 (murder):

You are sentenced to life imprisonment.

- (c) Count 4 (attempted murder):

You are sentenced to 12 years' imprisonment;

- (d) Count 5 (robbery with aggravating circumstances):

You are sentenced to 15 years' imprisonment.

- (e) The sentences imposed on counts 1, 2, 4 and 5 will run concurrently with the sentence imposed on count 3 in terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977.
- (f) No order is made in respect of accused 3 in terms of the provisions of section 103(1) of the Firearms Control Act, 60 of 2000.

MOSSOP J

APPEARANCES

Counsel for the State	:	Mr J Khathi
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Counsel for accused 1	:	Ms D S Franklin
Instructed by	:	Legal Aid Pietermaritzburg
Counsel for accused 2	:	Mr R Stuurman
Instructed by	:	Legal Aid Pietermaritzburg
Counsel for accused 3	:	Ms T M Citera
Instructed by	:	Legal Aid Pietermaritzburg
Dates of trial	:	2, 3, 4, 5, 6, 11, 12, 16, 17, 18 October 2023
Date of judgment on sentence	:	18 October 2023