

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, NORTH EASTERN CIRCUIT
MTUBATUBA**

Case No: CC24/2023

In the matter between:

THE STATE

and

**ZAKHELE VUSI GUMBI
ACCUSED**

FIRST

**SIBUSISO VELENKOSINI MKHWANAZI
ACCUSED**

SECOND

PHILANI CARLOS MZIMELA

THIRD ACCUSED

SIYABONGA MICHAEL SANGWENI

FOURTH ACCUSED

JUDGMENT ON SENTENCE

MOSSOP J:

[1] On Friday, 26 May 2023 when the indictment was read to you and you tendered your plea to it, I saw standing before me four innocent men. Men accused of wrongdoing, but innocent, nonetheless, at that stage. That is no longer the case. Twenty days later, those four innocent men have been replaced by four convicted criminals. You are no longer to be viewed as being ordinary members of society but

you are now forever marked as being part of that group of people that believes that the laws that govern the majority of us are not applicable to themselves. The benefits and privileges that you have enjoyed as free citizens of this young democracy are to be taken away from you because you have not respected society's laws and conventions.

[2] These may sound like harsh, condemnatory words, but in truth they are not. They merely describe what must now follow upon a conviction for serious criminal activity. Let me pull no punches: what you have been convicted of is, indeed, serious criminal activity. You used firearms to commit a robbery in a shop in a shopping mall, you fired indiscriminately and extensively at members of the SAPS and attempted to kill them with those firearms. Criminal activity is all pervasive in our society. Right thinking, law abiding members of the community are outraged by people such as yourselves who think they are entitled to simply do, and take, what they want, irrespective of other people's rights. There is a feeling in the community that crime is out of control. There is a feeling in the community that crime does pay, despite the old adage that it does not. The courts are viewed as the last bastion in the fight against such unlawful behaviour and, as Ms Ntsele correctly argued, the community looks to the courts to impose sentences that will both punish those who commit such criminal activity and deter those who are contemplating committing such criminal activity.

[3] That having been said, and whilst I must now acknowledge you as criminals, I must not lose sight of the fact that while you are criminals, you are also human beings. That means that you are not perfect, for no human is a perfect being. Human beings from time to time will make mistakes. I also do not lose sight of the fact that I am sentencing you in a South Africa that is very different to the historic South Africa from which we come. We see things differently now, thankfully. We are much more cognisant of each other as human beings and we respect the inherent dignity that all human beings must be afforded. We thus continue to strive to acknowledge, respect and honour our humanity, even when imposing sentences on criminals.

[4] One of the building blocks of our new society is the principal of ubuntu. Ubuntu can loosely be defined as a fundamental African value embracing dignity,

human interdependence, respect, neighbourly love and concern. In *S v Mankwanyane*,¹ the Constitutional Court recognised this principal as one of the values underpinning the Constitution when dealing with the question of criminal punishment. The Interim Constitution also incorporated the concept of ubuntu from traditional jurisprudence. In *Mankwanyane*,² six of eleven judges identified ubuntu as being a key constitutional value that:

‘. . . places some emphasis on communality and on the independence and on the interdependence of the members of a community. It recognises a person’s status as a human being entitled to unconditional respect, dignity, value and acceptance . . . The person has a corresponding duty to give the same. . .’

[5] The Constitutional Court has made several allusions to ubuntu being one of the core constitutional values of human dignity, equality and freedom. Though ubuntu is not specifically mentioned in the final Constitution, it remains part of our jurisprudence.

In *Port Elizabeth Municipality v Various Occupiers*,³ Sachs J said:

‘The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the needs for human interdependence, respect and concern.’

I shall attempt to infuse the sentences that I must impose upon you with as much ubuntu as possible. But while the lofty principles referred to in the cases that I have just mentioned demonstrate what we strive for, our understanding of ubuntu also serves as a mirror to show us the extent to which you, personally, have failed to embrace and apply that philosophy. This is revealed in the disrespectful and despicable way that you treated those people whom you found inside the store. Ms

¹ *S v Mankwanyane* 1995 (3) SA 391 (CC).

² *S v Mankwanyane*, *infra*, para 224.

³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 30.

Ntsele for the State correctly remarked that your legal representatives requested the court to show you mercy when you showed none to the victims of your crimes. You shall not be treated in the manner that you treated your victims for if that did occur then this court would be no better than you. But you must appreciate that your conduct will call for a very severe sentence.

[6] In seeking the appropriate sentence to impose upon you, I am guided by legislation passed by the National Assembly which requires certain minimum sentences to be imposed for certain offences. I explained to you at the commencement of this trial the concept of minimum sentences and you acknowledged that you understood what that meant. There is but a single offence amongst the offences of which you have been convicted that attracts a minimum sentence. That is the offence of robbery with aggravating circumstances framed in counts 1, 2, 3, and 5 of the indictment, which for first offenders attracts a minimum sentence of 15 years' imprisonment in terms of the provisions of section 51(2)(a) of Act 105 of 1997 (the Act), read with part 2 of Schedule 2 to that Act. For a second offender, the minimum sentence is 20 years' imprisonment.

[7] These provisions will obviously be of some interest to Mr Mzimela, accused three, who has a previous conviction for robbery. That offence of which you were previously convicted, according to the SAP69 document applicable to you, was 'robbery'. Ms Ntsele said in argument that she doubted that you did not use a firearm when committing that prior robbery. She may be correct. But ultimately, that assertion, no matter how prescient it may appear to be, is not really of any assistance: the court does not act upon suppositions, but on facts. There is no evidence that a firearm was used in that prior robbery nor is there any evidence that you were, in fact, convicted of robbery with aggravating circumstances. The offence of robbery without aggravating circumstances is not mentioned in the Act and the minimum sentence of 20 years' imprisonment is accordingly not automatically in play. But there will obviously have to be a more severe sentence for you on the counts of robbery of which you have been convicted compared to those that your co-accused will receive because of your criminal track record.

[8] The State sought, and obtained, your conviction, save for accused two, on count 16 of possessing a prohibited firearm⁴ in terms of the provisions of section 4(1)(f)(iv) of the Firearms Control Act 60 of 2000 (the FCA), read, inter alia, with schedule 4 of the FCA. The State in doing so did not rely on the provisions of the Act with regard to minimum sentences on this count. I do not know why that is the case, because in counts 17 and 18, being the counts dealing with the unlawful possession of the .38 calibre Smith and Wesson revolver and one round of ammunition for that weapon, it did rely on the Act. As was stated in *Mhlongo v The State*:⁵

‘Section 35(3) of the Constitution guarantees the right to a fair trial for everyone charged with a criminal offence, while s 84(1) of the CPA stipulates that a charge must contain the essential particulars of an offence. Considering the constitutional right of an accused to be sufficiently informed of the charge, and other underlying values of the Constitution, it is very important that a charge sheet makes reference to provisions relevant to the sentence for a particular offence; otherwise the Constitution would become a dead letter. This Court has said on numerous occasions that it is always desirable that a charge sheet refers to those provisions of the law of relevance to the sentence to be imposed for the offence charged. Although there is no fixed rule, a failure to state the relevant section in the Act, unless it occasions substantial prejudice to the accused, does not necessarily vitiate the whole trial. In *Ndlovu*, this Court held that the State’s failure to give the accused sufficient prior notice of the applicability of the statute was fatal to the sentence imposed, more so when the accused was unrepresented. In *Legoa* this Court did not prescribe any general rule on the issue, but emphasised the importance of a clearly drafted charge sheet and the reflection of the fundamental principle of a fair hearing in the entire trial process. It also stressed that an accused person should be given sufficient notice of the State’s intention to rely on the minimum mandatory sentencing regime in every instance.’ [Footnotes omitted]

[9] Perhaps this course of conduct was adopted because the State perceived the FCA to impose a minimum sentence of 25 years’ imprisonment. So much was stated

⁴ Section 4(1)(f)(iv) of the FCA provides that a prohibited firearm is any firearm the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.

⁵ *Mhlongo v The State* [2016] ZASCA 152; 2016 (2) SACR 611 (SCA) para 15.

by Ms Ntsele in her heads of argument.⁶ But in that the State is mistaken. What Schedule 4 to the FCA deals with is a maximum sentence, not a minimum sentence, that may be imposed. Thus, the maximum sentence that can be imposed for possessing a firearm without a serial number appearing on it is 25 years' imprisonment in terms of the FCA.

[10] The State, by its own election, word and deed, therefore does not rely upon the provisions of the Act on count 16. This is not a situation where an applicable section has been inadvertently omitted but the applicable statutory instrument named and identified: The Act is not mentioned at all in this count in the indictment, only the FCA is mentioned. Nor can it be argued that the warning that I gave you about minimum sentences remedied the situation. I spoke generally. I was unaware, as presumably your legal representatives were, that the minimum sentence on this count would be sought by the State given the wording of the indictment and I could not therefore have been warning you of its possible application. I accordingly approach the matter on the basis that there is no applicable minimum sentence on this count.

[11] I am not compelled to impose the minimum sentence on the counts of robbery with aggravating circumstances, namely counts 1, 2, 3 and 5 of the indictment, upon which I have convicted all four of you. I can impose a lesser sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The Act does not define what 'substantial and compelling' circumstances are. This is left to the courts to determine.

[12] Courts have consequently over the years considered what 'substantial and compelling circumstances' may mean. A leading case that is often referred to when it comes to minimum sentences is the matter of *S v Malgas*.⁷ In that matter, the court stated that it is incorrect to hold the view that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of being seldom

⁶ The concluding sentence of the State's heads of argument read as follows: 'What the accused's [sic] placed before this court is nothing out of the ordinary and therefore this Honourable court should not deviate from the prescribed minimum sentence of 25 years' imprisonment is [sic] the count 16; Possession of a prohibited firearm; 15 years in respect of Robbery with aggravating circumstances.'

⁷ *S v Malgas* 2001 (2) SA 1222 (SCA).

encountered or rarely encountered. The court held that whatever nuances of meaning may lurk in those words, their central thrust is obvious, namely that specified minimum sentences are not to be departed from lightly and for flimsy reasons which cannot withstand scrutiny. Speculative theories favourable to the accused persons, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy of minimum sentences, and like considerations are obviously not intended to qualify as substantial and compelling circumstances. But there is no reason to conclude that the Legislature intended a court to exclude from consideration, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.

[13] The court, however, went on to state in *Malgas* that courts are required to approach the imposition of sentence conscious of the fact that the Legislature has ordained the particular prescribed period of imprisonment as being the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

[14] In my view, however, it is important when considering the appropriateness of the sentence to be imposed upon you not to start with the mind-set that a 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.⁸

[15] Do any substantial and compelling circumstances exist in respect of any of you? I have listened carefully to what your respective counsels have submitted regarding your personal circumstances:

⁸ S v GK 2013 (2) SACR 505 (WCC) para 14.

(a) Accused one, Mr Gumbi: you are 32 years of age and the father of a 15-year-old child. The highest educational level that you attained at school was grade 10 and prior to your arrest you were involved in cutting peoples grass, in respect of which you earned between R3 700 and R4,000 per month. You, like all your fellow accused, have been in custody for 16 months since you were arrested. You have four minor siblings that you help maintain. Your counsel submits that you are remorseful for your conduct. I shall return to the concept of remorse later in this judgment. You have no previous convictions;

(b) Accused two, Mr Mkhwanazi: you are 32 years of age and the father of four minor children, two of whom are in grade two and two of whom have not yet entered the educational system. You passed grade 11 at school and were raised by a single mother. You had gainful employment at the time of your arrest at an alarm firm in Isipingo, KwaZulu Natal, where you earned R6 000 per month. You apparently assist in the maintenance of your mother and your minor children. You, too, have no previous convictions;

(c) Accused three, Mr Mzimela: you are 41 years old and the father of four children, the eldest of which was born in 2001 and the youngest of which is 3 years old. At school you attained a grade 11 level of education. You have, as previously mentioned, a previous conviction for robbery. During your incarceration, you suffered the loss of your father. You were sentenced to imprisonment in 2009 and were released in 2014 and it appears that you have been in and out of employment since then. You worked at a Spar store in the bakery section and at the time of your arrest you were working as an Uber driver earning R2 100 per month; and

(d) Accused 4, Mr Sangweni: you are 39 years of age and not 20 years of age as reflected in the indictment. You have three children, the eldest of which is 22 years old and the youngest of which is 6 years old. You were employed by Tronox for a period of five years prior to your arrest and were earning R5 000 per month. You have a grade 12 level of education and no previous convictions.

[16] Unfortunately, your personal circumstances appear to be the norm in our present unequal society. Your counsel submitted that none of you have had an easy

life. I accept that as being true. But there are millions of people in this country who have been born into unfortunate circumstances and have struggled to make their way in life who have not broken the law. I can therefore discern no basis for departing from the prescribed minimum sentence on the count of robbery with aggravating circumstances because there are no compelling and substantial reasons to for me to do so.

[17] I must also pay attention to the facts of this matter. All four of you took a decision to rob the Beauty Zone store on 2 February 2022. It was a bad decision. The author Mark Twain once said that good decisions come from experience and experience comes from making bad decisions. The four of you will hopefully now be able to make good decisions in the future because you have made numerous bad decisions in this matter. The decision to rob the store was the first of those; the decision to shoot at the SAPS was another; the decision to get into the ceiling a third. The list is lengthy. Reverting to the facts, you armed yourselves with three firearms and ammunition. You entered the store knowing that there would at least be employees present and you could reasonably have anticipated that there would also be customers within the store. There were, indeed, customers present when you struck. You took them and the employees at gunpoint to a small storeroom at the rear of the store where you held them against their will for at least 20 minutes. The witness impact statements handed up by the State reveals that your hostages were terrified by your conduct. That terror is manifestly observable on the videos that the court was shown. The ladies in the storeroom were besides themselves with fear and the point at which the deceased almost shot Mr. Dube is disturbing and almost unwatchable. Little wonder then that Mr. Dube was required to forfeit his employment as a security guard in order to recover from this terrible experience. The store manageress also mentions the mental anguish that she now suffers from, as does Ms Mchunu. Your conduct knew no restraint and when your activities were discovered you fired on at least two occasions at the members of the SAPS who were sent to arrest you. The cartridges recovered in the store reveals that 32 shots were fired from accused one's pistol. You actually hit one of the SAPS members and the fact that you did not kill him is, as stated in my judgment, due more to good fortune than to good planning.

[18] I indicated earlier in this judgment that I would deal with the issue of remorse. Accused one is the only person thus far who has claimed to have any. In my view, none of you have shown a single iota of remorse for your conduct. Nor can you, because your version, to which you still adhere, is that you were not involved in the robbery and the other offences because you were all shoppers in the store. How then can you express remorse for being a shopper? I put this conundrum to Mr Ntuli who was making submissions in this regard on behalf of accused one. He had no answer to the difficulty that I drew to his attention.

[19] In my judgment, I mentioned the fact that all four of you took the oath to speak the truth and immediately disregarded that undertaking. You should be ashamed of doing so. By falsely denying your complicity and guilt in the matter, you have eliminated any faint possibility of the court finding space to temper the sentences to be imposed on you because of genuine and profound remorse on your part. In the matter of *S v Matyityi*,⁹ Ponnann JA had the following to say on the issue of remorse:

‘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.’ (Footnotes omitted)

⁹ *S v Matyityi* 2011 (1) SACR 40 (SCA).

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

[21] In sentencing you, I take into account that all the events occurred on the same day at the same place and I am aware of the fact that there are multiple counts upon which you are to be sentenced. I must accordingly ensure that the cumulative effect of the sentences to be imposed is just. That having been noted, I consider the following to be just sentences:

1. Accused one is sentenced on:

- (a) Counts 1, 2, 3 and 5, being counts of robbery with aggravating circumstances, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences shall run concurrently with each other.

- (b) Counts 12, 13 and 14, being counts of attempted murder, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences shall run concurrently:

- (i) with each other; and
 - (ii) with the sentences imposed in terms of paragraph 1(a) above.
- (c) Count 16, being a count of unlawfully possessing a prohibited firearm, to 15 years' imprisonment.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that 7 years of this sentence shall run concurrently with the sentence imposed in terms of paragraph 1(a) above.

- (d) The nett effect is that accused one is sentenced to 23 years' imprisonment.

2. Accused two is sentenced on:

- (a) Counts 1, 2, 3 and 5, being counts of robbery with aggravating circumstances, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences shall run concurrently with each other.

- (b) Counts 12, 13 and 14, being counts of attempted murder, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that:

- (i) these sentences shall run concurrently with each other; and
 - (ii) 10 years of each sentences shall run concurrently with the sentences imposed in terms of paragraph 2(a) above.
- (c) The nett effect is that accused two is sentenced to 20 years' imprisonment.

3. Accused three is sentenced on:

- (a) Counts 1, 2, 3 and 5, being counts of robbery with aggravating circumstances, to 18 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences shall run concurrently with each other.

- (b) Counts 12, 13 and 14, being counts of attempted murder, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences shall run concurrently:

- (i) with each other; and
 - (ii) with the sentences imposed in terms of paragraph 3(a) above.
- (c) Count 16, being a count of unlawfully possessing a prohibited firearm, to 15 years' imprisonment.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that 7 years of this sentence shall run concurrently with the sentence imposed in terms of paragraph 3(a) above.

- (d) The nett effect is that accused three is sentenced to 26 years' imprisonment.

4. Accused four is sentenced on:

- (a) Counts 1, 2, 3 and 5, being counts of robbery with aggravating circumstances, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences shall run concurrently with each other.

- (b) Counts 12, 13 and 14, being counts of attempted murder, to 15 years' imprisonment on each count.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that these sentences:

- (i) shall run concurrently with each other; and
 - (ii) shall run concurrently with the sentences imposed in terms of paragraph 4(a) above.
- (c) Count 16, being a count of unlawfully possessing a prohibited firearm, to 15 years' imprisonment.

In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that 7 years of this sentence shall run concurrently with the sentence imposed in terms of paragraph 4(a) above.

- (d) The nett effect is that accused four is sentenced to 23 years' imprisonment.
- 5. No determination in terms of section 103(1) of the Firearms Control Act 60 of 2000 is made. All four accused are consequently unfit to possess a firearm.
 - 6. The Taurus 9mm pistol referred to in count 16 and the Smith and Wesson .38 revolver and one round of ammunition capable of being discharged from that weapon referred to in counts 17 and 18 respectively are declared forfeited to the State.

APPEARANCES

Counsel for the State	:	Ms T P Ntsele
Instructed by:	:	Director of Public Prosecutions, Pietermaritzburg
Counsel for accused one and two	:	Mr M R Ntuli
Instructed by	:	Legal Aid Durban
Counsel for accused three and four	:	Mr P Daniso
Instructed by	:	Legal Aid Durban
Date of Hearing	:	23, 26, 29, 30, 31 May 2023, 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15 June 2023
Date of Judgment	:	15 June 2023