



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HGH:CC43/2016

DELETE WHICH IS NOT APPLICABLE

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

Date

Signature

In the matter between:

THE STATE

And

MENIAS MANZUZU

ACCUSED

JUDGMENT

CHIDI, AJ:

INTRODUCTION

[1] Accused, a 23 year old male Zimbabwean citizen residing at Masakaneng Section, Ga-Kgapane, appeared before this court on 14 November 2016 on the following counts:

1.1. Count 1: House breaking with intend to rob;

1.2. Count 2: Robbery with aggravating circumstances as defined in Section 1 (1) of the Criminal Procedure Act 51 of 1977 (CPA) read with Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentence Act);

1.3. Count 3: Murder read with the provisions of Section 51 (1) of the Minimum Sentence Act;

1.4. Count 4: Contravening of Section 9 (1) read with Section 49 (1) (a) of the Immigration Act 13 of 2002 (Immigration Act);

1.5. Count 5: Contravening Section 9 (3) (a) read with Section 49 (1) of the Immigration Act.

[2] The State withdrew counts 1, 4 and 5 before the accused pleaded. Consequently the accused pleaded only to counts 2 and 3, i.e robbery with aggravating circumstances and murder read with the provisions of Section 51 (1) of the Minimum Sentence Act:

2.1. Count 2:

It is alleged that in that upon or about 22 September 2015 and at or near Modjadjiskloof in the District of Tzaneen, the

accused did unlawfully and intentionally assault **NUR HUSSEN MAHOMED**, and did then and with force take the following items from him, to wit: three (3) cellphones (2 Samsung and 1 Nokia) and clothes; the property of or in the lawful possession of **NUR HUSSEN MAHOMED** aggravating circumstances present in that the deceased in count 3 was chopped with a panga during the commission of the offence.

2.2. Count 3

It is alleged that in that upon or about 22 September 2015 and at or near Modjadjiskloof in the District of Tzaneen, the accused did unlawfully and intentionally chop **NUR HUSSEN MAHOMED**, an adult male person with a panga as a result of which he sustained cut wounds which caused his death on 28 September 2015 at Kgapane Hospital.

- [3] The accused is legally represented by Adv N.L. Mathaba from Polokwane Justice Centre.

THE PLEA

- [4] The accused pleaded guilty, and his legal representative prepared statement in terms of Section 112 (2) (b) of the CPA which was read into the record and explained to the accused in his home language,

Shona. The accused admitted the contents of the statement in terms of Section 112 (2) (b) which he signed together with his legal representative.

[5] The accused admitted all the elements of the offence and that he unlawfully and intentionally committed the offences.

[6] I then found the accused guilty on counts 2 and 3, as preferred against him.

[7] The case was then adjourned for mitigation and sentence.

[8] I am grateful to both the counsel for the State and defence with the well prepared arguments presented during mitigation and aggravation of sentence.

THE SCHEME OF SENTENCING

[9] In exercising its discretion the trial court is required to consider the principles known as the “triad of **Zinn**¹” where the court held that in imposing a sentence, what has to be considered is a triad consisting

¹ 1969 (2) SA 537 (A) at 540.

of the crime, the offender and the interests of society. This triad gave rise to three general guidelines in the development of a sentence: the seriousness of the offence, the personal circumstances of the offender, and the public interest.

[10] As **Snyman**² states that there ought to be a healthy balance between these three considerations. A court should not emphasise any one of them at the expense of the others.

[11] As the accused faces offences that fall within the purview of the Minimum Sentence Act, the proviso in following the prescribed minimum sentence is the existence of the substantial and compelling circumstances. In **S v Van Wyk**³ it was held that substantial and compelling circumstances must include those which previously were referred to as mitigating circumstances, and which include all the circumstances which might indicate a diminished moral blameworthiness on the part of the offender. It was decided in **S v Malgas**⁴ that:

"It has been suggested that the kind of circumstances which might qualify as substantial and compelling are those which reduce the moral guilt of the offender (analogously to the circumstances considered in earlier times to be capable of constituting 'extenuating circumstances' in crimes which attracted the sentence of death). That will no doubt often be so but it

² CR Snyman "Criminal Law" 6ed LexisNexis (2014) at 19.

³ 2000(1) SACR 45(C) 49j.

⁴ 2001 (2) SA 1222 (SCA) at 1235 para 24.

would not be right to suppose that it is only factors diminishing moral guilt which may rank as substantial and compelling circumstances.”

MITIGATION OF SENTENCE AND AGGRAVATING CIRCUMSTANCE

[12] Mitigating Factors

12.1 The following have been submitted as the accused's mitigating factors:

- 12.1.1 He is 23 years old;
- 12.1.2 He married at the age of 19 and they are blessed with one child who is 4 years old;
- 12.1.3 His wife is unemployed;
- 12.1.4 The wife and the child were staying with the accused at the time of his arrest;
- 12.1.5 He is an orphan;
- 12.1.6 He is not formally employed but survives on “odd jobs”, from which he receives R500.00 on a good month;
- 12.1.7 He is also supporting and maintaining his siblings who live in Zimbabwe with the money he receives from his “odd jobs”;

- 12.1.8 His wife and child have relocated to Burgersfort after his arrest;
- 12.1.9 He relocated to South Africa in 2008 for greener pastures;
- 12.1.10 He pleaded guilty on his first appearance before the trial court which is a sign of remorse;
- 12.1.11 He took responsibility for his actions by pleading guilty;
- 12.1.12 He was staying in Giyani during 2012; but his friend invited him to Bolobedu area as there were according to the friend “better piece jobs”. He did not know that the friend was referring to “illegal piece jobs”;
- 12.1.13 He was influenced by that friend of his to commit offences as a means to survive;
- 12.1.14 There is a likelihood of the accused being rehabilitated; therefore the court should impose a lesser sentence;
- 12.1.15 The accused during consultation with his legal representative on his own decided to admit guilt;
- 12.1.16 He cooperated with the police at the time of his arrest;

- 12.1.17 The period he spent in custody while awaiting trial, being from 18 December 2015 should be considered;
- 12.1.18 The counts should be taken as one for purposes of sentence;
- 12.1.19 He is not a hardened criminal but only acted through the influence of friends;
- 12.1.20 He can be joined with the society after serving sentence of at least 10 years;

12.2. The fact that he is a first offender in respect of the murder charge and all of the above factors should be considered as substantial and compelling circumstances, so it was submitted.

[13] **The circumstances of this case.**

13.1. It was submitted by the defence that on the date of the incident the accused and his friends went to the deceased house. Whilst there they all entered and the accused committed the offences. He stole the cellphones and clothes and murdered the deceased by chopping him with a panga.

13.2. After chopping the deceased he started to feel remorseful as he assisted the deceased to sit down and stop the bleeding but as he was not sure as to who else was in the house he ran away.

13.3. He realised R 300.00 from the sale of the stolen cellphones.

[14] **Aggravating factors**

14.1. On the other hand the State submitted the following as aggravating factors:

14.1.1. The accused was convicted of very serious offences;

14.1.2. The deceased came to South Africa as an asylum seeker being a Ethiopian national;

14.1.3. He is survived by two widows and 7 children;

14.1.4. He was also maintaining and supporting his mother and sister who is widowed;

14.1.5. His children are no longer attending school as there is no one to pay for their school fees.

14.1.6. The deceased was a business man who employed five local people; these people have now lost employment after the death of the deceased.

- 14.1.7. The wives and the children have returned to Ethiopia after the death of the deceased;
- 14.1.8. The brother expended the sum of R160 000,00 for the repatriation of the remains of the deceased and transport of the family;
- 14.1.9. The stolen items were not recovered;
- 14.1.10. The accused spent less than a year in custody awaiting trial and there were valid reasons for keeping him in custody while awaiting trial;
- 14.1.11. In terms of Section 51 (2) of the Minimum Sentence Act with regard to count 2, robbery with aggravating circumstances; the prescribed sentence is not less than 15 years for a first offender;
- 14.1.12. In respect of count 3, murder, Section 51 (1) prescribes that life sentence shall be imposed, unless the court is satisfied that substantial and compelling circumstances exist upon which the court may deviate from the prescribed sentence.
- 14.1.13. The offence of murder was committed during the robbery. This murder was planned as the accused armed himself with a panga, a

dangerous weapon, with the aim to overcome any resistance.

14.2 The State presented the following arguments in support of the appropriate sentence:

- 14.2.1 That as stated in **S v Malgas**⁵ that the prescribed sentence shall be imposed unless there exist substantial and compelling circumstances to impose a lesser sentence. The court need not deviate from the prescribed sentence for flimsy reasons;
- 14.2.2 The offences are very much serious taking into account the extent of the violence involved in the commission of the offences;
- 14.2.3 The cruelty and brutality of the attack as depicted in the photo album which show that there was blood all over house;
- 14.2.4 Most of the deceased's injuries were on his arms as he was trying to ward off the attack;
- 14.2.5 That there was careful planning, which should

⁵ 2001 (2) SA 1222 (SCA).

- be considered as stated in **S v Mnguni**⁶;
- 14.2.6 The previous conviction of theft which is related to the offence of robbery should also be considered as aggravating circumstance.
- 14.2.7 The motive to commit the offences was greed;
- 14.2.8 The fact that accused pleaded guilty should not be considered as a sign of remorse because he realised that there was overwhelming evidence against him;
- 14.2.9 The accused decided not to testify which would have counted in his favour;
- 14.2.10 The age of the accused should not be taken as a mitigating factor in that at the time of the commission of the offence he was over the age of 18 years which is the age of majority;
- 14.2.11 The accused was aware that he would put his family at risk when he committed the offences; so the fact that he is a breadwinner should not be considered;
- 14.2.12 There is no evidence that the level of education influenced him to commit the offences;

⁶ 1994 (1) SACR 579 (A).

14.3 It was submitted that the offences should not be taken as one for purposes of sentences on the basis that where life sentence is to be imposed the concurrency principle cannot be applied. On this aspect I was referred to the decided case of **S v Mashava**⁷.

[15] The defence submitted that the accused should be declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act⁸.

INTERESTS OF THE SOCIETY

[16] The State contended that the offences were committed at Modjadjiskloof which is a small area but the crime statistics are very much alarming. The deceased had employed five local people who were supporting their families with the salaries received from the deceased.

[17] The bereaved family which is part of the society is still grieving over the passing on of the deceased.

⁷ 2014 (1) SACR 541 (SCA).

⁸ Act 60 of 2000, as amended.

LEGAL PRINCIPLES

[18] The accused was also convicted of murder as contemplated in Section 51 (1) of the Minimum Sentence Act. The accused took away the very sacrosanct right the deceased had. The right to life is guaranteed in the Constitution. O' Regan J in **S v Makwanyane** and Another⁹ stated that:

“The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.”

[19] Consequently, to kill or to condone the killing of a person thus amounts to an infringement of the guaranteed right to life.

[20] The accused was convicted of robbery with aggravating circumstances. The court in **S v Valley**¹⁰ reflected on the

⁹ 1995 (3) SA 391 (CC), para 326.

¹⁰ 1998 (1) SACR 417 (W) at 420C.

seriousness of the offence of robbery with aggravating circumstances and stated that:

“The crimes which the appellant committed are extremely serious. We live in a society which is becoming increasingly lawless; firearms are frequently used in robberies and victims are not uncommonly shot to death or badly wounded. Persons who perpetrate such crimes must be punished severely. Society demands this and it is absolutely necessary that the message go out to the world that people who commit these sorts of crimes will be dealt with severely.”

[21] I must determine whether substantial and compelling circumstances exist which may enable me to deviate from the prescribed minimum sentence.

[22] The accused is a first offender on the murder charge. He is of course 23 years of age and a family man; his daughter is four years old.

[23] He pleaded guilty on the first day of the trial.

[24] In the commission of the offences the accused used a panga to hack the deceased. The deceased did not die at the scene of the crime but was taken to the hospital where he succumbed to the injuries days later.

[25] This is a reflection of the pain and suffering the deceased endured as a result of the horrendous conduct of the accused.

[26] In **S v Matyityi**¹¹ it was stated that:

“Whilst someone under the age of 18years is to be regarded as naturally immature, the same does not hold true for an adult. In my view 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.”

[27] In **S v Krieling And Another**¹² it was decided that:

“While it is a salutary principle of sentencing that a first offender should, as far as possible, be kept out of prison, it is well recognized that in appropriate cases first offenders may, and indeed should, be incarcerated. Whether or not imprisonment is indicated depends essentially upon the facts of each particular case. It is true that imprisonment will cause the appellants great hardship. It will effectively terminate their careers, they will probably lose their homes, their families will unfortunately suffer and they will be exposed to all the negative influences of prison - possibly even to acts of revenge and vindictiveness by certain elements in prison in consequence of their previous police connections. One is not unmindful of these considerations. No court would deliberately seek to harm a convicted person or cause him undue hardship - no enlightened system of justice would tolerate that. But harm

¹¹ 2011 (1) SACR 40 (SCA) at 48 para 14.

¹² 1993 (2) SACR 495 (A) at 497A-C.

or hardship may be the unavoidable consequence of an otherwise fair and proper sentence. A balanced approach to sentencing requires that not only the appellants' personal circumstances and the potential hardship to them be given due weight, but also the nature of their crime and the interests of the community."

[28] On that basis the fact that the accused is a first time offender will not count in his favour in the circumstances of this case.

[29] The accused argues that he committed the crimes because he did not have work and he needed to support and maintain his family. This argument is unsound; a person cannot kill in order to maintain his or her family. If that were to be the situation then the haves would die every day in the hands of the have-nots all in the name of "poverty." The deceased was a business man, the accused could have asked for employment there. Instead he armed himself with a panga and brutally terminated the precious life of the deceased.

[30] The accused sold the three cellphones and clothes for R300.00, this means the deceased died for mere R300.00.

[31] The guilty plea is generally considered to be a sign of remorse. Yet, at times an accused person pleads guilty because there is a strong

case against him. In **S v Matyityi**¹³ the court stated that:

“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 change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”

[33] Indeed the accused spent about ten months in custody awaiting trial. This in itself cannot be taken as a mitigating factor. The court in **S v Radebe And Another**¹⁴ stated that:

“A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful.”

[34] It is trite that the best interests of the child are of paramount importance in every matter concerning the child.¹⁵ This court must take that into consideration when sentencing the accused who is the father of a minor child. Nonetheless, this child as argued by the defence counsel has left the area where the accused was staying to

¹³ Ibid at 47 para 13.

¹⁴ 2013 (2) SACR 165 (SCA) at 169 para 13.

¹⁵ Section 28 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

Burgersfort with the mother.

[34] The mother of the child is then the primary care giver who takes care of the needs of the child. Even before the accused was arrested, he was surviving on illegal means which no one can regard that as the recognised means of support and maintenance. As it was found by Cameron J in **MS v S (Centre for Child Law as Amicus Curiae)**¹⁶ that the enquiry on the impact of the custodial sentence is not required unless the court finds that the rights of the children will be jeopardised if imprisonment is imposed on the secondary caregiver.

[35] After considering all the circumstances in this case, it is my considered view that there exist no substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[36] The State argued that the court should not order the sentences to run concurrently. I was referred to the case of **S v Mashava**¹⁷ in support of the argument. Unfortunately, the State it appears, did not read the whole judgment as the court made a contrary decision. In that case of **S v Mashava**¹⁸ the court held that:

¹⁶ 2011 (2) SACR 88 (CC) pars 62-64.

¹⁷ Ibid.

¹⁸ Ibid at 543 para 7-8.

“The provision is clear. Any determinate sentence of incarceration imposed in addition to life imprisonment is subsumed by the latter. This is logical and practical. A person only has one life and a sentence of life imprisonment is the ultimate penal provision. Section 39(2) (a) (ii) provides for more than one life sentence imposed on a person also to run concurrently. The effect of s 39(2) (a) (i) is that the order by the court below that the sentences are not ordered to run concurrently, is liable to be set aside. Consequently, the directive by the court below that the sentences imposed on the appellant are not to run concurrently stands in clear violation of the foregoing statutory provisions. There is really no need to order such sentences to run concurrently, they do so by operation of law, and stating it in an order might well be superfluous. In the present case the substituted order that appears in the next paragraph contains such an order for the sake of clarity.”

CONCLUSION

[37] Having considered all the relevant circumstances of this case, I cannot find any reason not to impose the prescribed minimum sentence in accordance with the Minimum Sentence Act

[38] In **S v Holder**¹⁹ the court emphasised that the approach that imprisonment is only justified in certain cases cannot be accepted and is a limitation which does not exist in the meting out of punishment. Any serious offence, irrespective of the nature thereof,

¹⁹ 1979 (2) SA 70 (A) at 74-78.

can lead to imprisonment and imprisonment is sometimes the only appropriate sentence which ought to be imposed. In the application of the principle that imprisonment ought to be avoided, the punitive element of punishment must, in serious offences, of whatever nature, come to the fore and be properly considered, if punishment is to have any meaning in the criminal law.

The following is what I consider to be a sentence that is appropriate:

ORDER

1. For the purposes of sentence both counts are taken as one.
2. The accused is sentenced to LIFE IMPRISONMENT.
3. In terms Section 103 of the Fire Arms Control Act²⁰ you are declared unfit to possess a fire arm.

²⁰ Act 60 of 2000, as amended.

APPEARANCES:

Counsel for the Accused:	Advocate N.L.Mathaba
Instructed by:	The Polokwane Justice Centre
Counsel for the State:	Advocate C. Chauke
Instructed by:	The Director of Public Prosecutions
Date of Hearing:	14 November 2016
Date of Judgment:	16 November 2016