

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: SS231/2007

In the matter between:

THE STATE

Versus

**LUYANDA ZAZA
SIMON LOLO
MZAMU NCWANA
THEMBILE NGXOWE
LUNGILE MAYO
VUYILE MSASENI**

**1st Accused
2nd Accused
3rd Accused
4th Accused
6th Accused
8th Accused**

SENTENCE DELIVERED ON 8 DECEMBER 2009

Allie, J

[1] The conviction on count 3, that of murder is subject to the discretionary minimum sentence in terms of Section 51(1) of Act 105 of 1997 read with Part 1 of Schedule 2 which is the imposition of life imprisonment where no substantial and compelling circumstances exist to justify a departure from that sentence. In the instant case, Section (c)(ii) of Part 1 of Schedule 2 applies in as much as, the death was caused while committing robbery with aggravating circumstances. Section (d) of Part 1 of Schedule 2 also applies because the murder was committed in the execution of a common purpose.

[2] All the accused are first offenders for the murder count but accused 1 has a previous conviction of robbery which has an element of violence in it.

[3] Counts 2 and 5, that of robbery with aggravating circumstances, attract the minimum sentence in terms of Section 51(2) of Act 105 of 1997 read with Part II of Schedule 2. Section (b) of the Schedule provides for a prescribed minimum sentence where the robbery involved the taking of a motor vehicle and that provision applies to count 5 where the motor vehicle of Clifford Bacon was stolen.

[4] The primary purpose of sentence is to act as a means of retribution for the victims, as a deterrent for the perpetrators and any prospective perpetrators of crime and as a means of rehabilitating offenders who could benefit from it. A judicial officer should also temper the sentence with a measure of mercy where it is appropriate.

[5] In the case of **S v Maigas 2001 (1) SACR 469 (SCA) at 482 c-d** Marais J.A held as follows in regard to the finding of substantial and compelling circumstances:

"All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as to cumulatively justify a departure from the standardized response that the Legislature has ordained."

[6] Accused no. 1 is a 22 year old who was a scholar in Grade 9 at the time of his arrest. He was 18 and a half years old at the time when the offences were committed. He lived with his mother in a stable family relationship. He worked at Wimpy, Canal Walk in his spare time. He was clearly not driven to commit the offences by any pressing basic need as he lived in relative stability and was able to be productive in his free time when not at school. Despite this, he occupied himself in 2003, 3 years before he committed the offences in this case with the commission of an offence of housebreaking and one of robbery.

[7] Accused 2 was 20 years old at the time when he committed the offences. He worked as a cleaner for Bergco in Canal Walk, Century City. He left school while in standard 7. He has one minor child. He has 3 previous convictions for housebreaking. He also chose a socially deviant path by committing those offences while he was still a youth.

[8] Accused 3 was 18 years and 3 months when he committed the offences. He completed standard 8 at school. He too, worked at Wimpy, Canal Walk before he was arrested. He has a child aged 4 years. He has no previous convictions.

[9] Accused 4 was 24 years old when he committed the offences. He completed standard 7 at school. He was a self-employed barber when he was arrested. He earned between R400 and R500 per week. He has previous convictions for housebreaking.

[10] Accused 6 was 24 years old when he committed the offences. He completed standard 6 at school. He was unemployed before his arrest. He has a 3 year old son. He has previous convictions for housebreaking.

[11] The complainants in the Bacon house and the deceased had their sense of security and comfort disturbed in the middle of the night and in the early hours of the morning by the accused who forcibly entered their homes and violently brought them to submission.

[12] Mrs Van Aarde was brutally bludgeoned and choked to death so that the accused could carry out the series of offences they had set out to commit. Elderly people have all too often had their lives snuffed out by people who wish to enrich themselves at the expense of defenceless people in their twilight years. Mrs Van Aarde clearly lived a frugal life yet the accused deemed it fit to rob her of her few prized possessions.

[13] At the Bacon house, the accused descended upon helpless, sleeping youth, namely Calvin Bacon and Michael Billson in huge numbers, threatening them with knives and robbing them of a large quantity of valuable goods. Not satisfied with what they had stolen, the accused proceeded to demand entry to the main bedroom where unsuspectingly, Jocelyn Human and Clifford Bacon were asleep. It is clear that the accused did not hesitate to stab Clifford Bacon and the fact that he was not seriously injured is not due to some act of mercy on

the part of the accused, but rather because Clifford chose not to resist and to co-operate instead.

[14] Once inside the main bedroom, the accused were able to steal more valuables and money before creating the conditions in which Jocelyn was raped and then they fled in Clifford Bacon's bakkie. The impunity with which the accused continued their night of mayhem, speak volumes about their determination to perpetrate the offences with no regard for the consequences.

[15] While it is true that the youthfulness of an offender can be a substantial and compelling circumstance, it has to be weighed against the other factors relevant to sentence. The nature and circumstances of the offences and the previous convictions of the offenders in the instant case are aggravating factors that could negate the youthfulness of the accused. The court will however weigh those aggravating factors against the fact that the accused spent 3 years in prison awaiting trial to arrive at the conclusion that had they not spent that time in prison, the aggravating factors could negate their youthfulness as a mitigating circumstance.

[16] In the case of accused 1, the court finds his youthfulness of 18 years to be a substantial and compelling circumstance.

[17] The court finds accused 2's youthfulness of 20 years to be a substantial and compelling circumstance.

[18] Accused 3's youthfulness of 18 years and his lack of previous convictions are substantial and compelling circumstances.

[19] Accused 4 and 6 were 24 years old and can clearly not be described as youth. They were also not adolescents at the time but were clearly adults who ought to accept the consequences of their actions.

[20] Accused 8 was 23 years old and had passed standard 6 at school. He has previous convictions for housebreaking which involves an element of dishonesty.

[21] If people do not accept stolen goods, there would be no demand for them and thus no incentive for offenders to steal or rob. Those who possess stolen goods facilitate concealing the spoils of ill gotten gains and participate in a demand and supply relationship involving theft and robbery. Accused 8 spent 3 years awaiting trial and this will be taken into account, in his instance when imposing sentence.

It is ordered that the following sentences are imposed:

1. Accused 1:

1.1 On Count 1, that of housebreaking with intent to steal, 7 years direct imprisonment.

1.2 On Count 2, that of robbery with aggravating circumstances, 15 years direct imprisonment.

1.3 On Count 3, that of murder, 20 years direct imprisonment.

1.4 On Count 4, that of housebreaking with intent to steal, 7 years direct imprisonment.

1.5 On Count 5, that of robbery with aggravating circumstances, 15 years imprisonment.

2. The sentence imposed on counts 1, 2, 4 and 5 shall run concurrently with the sentence imposed on count 3.

Accused 2:

2.1 On Count 1, that of that of housebreaking with intent to steal, 7 years direct imprisonment.

2.2 On Count 2, that of robbery with aggravating circumstance, 12 years direct imprisonment.

2.3 On Count 3, that of murder, 20 years direct imprisonment.

2.4 On Count 4, that of housebreaking with intent to steal, 7 years direct imprisonment.

2.5 On Count 5, that of robbery with aggravating circumstances, 12 years direct imprisonment.

3. The sentence imposed on counts 1, 2, 4 and 5 will run concurrently with the sentence imposed on count 3.

Accused 3:

3.1 On Count 1, that of that of housebreaking with intent to steal, 5 years direct imprisonment.

3.2 On Count 2, robbery with aggravating circumstance, 12 years direct imprisonment.

3.3 On Count 3, that of murder, 18 years direct imprisonment.

3.4 On Count 4, that of housebreaking with intent to steal, 5 years direct imprisonment.

3.5 On Count 5, that of robbery with aggravating circumstances, 12 years direct imprisonment.

4. The sentence imposed on counts 1, 2, 4 and 5 shall run concurrently with the sentence imposed on count 3.

Accused 4:

4.1 On Count 1, that of that of housebreaking with intent to steal, 7 years direct imprisonment.

4.2 On Count 2, robbery with aggravating circumstance, 15 years direct imprisonment.

4.3 On Count 3, that of murder, life imprisonment.

4.4 On Count 4, that of housebreaking with intent to steal, 7 years direct imprisonment.

4.5 On Count 5, that of robbery with aggravating circumstances, 15 years direct imprisonment.

5. Accused 6:

5.1 On Count 1, that of that of housebreaking with intent to steal, 7 years direct imprisonment.

5.2 On Count 2, robbery with aggravating circumstance, 15 years direct imprisonment.

5.3 On Count 3, that of murder, life imprisonment.

5.4 On Count 4, that of housebreaking with intent to steal, 7 years direct imprisonment.

5.5 On Count 5, that of robbery with aggravating circumstances, 15 years direct imprisonment.

6. Accused 8:

On the competent verdict on the robbery charges, that of possession of stolen goods knowing them to have been stolen, **3 years direct imprisonment**.



ALLIE, J