IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS23/2009

DATE: 29 JULY 2010

In the matter between:

THE STATE

and

1. **VUYANI MASELANI**
2. **PATRICK MGESI**

SENTENCE

KOEN, AJ:

Mr Maselani and Mr Mgesi have been convicted of the offence of robbery with aggravating circumstances. If we turn to section 51(2) of the Criminal Law & Procedure Act, I am required, if I am not satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, to impose upon them a sentence of imprisonment for a period of not less than 15 years.

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The proper approach which I must adopt, was authoritatively set out in the case of S v Malgas 2001(2) SA 1222 (SCA). In essence, whilst all factors traditionally taken into account in sentencing, continue to play a role (about which I will say more shortly), I am nonetheless required to be aware that the legislature has intended that the prescribed minimum sentence should "ordinarily and in the absence of weighty justification be imposed" (See reference Malgas at 1235g-h).

In Malgas the Court went on to say that:

> "The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses, favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders, are to be excluded." (at 1235i).

Furthermore, in the words used by the SCA in Malgas I am entitled to impose a lesser sentence only if, on a consideration of the circumstances of the case, I

am satisfied that the prescribed sentence is unjust in that it would be disproportionate to the crime, the criminal and the needs of society."

I must, therefore bear in mind that I am not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence and that this inquiry entails a consideration of every material circumstance in the case. (See S v Vilakazi [2008] ZASCA 87 at 20). I do not propose to deal at any length with the duties of a sentencing court imposed by the case of S v Zinn 1969(2) SA 537 (A). These are well known and it is trite that I am required "to consider and to try to balance evenly the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern". (Per Freedman J in S v Banda & Others 1991(2) SA 352 (B) at 355A-C).

Malgas makes it clear that all of these factors still play a vital and important role in the exercise of sentencing discretion. Robbery with aggravating circumstances is undoubtedly a serious crime. In this case the deceased, who was only 19 years old, was set upon by three men at her place of work. She had been singing whilst working in the moments preceding the attack upon her. She was a soft target, outnumbered by

the three and defenceless. She was subdued by force and her hands were bound behind her back. The medical evidence revealed that her mouth had probably been blocked to prevent her from screaming. Her death did not come about quickly and it is plain from the evidence of Dr Van Der Reyde that she must have suffered greatly whilst being strangled. Her last moments on this earth can only have been characterised by abject fear and terror. The premises where she worked were then plundered and goods to the approximate value of R60 000, according to the evidence of Ms Lerwill, were stolen.

Mr Maselani testified during the trial that he was remorseful and I am prepared to accept that this is so. Further evidence led in mitigation revealed that he is married and gainfully employed and that he contributes to the support of two children who live, at the present, with an ageing grandmother. Mr Maselani's wife, who testified on his behalf in mitigation, told the Court that she would take care of his children should their grandmother be unable to do so. I also accept that at the time of the offence, Mr Maselani was unemployed and that financial desperation, born out of poverty, probably played a role in his decision to commit the ~~d~~of~~e~~fence.

Mr Maselani's wife also testified that he is now a religious person, ~~which~~ and he has since November 2007 assisted those in

need where he is able to do so. During argument, counsel for Mr Maselani placed considerable emphasis on the fact that Mr Maselani has two young children, who are presently in the care of their aged grandmother, a situation which at some stage in the not too distant future will come to an end. Although Mr Maselani's wife testified that when the children's grandmother becomes unable to take care of the children, then she would do so, counsel was at pains to point out that there would be no legal obligation on her in this respect.

I was referred to the case of S v M 2008(3) SA 232 (CC), where the proper approach of a sentencing court, where the convicted person is the primary caregiver of minor children, was authoritatively set out. In S v M, Sachs, J described a primary caregiver as "the person with whom the child lives and who performs every day tasks like ensuring that the child is fed and looked after and that the child attends school regularly". (at para 28 of the judgment). It is clear in my view from the evidence, that Mr Maselani is not a primary caregiver in the sense meant in S v M. The children's grandmother is and when she is no longer able to be such, Mr Maselani's wife will take over that role.

This does not mean, of course, that the fact that Mr Maselani has children to whose support he contributes, must be left out

of account. It means only that I am fortunately exempted from the difficult inquiry whether it is necessary to take steps to ensure that Mr Maselani's children will be cared for properly, should I decide that a custodial sentence is appropriate. I am satisfied on the evidence that they will be cared for properly in this event.

It was also submitted by counsel for Mr Maselani that it should be taken into account that he pleaded guilty to robbery and that he had testified honestly. This is plainly correct and these factors must and do inform my decision concerning an appropriate sentence. It is necessary finally, to mention at this stage that during the period 1989 to 1996, Mr Maselani was convicted of theft, for which a sentence of caning was imposed; robbery for which a sentence of 12 months imprisonment was imposed; theft for which a period of three and a half years imprisonment was imposed, of which one year was suspended on conditions, and possession of presumably stolen property for which a period three years imprisonment was imposed. Given that these offences were committed considerably more than ten years ago, I do not regard them to be aggravating factors.

Mr Mgesi testified in mitigation of sentence. I accept from his evidence that he too is remorseful about his role in the

commission of the offence. Mr Mgesi has three children, whom he helps to support from a grant he receives on account of illness and incapacity. He is HIV positive, suffers from blackouts as a result of a head injury and suffers from asthma. He receives medication to treat these conditions from the day hospital at Delft. Mr Mgesi has also spent 14 of the months which have elapsed since the offence in custody, but this arose for reasons unrelated to this matter as I understood the evidence and I do not think that it is a factor to which considerable weight should be attached.

As is the case with Mr Maselani, I accept that Mr Mgesi was unemployed at the time of the offence and that financial desperation, born out of poverty, probably played a role in motivating his conduct. In argument on his behalf, much was made of Mr Mgesi's poor state of health. In my view, however, it is possible for the treatment he presently receives to be continued, should he be incarcerated. There is no evidence to the contrary. Mr Mgesi has a caring father, who testified on his behalf in mitigation and I have no reason to think that his father would not see to it that he receives his medication or that steps are taken to ensure that the prison authorities supply the necessary medication if it turns out that they fail in this duty. Mr Mgesi has two previous convictions. One for theft in 1991, which resulted in a sentence of imprisonment for

four years and another for housebreaking in 1990 in regard he was sentenced to imprisonment for 30 months. Because these offences were committed almost 20 years ago, I do not consider them to be aggravating factors.

Counsel for both Mr Maselani and Mr Mgesi submitted that I ought to take into account that neither had intended that harm should come to the deceased and that this was, to use the words used in argument, a robbery gone terribly wrong. I do not think that it is correct to say that neither had intended that the deceased be harmed. I do not think that there is any question from the evidence that Mr Maselani and Mr Mgesi both participated in subduing the deceased by force. She had been deliberately and intentionally set upon and forcibly overwhelmed by her three assailants. I think it is self-evident that harm was intended and done when she was attacked in this manner.

I accept in favour of Mr Maselani and Mr Mgesi that the decision to enter the premises and commit robbery was not long in the planning, although it was undoubtedly, in my view, premeditated. But although it was not long in the planning, it remains a fact that when the opportunity to rob a defenceless victim presented itself, it was seized upon without hesitation and carried out ruthlessly with no regard for the

consequences. In doing so, the life of a young woman came to an end. This notwithstanding, it is clear from the evidence as a whole that the crime was more one of opportunity and that the terrible consequence which ensued, namely the death of the deceased, was not something which either Mr Maselani or Mr Mgesi had contemplated or foreseen.

As stated above, it is true that there is no evidence to suggest that the death of the deceased was an intended or foreseen result of the attack upon her. In essence this is the reason why Mr Maselani and Mr Mgesi were acquitted on the charge of murder. This factor, as I see it, has limited bearing on the charge of which they have been convicted. In the event, the harm which eventuated, the death of the deceased by strangulation, was considerable. It may not have been intended, but I do not think that this is a factor which is so weighty that it impels the conclusion that the prescribed minimum sentence is disproportionate to the offence.

It must be remembered that even the threat of grievous bodily harm during a robbery, may result in a conviction. It follows that actual harm is not a necessary prerequisite for a conviction. Yet parliament intended, when it enacted the minimum sentence legislation, that even a robbery involving only a threat of grievous bodily harm is robbery with

aggravating circumstances and that a conviction for this offence triggers the application of the minimum sentence legislation. I cannot ignore this obvious indication of the seriousness with which parliament viewed the offence of robbery with aggravating circumstances.

The question which now arises is whether the facts and circumstances I have outlined above, can be said to include in my judgment, anything substantial or compelling, warranting the imposition of a sentence less than the prescribed minimum. It is undoubtedly true that a custodial sentence of least 15 years will impact considerably, not only upon Mr Maselani and Mr Mgesi, but also upon their children and their families. But it is an inescapable reality that the offence they committed has played a role in adversely affecting many persons lives. The deceased's family is an obvious example. The family of Ms Lerwill, on whose premises the offence took place and whose children were severely traumatised and indirectly all of society who se fear that they might become the victims of crime, is reinforced by the sad fact that it happens all too often.

In regard to Mr Maselani and Mr Mgesi, after careful and anxious thought, I have taken the view that no substantial and compelling reasons exist which justify my departing from the prescribed minimum sentences. No "weighty justification", to

use the expression adopted by the SCA in Malgas to depart from this minimum sentence in my judgment, exists.

The next question which arises is what is an appropriate sentence, regard being had that a penalty of not less than 15 years must be imposed. Counsel for the State has submitted that a sentence of 15 years imprisonment must be imposed. After consideration I have come to the conclusion that a sentence of 15 years is not disproportionate, bearing in mind the severity of the crime, the personal circumstances of both Mr Maselani and Mr Mgesi as outlined above, and the interests of society. In the circumstances I am bound to impose the following sentences:

1. Mr Maselani you are sentenced to 15 (FIFTEEN) YEARS IMPRISONMENT.

2. Mr Mgesi you also are sentenced to 15 (FIFTEEN) YEARS IMPRISONMENT.

KOEN, AJ

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