Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS24/2010

DATE: 23 SEPTEMBER 2010

In the matter between:

THE STATE

and

1. **LINDELA MGWALI**

2. **MTUTEZELI TEBHI**

SENTENCE JUDGMENT DELIVERED ON 23 SEPTEMBER 2010

BINNS-WARD, J:

[1] The accused have both been convicted of most serious offences. The gravity with which the offence of robbery with

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[2] aggravating circumstances is regarded by society is reflected in the provisions of the Criminal Law Amendment Act 105 of 1997, which, in respect of first offenders, prescribes a minimum sentence of 15 years' imprisonment. The robbery in this case involved the taking of a motor vehicle. That, by itself, even if aggravating circumstances, as defined, were otherwise not present, also carries a 15 year prescribed minimum sentence. In the current case the 'aggravating circumstances', as defined in the Criminal Procedure Act, were extreme; in that the complainant was not only grievously injured by an accomplice of the accused immediately after the commission of the offence, the consequence of that injury was fatal.

[3] It is well established through authoritative decisions of the apex courts in matters such as *S v Malgas* 2001 (1) SACR 469 (SCA), 2001 (2) SA 1222; *S v Dodo* 2001 (3) SA 382 (CC) and more recently *S v Vilakazi* 2009 (1) SACR 552 (SCA) that the minimum sentence regime has left the courts a substantial measure of judicial discretion in the imposition of sentence and does not exclude a weighing of the considerations traditionally relevant to sentence. The legislation does, however, require a severe, standardised and consistent response unless there are truly convincing reasons for a different response.

I shall accordingly examine the evidence and considerations that

weigh in respect of each of the accused and, in the light of my conclusions thereon, determine whether, in the case of either of them, a lesser sentence than the prescribed minimum might be appropriate. This is a useful exercise, because probably the most pertinent of the means of determining whether a departure from the prescribed minimum is justifiable, is to compare the sentence that might notionally be determined on the traditional approach with the minimum required by the legislation. If taking into account the policy considerations inherent in the legislation, which the courts are bound to respect and give effect to, there is a striking disparity between the two, that is a compelling indicator that substantial and compelling reasons exist to depart from the prescribed minimum. If, on the traditional approach, no disparity exists, then the question which could arise in terms of section s 51(3)(a) of the Criminal Law Amendment Act does not arise. .

[4] The conventional approach, most famously stated in *R v Zinn* 1969 (2) SA 537 (A) is that the three principal considerations taken into account for the purposes of determining an appropriate sentence are the crime, the criminal and the interests of society. These considerations do not comprise watertight compartments and they do not in any manner detract from the individualised consideration of the case that the determination of sentence enjoins, including, amongst other matters, the effect of the crime

on the victims of the crime, which, in a case where, as here, a person has been killed, obviously means the dependants and other persons closely connected to the deceased.

[5] Both the accused are young men in their mid-twenties. They are both from the Eastern Cape originally, but have lived in the Western Cape for a number of years. Accused no. 1, who is 25 years old, achieved matriculation level at high school, although it would seem at a relatively advanced age for a school leaver. He has been employed as a filling station attendant at a number of filling stations in the greater Cape Town area in the two years or so prior to his arrest in connection with the current case in September last year. It was not clear why the accused has had three changes of job during this period with intervals of unemployment in between them.

[6] At the time of his arrest he worked as a casual, employed sometimes for a few days in the week at the Engen filling station in Belhar. He had been working there on that basis since June 2009. He used some of his income to contribute to the maintenance of his five year old son, born of an extramarital relationship in the Eastern Cape. He is not permitted access to this child, who lives with his mother and grandparents, because he has not yet compensated, as custom demands, the parents of the woman in question for impregnating her out of wedlock. He is

unmarried. His father passed away in 2005 and his mother lives in the Eastern Cape. The mother is reported to be sickly and in need of financial assistance. Now that the accused is unable to contribute to her care, she has only a social grant to live on. His brother died while the accused has been in custody awaiting trial. He has a sister who is currently aged 30, who is married and lives in Mfuleni in Cape Town.

[7] Accused no. 1 has one previous conviction. He paid an admission of guilt fine of R100 for theft committed in March 2009. The sentence suggests that the matter must have been a minor offence, and I intend to treat him for sentence purposes as a first offender.

[8] In evidence the accused expressed his regret at the death of the deceased and said that he felt very sad about it. During argument on sentence, Mr Raphels, the accused's legal representative, clarified that the accused had meant by this to express remorse for his involvement in the offence and that if anyone was at fault in not putting this clearly on record during the accused's evidence, it was he, that is Mr Raphels. I indicated that I would approach the question of sentence on the basis of an acceptance of Mr Raphels' clarification.

[9] Mr Raphels said that the accused accepted that a lengthy period of effective imprisonment was inevitable, having regard to the seriousness of the offence, which is only realistic, but that he asked that punishment be tempered with mercy.

[10] Accused no. 2 is 24 years old. He will turn 25 in just over two months' time. As mentioned in the conviction judgment, he was employed at Brights in Bellville as a delivery assistant at the time of his arrest. He earned the sum of R2 500 per month in that capacity and he had been employed there since 2005.

[11] Accused no. 2 achieved standard five while he was living in the Eastern Cape and then continued his education after arriving in Cape Town, progressing up to standard eight. His parents had asked him to terminate his education early to obtain employment, so as to be able to contribute financially towards the care of a sickly brother. This brother died in March last year, as in fact adverted to in the conviction judgment.

[12] He is unmarried and does not have any children. He has two siblings, a brother and a sister, both of them older than he. His brother is a captain in the SAPS in Port Shepstone in KwaZulu-Natal and his sister is married and living in Khayelitsha, Cape Town. She is unemployed. He explained that the person referred to in his evidence in chief, Philiswa Mcitheka, as the sister in

whose backyard he lived in Delft, is in fact a relation by marriage. His parents are both still alive, living in Mthatha.

[13] He also had one comparatively minor previous conviction, being one for common assault in 2008 for which he was fined R300. I shall also treat him as a first offender for the purposes of sentence.

[14] Ms Masihlela, counsel for accused no. 2, acknowledged the seriousness of the offences of which accused no. 2 had been convicted, but pointed out that he had, until now, been an essentially law abiding and useful member of society. These factors, together with his relative youth, she submitted, justified the imposition of a sentence directed at recognising and facilitating the accused's apparent potential to rehabilitate himself. She submitted that these were sufficient grounds to depart from the prescribed minimum sentence. She submitted further that the sentence in respect of the convictions on counts 3 and 4 should run concurrently with that imposed in respect of count 1.

[15] Both of the accused have been in custody awaiting trial since September 2009; that is, for one year. This will, of course, be taken into account in the determination of an appropriate sentence.

[16] I have already commented on the seriousness of the offence of robbery with aggravating circumstances. There is no doubt that whatever the personal circumstances of the accused, the only appropriate sentence for such an offence is a substantial period of effective imprisonment. As soon as this is acknowledged, it must follow that the peculiar personal circumstances of the accused, such as the reliance on them by their greater family for financial support, while not entirely irrelevant, assume a much diminished relevance. The accused's essentially clean records and their apparent potential to be once again useful and contributing members of society does, however, remain a consideration.

[17] The crime of robbery and the incidence of the perpetration of criminal violence to innocent members of society is a scourge in this country. The vast majority of people from all walks of life and at every socio-economic level are fed up with the level of crime that the citizens of this country have to endure. Delft is one of the poorer and more economically deprived areas of Cape Town. The experience of sitting in this court gives one insight into the fact that the inhabitants of such areas are the most exposed to the oppressive effects of violent crime, while they are the least equipped to protect themselves against it.

[18] The victim of the robbery, who lost his life in the context of its commission in this case, was a family man from outside the

Delft area. A decent working man, who had been in the employment of the municipality for 25 years. He lost his life because he went out of his way on the evening in question to take a fellow worker home. The perpetration of crimes like the one in this case make people afraid to do what decent people should have no cause to fear. It should not be a life-risking exercise to drive home a less advantaged co-worker, because doing so might involve going into the more deprived parts of the city. Conduct such as that in which the accused engaged on the night of the 11 September 2009 conduces to shrinking people's freedom to go out and move freely about and interact with a broader cross-section of society. The crime itself was aggravated by the wanton, senseless and deliberately cruel assault by shooting at the deceased after he had already been dispossessed of his car. The cowardly act inherent in the assault by four men on a defenceless and vulnerable middle aged man, who was alone, was compounded by an act of despicable cynicism and cruelty.

[19] The actions of the accused have brought tragedy and sorrow into the lives of Mrs Yvonne Curtis and her family. It is likely that they will live with the pain of what you contributed to happening that night for the rest of their lives. It should also be remembered that the deceased, who is not here to speak to his experience in the robbery, must have endured a period of absolute terror before

he was shot. His end was a lingering one. He underwent the further trauma of surgery and intubation. It is apparent, from the oedematous condition of his body at the post-mortem and the nature of his injuries and the surgical intervention, that any conscious moments he may have had in the two weeks before he died would probably have been a painful and extremely uncomfortable experience. The expressions of remorse and the prospects of reform that came to the fore during the post conviction and pre-sentence proceedings would have carried so much more weight had the accused acknowledged their wrongfulness at an earlier stage. This does not mean that these factors will be overlooked; it simply means that due cognisance will be taken of the context in which they were brought forward.

[20] I must, however, record that by his evident reluctance to get into the vehicle after the shot had been fired, accused no. 1 showed perhaps a measure of surprise that his accomplices would resort to such extremes and an indication of distinguishing moral discomfort about it. This is a mitigating feature I shall take into account and which will explain a small differentiation between the sentence to be imposed on him with that to be imposed on accused no. 2.

[21] The minimum sentence legislation is an expression of what the elected legislative representatives of the nation consider to be

in the interests of society. The statute is an unambiguous indication that the community requires an appropriate emphasis on retributive justice as an element of sentencing in the currently prevailing circumstances throughout the country. It is the duty of the courts to give effect to these considerations. Respect for the judicial system cannot be expected if the courts are seen to fail in this duty.

[22] It is no pleasant task to send anyone to prison. It is particularly painful when those to be sentenced are young persons with the potential to make a useful way in life, as the two accused appear to be. That said, the accused have no right or entitlement to be treated with maudlin sympathy. It is important, however, in my opinion, that they should know that if they are able to behave in an exemplary fashion while in prison serving their sentence, the executive authority can take this into account in a decision to grant them parole before the completion of their respective terms of imprisonment.

[23] I am satisfied that in the case of each of the accused a sentence of not less than 15 years' imprisonment is in any event appropriate, even if the requirements of the Criminal Law Amendment Act did not exist. The mitigating features that I have mentioned are, therefore, considered insufficient in the totality of

the case to warrant the imposition of a lesser sentence than the prescribed minimum.

[24] I am of the view that on count 1, accused no. 1 deserves a sentence of 15 years' imprisonment and accused no. 2 one of 16 years' imprisonment.

[25] Accused no. 2 must also be sentenced in respect of counts 3 and 4. I consider that it is appropriate for these counts to be taken as one for the purposes of sentence. The unlawful possession of firearms and ammunition is a serious offence. The abundance of unlicensed and unlawfully possessed firearms in the country is notorious and undoubtedly a contributor to the high incidence of serious violent crime. The obtaining of these weapons by robbery and theft of firearms from members of the police force is a widely documented and worrying phenomenon. I regard it as an aggravating factor that the firearm in issue in this case was one that was taken from a police reservist. By taking that factor into account, I should not be misunderstood to be misdirecting myself into imposing a surrogate punishment on the accused for the theft or robbery concerned, in which, for all I know, he may have had no part. I am merely pointing out that the unlawful possession of a firearm stolen from the security organs of the State, is a more serious incidence of the statutory offence.

[26] In my view a sentence of seven years' imprisonment in respect of the conviction on counts 3 and 4, taken as one for sentence, is appropriate. Taking into account the cumulative effect of the sentences to be imposed on accused no. 2, I shall direct that five years of that sentence shall be served concurrently with the sentence to be imposed on him in respect of count 1.

[27] The accused are advised that as a consequence of their convictions, they are regarded, for the purposes of the Firearms Control Act 60 of 2000, to be unfit to possess a firearm. The Registrar of the court is directed, in discharge of the Court's obligation in terms of s 103(3) of the Firearms Control Act, to inform the National Commissioner of Police, in his capacity of Registrar of Firearms, of the convictions of accused no. 1 and 2. To the extent necessary or required, the issue of a search and seizure order in terms of s 103(4) is authorised.

[28] In the result:

1. Accused no. 1 is sentenced to a term of 15 (FIFTEEN) years' imprisonment on count 1.

2. Accused no. 2 is sentenced to a term of 16 (SIXTEEN) years' imprisonment on count 1.

3. Counts 3 and 4 are taken as one for the purpose of sentence. Accused no 2 is sentenced to a term of 7 (SEVEN) years' imprisonment in respect of those counts. It is directed that five years of the said seven years sentence is to be served concurrently with the period of 16 years imposed in respect of count 1, giving an effective sentence of 18 (EIGHTEEN) years' imprisonment altogether.

A.G. BINNS-WARD
Judge of the High Court

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