REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: SS16/10

In the matter between:

THE STATE

versus

LUNGA PAUL LUKE	**Accused no. 1**
THOBELA NONO	**Accused no. 2**
CELANI MAXWELL TWAZI	**Accused no. 3**
MZUKISI MALAMLELA	**Accused no. 4**
ZAMEKILE NGQONGA	**Accused no. 5**
THANDO MAFALALA	**Accused no. 6**
THOBILE NICOLAS PEZISA	**Accused no. 7**
GCINIKHAYA MAKOMA	**Accused no. 8**
ANDILE NDANDANI	**Accused no. 9**
ZUKILE SANDISO NETTI	**Accused no. 10**
THEMBIKILE NICHOLAS TIKIPINI	**Accused no. 11**

SENTENCE: THURSDAY 16 FEBRUARY 2012

GAMBLE, J:

INTRODUCTION

[1] We have now reached the last day of this marathon trial. After sixteen months in Court the accused are now to be sentenced for the various offences of which they were convicted on 20 December 2011. The task of imposing sentence in a criminal

trial is not an easy one: indeed, it was once described by a Judge of appeal as a lonely and onerous task. While the assessors in this case have been consulted in relation to the sentences to be imposed, and they are in agreement therewith, the prerogative to sentence is that of the presiding Judge and the presiding Judge alone.

[2] In State vs Rabie 1975 (4) SA 855 (A) at 861-2 Holmes JA reminded judicial officers of the importance of being fair to both the accused and to society in handing down sentence. Justice, it was said, includes the element of mercy which is the hallmark of a civilized and enlightened criminal justice system.

[3] And in the same case at p866 Corbett JA eloquently summarized the approach as follows:

> *"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in*

the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[4] As stated above, the point of departure in sentencing is to have regard to the three inter-connected factors (for that is what a triad is) relevant to an appropriate punishment. It is the Court's task to have regard not only to the offender, but also the offence itself and the interest which society has in the imposition of a suitable sentence (S v Zinn 1969 (2) SA 537 (A)).

[5] At the same time sentencing must also be directed at addressing the traditional purposes of punishment. Those are deterrence, prevention, retribution and rehabilitation of the offender. At the end of it all, it is the unenviable task of the Judge to achieve a proper balance amongst these competing factors and ultimately arrive at a sentence that is just. For that is what the Constitution ultimately requires that a Court must strive for: justice.

[6] When the learned Judges of appeal delivered their judgment in the Rabie case the political and social landscape in South Africa was quite different from what it is now. And, in the halls of justice, too, matters were other. The maximum penal sanction, for example, was the death sentence. Alternative non-custodial sentencing options were rarely, if ever, resorted to and restorative justice was not a phrase with which courts were familiar.

[7] With the advent of the democratic order in 1994, South Africa became a constitutional state with all law subject to the provisions of the Constitution. That of

course included the criminal justice system and it is significant that the first case which came before the Constitutional Court was one in which the death sentence was declared unconstitutional. In S v Makwanyane 1995 (2) SACR 1 (CC) the Court found that the death sentence constituted cruel and inhuman punishment and, being in conflict with the relevant provisions of the erstwhile Interim Constitution, it was struck down as a form of sentence. In its stead came life imprisonment as the ultimate sentence which a court might impose. This was previously a sentencing option open to the High Court and was generally regarded as the second most onerous form of sentencing.

Minimum Sentence Legislation

[8] The emergence of a new political order and a constitutional democracy did not, however, bring with it an end to the social ills which had plagued our society for so many decades. Levels of serious and violent crime continued to increase to unprecedented levels and very soon Parliament saw it necessary to step in and address the problem. In 1997 the Legislature passed the Criminal Law Amendment Act, 105 of 1997 ("Act 105") which was intended to prescribe a variety of mandatory minimum sentences to be imposed by our courts in respect of a wide range of serious and violent crimes. This was said to reflect the stern voice of the people in response to crimes which were perceived to be reaching epidemic proportions.

[9] The passage of Act 105 was criticized from a variety of quarters, not least the courts themselves, which perceived an impermissible intrusion into their domain, sentencing having traditionally been regarded as the pre-eminent prerogative of the

courts. Act 105 was subjected to constitutional scrutiny and in S v Dodo 2001 (1) SACR 594 (CC) the Constitutional Court found that the legislation passed muster.

[10] In his judgment in Dodo Ackermann J refuted suggestions that Act 105 infringed upon the principle of the separation of powers and found that it was permissible for Parliament to require the Judiciary to impose punishment in specified cases provided that such punishment was not "*wholly lacking in proportionality to the crime*".

[11] In regard to proportionality the learned Judge said the following at p614g:

> *"[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is*

predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's dignity."

[12] In the present case the provisions of Section 51(1) read with Section 51(3) of Act 105 are applicable. The accused were all informed of this at the commencement of the trial and their defences would have been prepared accordingly. The consequences thereof are that on count 5 (the murder of Andile Selepe) all of the accused (save accused no. 5) face a minimum sentence of life imprisonment, while on count 8 (the hijacking of the taxi in Connaught Road) accused nos. 8 and 11 face minimum sentences of fifteen years' imprisonment

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[13] In terms of Schedule 2, Part 1 to Act 105 the murder count attracts the minimum sentence of life imprisonment on two bases. Firstly, because the death of Mr Selepe was caused by the accused in attempting to commit a robbery with aggravating circumstances (see Schedule 2, Part 1, (c)(ii). Further the sentence is applicable because "*the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.*" (see Schedule 2, Part 1 (d).

[14] In terms of Section 51(3)(a) of Act 105 the Court may not impose a life sentence if it is satisfied that "*substantial and compelling circumstances*" are present. For the sake of convenience, I shall recite the relevant parts of the section in its current form:

> "*51(3)(a) If ...[the High Court] ...is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those sub-sections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence...*"

I shall revert to the interpretation of the phrase "*substantial and compelling circumstances*" later, but before doing so I need to look at the rationale for the minimum sentencing legislation as our Courts have interpreted it.

[15] The leading case on the application of Act 105 is S v Malgas 2001 (1) SACR 469 (SCA), a case which was quoted with approval by the Constitutional Court in Dodo's case at p615e para [40]. At para 7 on page 476 of the Malgas judgment Marais JA comments as follows regarding the background to Act 105:

> *[7] First, some preliminary observations. The provisions are to be read in the light of the values enshrined in the Constitution and, unless it does not prove possible to do so, interpreted in a manner which respects those values. Due weight must be given to the fact*

that these provisions were not intended to be permanent fixtures on the legislative scene and were to lapse after two years unless extended annually. (They were put into operation on 1 May 1998 and were extended for twelve months with effect from 1 May 2000) That shows that, when conceived, they were intended to be relatively short-term responses to a situation which it was hoped would not persist indefinitely. That situation was and remains notorious: an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society. It was of course open to the High Courts, even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes."

[16] That onslaught on society of serious and violent crimes has not abated (indeed some would argue that it has escalated alarmingly notwithstanding the legislation) and Parliament has seen fit to extend the application of Act 105 from time to time. (S v Vilakazi 2009 (1) SACR 552 (SCA) at 571h [51]; S v Matyityi 2011 (1) SACR 40 at 46c [11]) Organized criminal activity like that which occurred in this case strikes at

the very heart of our democratic order. It destabilizes society and replaces the constitutional order with the law of the street where gangs with weapons rule at will. The cost to society both in terms of human life and property is enormous. And, notwithstanding strong responses from the Courts, serious crime continues unabated. While the politicians tell us that the crime statistics are dropping, those of us in the criminal justice system and the ordinary people on the streets experience it otherwise. The continued implementation of Act 105 is testimony to this.

[17] In the circumstances, and for so long as this legislation is in force, it is no longer "*business as usual*". That means that the traditional approach in cases such as Zinn and Rabie where the courts exercised an unfettered discretion in relation to sentence is now constrained by the terms of this legislation, provided of course that any sentence imposed must be just, and in accordance with the applicable constitutional principles.

Substantial and Compelling Circumstances

[18] What then must a court make of the phrase "*substantial and compelling circumstances*" as contemplated in Section 51(3)(a) of Act 105? In Malgas, Marais JA conducted a detailed and thoughtful analysis of the provisions of that Act and came to the following conclusions in paragraph 25 at p481f of his judgment which I will recite in full as it provides a useful summary of the law as it is to be applied:

> "*[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been*

supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2, or imprisonment for other specified periods for offences listed in other parts of Schedule 2.

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should "ordinarily" and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the

crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts.

D. 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.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. 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.

G. 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 cumulatively justify a departure from the standardized response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

[19] I pause to point out that since the delivery of the judgment in Malgas the provisions of Section 51(3) were amended in 2007 when the word "*must* "replaced the word *"may"* therein, thereby directing a court not to impose a life sentence in the event that substantial and compelling circumstances are found to exist. Accordingly the summary provided by Marais JA in para I above would now read "*is obliged to impose a lesser sentence.*"

[20] That the approach set out in Malgas is still mandated today, appears from subsequent decisions in the Supreme Court of Appeal such as Vilakazi, Matyityi and Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and Others 2009 (2) SACR 361 (SCA).

[21] I shall return to the presence or not of substantial and compelling circumstances when I deal with each of the accused's personal circumstances and the like later. Before doing so it is necessary, as per Zinn and Rabie to consider the circumstances of the offence itself and the issues affecting the interests of society.

The Offence

[22] As regards the offence itself, the attack on Duiker Street was, as we have already found, well planned and executed with para-military precision. In his confession accused no. 8 indicated that his involvement in the planning of the robbery commenced on Saturday 1 December 2007 and that he and certain of his accomplices visited the scene itself on Sunday the 2nd.

[23] While we have no evidence as to how the robbers came to know about the route customarily taken by the Iveco, there can be little doubt that the locality was carefully selected. After all, Mr Dick told the Court in his evidence led by the State in aggravation of sentence, that a cash-in-transit vehicle such as the Iveco would ordinarily follow the same route on every collection, so as to meet the needs of the client regularly as to time and place. Anyone watching the route taken by the Iveco in advance would have realized that it went along Duiker Street, collected money at the hardware store at the end of the street and then had to turn back towards Tygerberg Hospital. The interception of the vehicle in a cul-de-sac such as Duiker Street was a perfect spot from which to attack in a classic pincer movement. The use of three vehicles on scene 1 and a further two vehicles at scene 2 also confirms the extent of planning of the offence.

[24] We have found that as the bakkie intercepted the Iveco, the gunmen on the back of the bakkie stood up and immediately began firing at the Iveco. Simultaneously, the two men on the grass verge began firing with handguns. No demands were made on Mr Selepe that he should open up the Iveco and allow the robbers access to the vault. Rather, the attackers began pounding the Iveco at close

range (no more than a couple paces) with heavy calibre, powerful military weapons. At least twelve of those shots were aimed at, and struck, the windscreen and a total of about 30 shots were fired on the scene by five of the accused with five different fully automatic rifles. As the medical evidence demonstrates, Mr Selepe was gunned-down at point blank range by more than one of the attackers.

[25] When Constables Kleinsmith and Van der Poel happened upon the scene at least one of the gunmen began firing in their direction, and as the robbers sped off along Duiker Street in the Golf at least one shot was discharged into the premises of Hanco through a glass door. We know that Mr Christians and his colleague were sitting on the grass verge taking their lunch and we can see from photographs 12, 13 and 14 that workers were busy erecting signage at the premises of Primador right next to the spot where the Iveco was attacked. We can also see from some of the other photographs taken at scene 1 that the shooting occurred in a relatively busy light-industrial area on an ordinary working day.

[26] We know too that Duiker Street is bounded by Francie van Zijl Drive – a major dual carriage way in the area along which there would usually be a steady flow of traffic at midday on a Monday. And, on the far side of Francie van Zijl, lies the working class suburb of Ravensmead. The accused shamelessly chose to turn an area of commercial activity where law abiding citizens were going about their business into what the State correctly described as "*a war zone*". In so doing they callously exposed innocent bystanders, motorists and nearby residents to the risk of grave harm. It is

indeed a miracle that no one else besides Mr Selepe was struck by a bullet on the day in question.

[27] But, matters did not end there. The robbers set off at high speed through the streets of Ravensmead thereby exposing residents to further potential harm. And, when they eventually fled from their vehicles at the stadium they sought refuge in a place to which the residents of Ravensmead went to receive community services. Three of them, accused nos. 2, 6 and 7 exposed young toddlers to physical and emotional harm, while the deceased accused no. 4 was close to a number of senior citizens when arrested in the forecourt of the community centre. Accused no. 5, in turn, had no qualms about rushing into somebody's front yard and hiding amongst the shrubbery in an attempt to avoid the long arm of the law.

[28] And yet, that is still not the end of the saga. Four of the robbers, including accused nos. 8 and 11 proceeded to hijack a taxi in Connaught Road while brandishing handguns and rifles. Fortunately Mr Florens and his colleagues did not offer any resistance and they were not injured. The taxi was also recovered nearby soon afterwards.

[29] In summary then it may be said that the accused, who were all strangers to the area, shamelessly imposed themselves upon law-abiding citizens at all three scenes and were prepared to stop at nothing to execute their deadly plan. And when that was foiled by the police they went on to expose the residents of Ravensmead to potential harm as well. Ultimately, however, the community based response of the

residents who co-operated with the police in pointing out the flight of the accused was a most important factor which led to the arrest of this highly dangerous gang of robbers. The facts of this case also demonstrate, once again, that there is no substitute for straight-forward visible policing. The availability of a number of uniformed police officers who descended on scenes 2 and 3 and assisted in the arrests of the bulk of the accused, is testimony to that.

[30] As I have said, Mr Selepe was killed, almost execution-style in the driver's seat of the Iveco. He was going about his ordinary duties in the course of his employment when he lost his life. The last moments of his life must have been terrifying. We know too from the harrowing evidence of Mr Samuels of the catastrophic effect which the attack had on his life. He lost his job and his house as a consequence of the emotional injury which he sustained, the effects whereof were still visible three years after the event. And yet despite all that, he exhibited a magnanimous act of forgiveness towards the accused in the Court room.

[31] The Court was also given insight into the extremely damaging effect which this event has had on Ms Selepe and her children. She is clearly a strong woman who has managed to rebuild her life somewhat but the scars which her young children bear through the loss of their father will surely take many years to heal.

[32] This attack was perpetrated by the accused for one reason only – quick money – which they hoped would be available in large amounts. They failed in that regard and left in their wake a tale of destruction of enormous physical and

psychological proportions. I can, in all honesty, not conceive of a more horrendous, callous or grotesque event. This is certainly a crime of the most serious proportions.

Interests of Society

[33] The attack in Duiker Street was not an isolated event in 2007 as the evidence of Mr Dick demonstrates. From the figures placed before this Court we can see that robberies at the largest cash-in-transit company in the country (G4S) ran into tens of millions of rands annually. In 2007 alone G4S Security was subjected to 238 incidents of robbery (not all of them cash-in-transit) in which more than R48 million was stolen. Over a 7-year period from 2005 to 2011 a total of R366 million was stolen from this company in robberies with just more than R31 million being recovered. This is a recovery rate of 8.5 per cent and the enormity of the loss is self-evident from these figures. Mr Dick testified that by 2011 things had begun to improve slightly. The number of industry deaths and the deaths of company employees in armed robberies were down as were the number of incidents involved. In particular cash-in-transit robberies had dropped from 12 in 2010 to 5 in 2011 although the amount stolen in 2010 of almost R35 million had shot up to R60 million the following year, no doubt attributable to larger amounts stolen in individual robberies. Mr Dick speculated that the drop in the number of incidents was possibly attributable to robbers being caught and imprisoned or shot during incidents but clearly it is still "*business as usual*" as far as the organized armed robbers are concerned.

[34] More recently we have read in the local press of the escalation in robberies from ATM's which now appear to be the target of organized gangs. One can

only speculate whether there has been a change of focus by armed robbers to so-called "*softer*" targets. What is undoubtedly clear, however, is that the minimum sentencing legislation has not yet had the desired effect and that it is not yet "*business as usual*" as far as the criminal justice system is concerned.

[35] Ordinary members of the public, whether they reside in informal settlements, townships or leafy suburbs are all exposed to violent crimes of various descriptions on a regular basis. They look to the courts for protection against ruthless thugs like the accused and they are entitled to be protected from them. A failure by the courts to respond appropriately could result in vigilantism – something which undermines the very core of our constitutional order.

[36] It is important too that a stern message be sent out by the Court to all those who participate in this type of crime that they will be seriously dealt with and will face the full might of the law if they are convicted of such offences. While it may be business as usual in their eyes, it is certainly not yet business as usual in the sentencing arena.

[37] So much for the offence and the interests of society.

The Offenders

[38] I turn now to the third factor in the so-called triad namely the offenders. As a general thesis it was pointed out in Vilakazi at p574d that –

> *"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the back ground. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions of whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that Malgas said should be avoided."*

I shall proceed, nevertheless, to consider these in due course.

[39] Returning to the existence of substantial and compelling circumstances, one must bear in mind that there is no onus of proof on any party to these proceedings in that regard. The Court must consider all of the information placed before it in determining the proportionality of the sentence. If it is satisfied that such circumstances exist, it **must** avoid life imprisonment but if it is not so persuaded it will impose the ultimate sentence.

[40] None of the accused gave evidence in mitigation of sentence. Accused no. 8 did however call a witness. The legal representatives for the defence placed certain facts before the Court in regard to their clients' personal circumstances which the State did not challenge. The Court must now consider those facts in relation to the other issues mentioned previously to assess the moral blameworthiness of each of the accused in relation to the charges on which each has been convicted.

[41] Aside from the individual factors relevant to each accused, there were three themes which emerged from the defence during the submissions on sentence. The first of these was that the fact that certain of the accused have been in custody for more than four years pending the finalization of these proceedings was a factor to take into account in determining whether substantial and compelling circumstances existed. The matter was ultimately put to bed by Mr Vismer in reply who, very properly in my view, conceded that this could never be such a circumstance. In the first place, the reason for an accused being kept in custody may vary from person to person. There may be good reason for an accused to be denied bail, as in the case of accused no. 1 who had a previous conviction for escaping from lawful custody. But ultimately something which post-dates the commission of the offence through the intercession of the criminal justice system can hardly be regarded as something which is substantial and compelling when one is considering an infinite sentence such as life. The position may be different, of course, where a finite sentence is imposed (see S v Stephen 1994 (2) SACR 163 (W); S v Vilakazi 2000 (1) SACR 140 (W); S v Njikelana 2003 (2) SACR 166 (C)).

[42] Next, it was contended that the fact that all of the accused, save for nos. 1 and 5 were first offenders (or were to be regarded as first offenders) was a factor to be considered as constituting substantial and compelling circumstances. As Marais JA pointed out in para 25.D of Malgas in the passage cited in para 18 above, a clean criminal record may be a factor for consideration when all the relevant factors are considered but, the "*aversion to imprisoning first offenders*" is not a substantial or compelling factor *per se*.

Mens rea

[43] It was argued on behalf of accused nos. 2, 6, 7, 9, 10 and 11 that the fact that the Court had found that their *mens rea* (i.e. their criminal intention) on count 5 was in the form of *dolus eventualis* (so-called "*indirect intention*") rather than *dolus directus* (co-called "*direct intention*"), was a consideration to be taken into account when determining whether substantial and compelling circumstances existed. It was further contended in respect of these accused, all of whom save no. 9 have no previous convictions, that their clean records together with the finding of *dolus eventualis*, were sufficient to warrant the Court not having to impose the mandatory minimum sentence. In respect of accused no. 9 it was said that his previous conviction for attempted housebreaking for which he received a suspended sentence was more than ten years old and should be disregarded for purposes of sentence considerations in this matter.

[44] Regarding the alleged finding of *dolus eventualis*, the Court found in Part F para 96 of the judgment on the merits that there was a very strong case to infer a prior agreement to rob the Iveco. That prior agreement, we found, must have included either an intention to kill the occupants of the Iveco (i.e. *dolus directus*) or an appreciation that the death of the occupants of the Iveco may ensue, and that the robbers associated themselves therewith regardless of the consequences. (i.e. *dolus eventualis*)

[45] Our finding therefore was that *dolus directus* may well have existed but that at the very least the form of *mens rea* would have been *dolus eventualis*. Because we were unable to say with any degree of certainty who did precisely what on the scene

we were not in a position to find beyond reasonable doubt which of those accused actually had intention in the form of *dolus directus*.

[46] In their respective confessions accused nos. 8 and 11 admit having handled automatic rifles on the scene at Duiker Street. While Mr Sebueng argued that Tikipini's statement was somewhat equivocal as to whether he actually fired his weapon (an R5) at the Iveco, there is no doubt that Makoma admitted discharging his firearm (either an AK47 or an R4) at the cab. Makoma, however, claims in his statement that someone known as "*Mendoza*" fired the fatal shots at Mr Selepe. We do not know who Mendoza is, but in any event this allegation by Makoma is inadmissible against any of his co-accused. However, Ms Fitz-Patrick, correctly in my view, did not argue that in the case of Makoma the existence of *dolus eventualis* should be regarded as a substantial and compelling circumstance for purposes of avoiding the mandatory sentence. I shall revert to Mr Sebueng's argument later.

[47] In his confession accused no. 10 admits that he was armed with a 9mm pistol on the scene and clearly intimates that he discharged it.

[48] While the suspicion is strong as to who actually fired the fatal shots that ripped through Mr Selepe's body at close range, that suspicion is not sufficient to conclusively establish *mens rea* in the form of *dolus directus* on the part of any particular accused save Makoma. For purposes of sentence therefore I shall assume in favour of all the accused save no. 8 that they all had, at the very least, *dolus eventualis*.

[49] As the Appellate Division pointed out in S v Mienies 1978 (4) SA 560 (A), *mens rea* in the form of *dolus eventualis* is an elastic concept. It can range from bordering on negligence (*culpa*) on the one hand to *dolus directus* on the other. However, the test always remains whether the accused person subjectively foresaw the possibility of the death of the deceased and associated himself therewith.

[50] In assessing where on the *continuum* a perpetrator's actual *mens rea* is to be measured, the Appellate Division in S v Dladla en Andere 1980 (1) SA 1 (A) reminded us that there is a clear dividing line between *dolus eventualis* and *dolus directus* and that this has to be respected at all times. In the context of that case (where there had been a conviction for murder, where the death sentence was likely to be imposed and the inquiry was as to the existence of extenuating circumstances which might permit the imposition of a lesser sentence) the Court pointed out that the correct approach was to consider whether, in the light of all the known circumstances, the absence of a direct intention to murder should be considered as an extenuating circumstance. Jansen JA cautioned (at p4H) that in coming to the decision the Court should not allow questions of proof to be supplanted by common sense based on objectively determinable probabilities.

[51] The enquiry in this matter is **not** whether extenuating circumstances have been established by an accused to avoid a mandatory sentence of death. The enquiry is rather, whether on an evaluation of all the available evidence, the Court is persuaded that there is a compelling reason to digress from a statutorily mandated sentence of life imprisonment and whether it is just to do so. The test is therefore different from that which applied in respect of a sentence which has been found to be unconstitutional and

a Court applying Act 105 should be cautious not to fall into that trap. Having said that, the pre-constitutional authorities do afford one broad guidelines as to how to approach the moral blameworthiness to be imputed to a particular form of *mens rea*.

[52] In the instant case a group of heavily armed men, some with lethal military weapons and others with powerful handguns, set out in a group to commit a robbery of an armoured vehicle. Their target was a sum of money secured in an impenetrable steel vault in the rear of that vehicle. According to Mr Dick, the vault could only be opened by activating a button or a lever in the cab section where the guard and the driver were seated. The cab itself was encased by thick steel and safety glass and there were only two ways to get to that lever or button. Either, the driver opened the cab door and let the robbers in or, if he did not, the robbers would have to force their way into the cab and open the vault themselves.

[53] The accused before Court took the latter option and literally attempted to blast their way into the cab with utter disregard for the safety or bodily integrity of Mr Selepe and his passengers (or, for that matter, anyone in the immediate vicinity). And, when the police arrived on the scene, the robbers included them in their relentless attack.

[54] In those circumstances the death of Mr Selepe would most certainly have been uppermost in the mind of all of the attackers. Aware of this they persisted with their ruthless attack. Having regard then to all the circumstances of the case, I am satisfied that the requisite form of intent in this case, *dolus eventualis*, was at the extreme limit of the *continuum* and probably bordered on direct intention to kill.

[55] As to whether a case of *dolus eventualis* bordering on direct intent is sufficient to persuade a Court not to impose the minimum sentence is a factor which has to be considered ,not in isolation, but in relation to all the other factors in the case, including the accuseds' personal circumstances, any mitigatory factors and reduced moral blameworthiness, as well as the offence itself and the interests of society.

[56] That having been said, one cannot lose sight of the fact that the Legislature has specifically singled out a crime of this nature and magnitude as being one in which life imprisonment is the sentence that should ordinarily be imposed. The relevant provisions of Part 1 of Schedule 2 of Act 105 specifically refer to a murder committed in the course of an attempted armed robbery in which a group of perpetrators is found to have acted in the execution of, or the furtherance of, a common purpose. And, as Marais JA observed in Malgas at para [25]D referred to above, marginal differences in degree of participation in the offence by co-perpetrators are not to be regarded as substantial and compelling reasons to digress from that sentence.

Multiple charges and concurrent sentences

[57] Counsel for the State and the defence were in agreement that counts 1 and 2 (the theft of the Jetta and the Ford Ranger) should be taken as one for the purposes of sentence. I agree with that submission.

[58] In respect of the attempted murder charges, the parties were however at odds. The defence suggested that counts 6 and 7 (the attempted murder of the security guards in the Iveco) should be taken as one for purposes of sentence, and so too,

counts 9 and 10 (the attempted murder of the policemen). The State argued to the contrary.

[59] I am inclined to agree with the approach suggested by the defence. The focus on counts 9 and 10 was probably the police vehicle in which Kleinsmith and Van der Poel suddenly arrived, and behind which they sought refuge, rather than each individual police officer. It was really one targeted event in the entire episode and deserves to be considered as such for purposes of sentence.

[60] Similarly, on counts 6 and 7 the focus was primarily on the occupants of the cab of the Iveco. We know too from the evidence of Samuels that he was seated further back in the vehicle in a place where he was less likely to be injured. I shall accordingly also take these two counts as one for purposes of sentence.

[61] The attempted robbery of the Iveco and the murder are also essentially a single event and one must be cautious not to over-emphasize the violent aspect of the robbery which is, in essence, covered by the minimum sentence provisions on the murder. Care must therefore be taken to ensure that an offender is not sentenced twice (S v Mathebula 1978 (2) SA 607 (A) at 613E.)

[62] Reference was made during argument to the recent decision of the Supreme Court of Appeal in S v Nkosi and Another 2011 (2) SACR 482 (SCA) which dealt with a matter very similar to the present. That case also involved a botched cash-in-transit robbery on a busy highway in Gauteng. The Supreme Court of Appeal found that a sentence of fifteen years' imprisonment was warranted in respect of the robbery

and held the view that there was little difference between the attempted robbery and a completed crime. There is, however, one significant difference between Nkosi's case and the present, and that is that in the former there was no loss of life. The excessive degree of violence in that case was one of the factors which therefore counted in favour of a heavy sentence. In the present case the element of violence inherent in the charge of attempted robbery is relevant to the murder charge and one should be cautious not to impose too heavy a sentence on the former. In my view, therefore, a lesser sentence than that contemplated in Nkosi is justified.

The firearm charges

[63] The parties were also in agreement that there was no minimum sentence applicable in respect of charges 11, 12 and 13 – the unlawful possession of the handgun, the fully automatic rifles and the ammunition for the handgun. That submission follows the judgment of the Full Court in this Division in S v Baartman 2011 (2) SACR 79 (WCC) by which I am bound and which, in any event, in my view was correctly decided. Accordingly only the maximum sentences prescribed by the Firearms Control Act 60 of 2000 are of application in this matter.

[64] It was also suggested by counsel for the defence that a distinction might be drawn in sentences between those accused who have been convicted of possession of the firearms by virtue of joint possession, and those who actually had weapons in their possession. I am not satisfied that such a distinction is warranted in the present case. Having found that joint possession of the rifles was for the benefit of all of the members of the gang in the execution of the robbery, it does not seem fair to me to

burden, for example, Makoma for actually handling and firing an AK47 or an R4 on the scene.

[65] In the case of accused no. 7 we have found that his weapon of choice on that day was a handgun for which he must be sentenced separately on counts 11 and 13. Fairness dictates, however, that those two counts should be taken together with count 12 on which sentence is to be imposed in respect of the joint possession of the fully automatic rifles.

Personal circumstances of the accused

[66] I turn now to the individual accused. In respect of **accused no. 1** Mr Vismer was unable to advance any argument to suggest that life imprisonment should not be imposed on Luke on count 5 (the murder charge), and left matters in the hands of the Court. I am not bound by counsel's submission and have considered the relevant circumstances myself.

[67] Luke is 34 years of age, is unmarried and has three children for which he claims maintenance responsibilities. It was also said that he worked in a small store run by his parents from their home in Langa. It is difficult to understand quite how he managed either of these responsibilities because he has been continually in custody on various cases, including the present charges, since about 2003. It is significant that Luke was released from custody on these other charges during the second half of November 2007 and that he lost little time in getting involved in serious crime notwithstanding the fact that he had been incarcerated for some three to four years.

Luke has various previous convictions, some less serious than others, but his future prospects of leading a responsible, crime-free life are in my view slim and I am not persuaded that there are substantial and compelling reasons to deviate from the minimum sentence on count 5 in his case.

[68] In regard to **accused no. 2**, Mr Vismer argued that his clean record and the fact that his *mens rea* was in the form of *dolus eventualis* were sufficiently substantial and compelling reasons to avoid the minimum sentence of life on count 5.

[69] I was told that Nono is now 31 years of age, is unmarried, has no dependents and ran a barber shop business when he became involved with the gang of robbers before Court. While he had not been convicted of involvement in any previous offences, at the age of 27 Nono knew what he was doing, voluntarily participated in the attack and freely took on the risks associated therewith, no doubt being attracted by the lure of "*quick money*" in a substantial amount. (S v Ngubane 1985 (3) SA 677 (A) at 685D-G; S v Rapitsi 1987 (4) SA 351 (A) at 361E-J). No report from a suitably qualified expert was placed before me in respect of Nono and it is difficult to say whether he will ultimately be a candidate for rehabilitation or not. But even if he is, I am not persuaded that this factor, nor his clean record, nor the finding of *dolus eventualis* warrants deviation from the minimum sentence, particularly in view of the seriousness and enormity of the crime in question.

[70] **Accused no. 5** is liable to be sentenced only on count 4 (attempted armed robbery). Ms Nöckler urged the Court to consider the fact that Ngqonga had been convicted of attempted robbery and then only as an accomplice, waiting in the getaway

vehicle to be used in the second leg of the robbers' escape plan. In our judgment on the merits we were unable to find within any degree of certainty what role Ngqonga played in the robbery before the commencement of the shooting in Duiker Street and because of that fact we considered it appropriate to find only that he was certainly part of the getaway plan. Ngqonga's role in the robbery was nevertheless a vital one and his absence at the stadium would have placed his colleagues in a severe predicament upon arrival there.

[71] Ngqonga is a 36 year old married man with two children – a teenage daughter and three and a half year old son by a second wife. His wife is in fixed employment and he claims to have held down a steady job for a few years as a taxi-driver before becoming involved in this matter. What aggravates Ngqonga's position is that he has a previous conviction for armed robbery for which he served an effective prison sentence of eight years commencing in 1996. During that time he was convicted of possession of dagga in prison.

[72] Ms Nöckler argued that the conviction for robbery, being more than fifteen years old should be ignored due to the passage of time. I do not agree. Accused no. 5 was sentenced to eleven years' imprisonment in 1997 and was given the benefit of a partial suspension so that his effective sentence was eight years. He was released from prison early in 2004 and his parole period expired sometime in mid 2006. Within about eighteen months of that date, he was involved in a similar offence. Clearly, he has not learned from his previous prison sentence and must therefore be considered to be a poor candidate for rehabilitation.

[73] Accused no. 5's participation in the current matter as an accomplice would ordinarily attract a lesser sentence than his co-accused but, on the other hand, he is the only one of the gang against whom the State has proved a previous conviction for a similar offence. In such circumstances, there does not seem to me to be any compelling reason to impose a lesser sentence on accused no. 5 than on his co-accused.

[74] **Accused no. 6** is 36 years old and has a matric certificate. He has two children by different mothers, age 10 and four and a half years. Mafalala has no previous convictions and at the time of his arrest ran a bread distribution agency from which he says he earned around R30 000.00 per month. In my view this factor suggests that there were no compelling reasons for accused no. 6 to become involved in this robbery other than greed. He too obviously wanted more money and he wanted it quickly. The fact that he may have been involved in the planning of the robbery is demonstrated by his acquisition shortly before the event of a vehicle not registered in his name, which was perfectly suited to transport the loot away from the scene. That vehicle was driven to the stadium and left there under the watchful eye of accused no. 5.

[75] Ms Givati argued that at 36 Mafalala was a suitable candidate for rehabilitation and that this was one of the factors, together with his clean record and the finding of *dolus eventualis,* which were sufficiently compelling to avoid the mandatory sentence. Once again in the absence of any evidence from a suitably qualified person regarding Mafalala's future prospects of rehabilitation I think that this is, at best, a neutral factor.

[76] I was also asked to have regard to the fact that Mafalala had been awaiting trial for all of four years and that during that time he had been severely assaulted in prison, allegedly by warders. The facts of the matter are that in 2008 accused no. 6 was granted bail of R2 500.00 in this matter, which was forfeited to the State in December 2008. The circumstances of that forfeiture were not explained but I was informed by Ms Givati that Mafalala was, in any event, in custody on another matter. In my view then, the period of time he spent in custody is unexplained and is, at best for accused no. 6, a neutral factor (S v Blouw [2011] ZAECGHC20 (27 May 2011)).

[77] Having considered all factors relevant to Mafalala, and in particular the gravity of the attack on the Iveco, I am not persuaded that there are either substantial or compelling reasons to deviate from the mandated minimum sentence.

[78] In respect of **accused no. 7** Ms Losch told the Court that he is 35 years old, was married in 2007 and has two boys aged 13 and 2 years. He has a matric certificate and previously worked for his mother, assisting her in her small transport business. Pezisa is a first offender and it was suggested that he was still relatively youthful at the time when the offence was committed. It was argued that this, together with his *mens rea* in the form of *dolus eventualis* and his clean record, warrant a lesser sentence than the minimum.

[79] The suggestion that Pezisa was relatively youthful at the time (31 years) is misplaced. He and various of his co-accused (save for accused nos. 2 and 11) are all of a similar age. Their conduct in Duiker Street on 3 December 2007 was anything but that of reckless young men spurred on by the exuberance or immaturity of misguided youth.

Their conduct was organized, goal-directed and ruthless. Accused no. 7's age is not a significant mitigating factor in this case.

[80] Pezisa was found to have possessed a .357 revolver with two live rounds and 3 empty casings in the chamber. The only reasonable inference is that this firearm was discharged on the Duiker Street scene – no self-respecting robber would take a partially loaded firearm to an event like that. This is clearly an aggravating factor.

[81] I am not persuaded that it has been shown either that Pezisa is a candidate for rehabilitation. But even if that were the case, I am of the view that in his case too the conscious decision to participate with his fellow accused in so serious an offence which was planned with such a degree of detail, outweighs any such considerations of a personal nature. In the case of Pezisa too I am unable to find any compelling reason to deviate from the prescribed minimum sentence.

[82] I turn then to **accused no. 8.** He is also now 36 years of age, is not married but has two sons aged 8 and 5 years. He was taken into custody on 20 December 2007 but was granted bail in mid 2008. After his release on bail in this case he was arrested on another matter and consequently forfeited his bail in this case, so I was informed. In his case too Makoma's time in prison awaiting trial has not been properly explained but it nevertheless appears, on the available evidence, to be a neutral factor and is not a circumstance which in and of itself is persuasive in regard to not imposing the prescribed sentence.

[83] In his confession Makoma sets out in quite some detail how the robbery was planned, including surveillance of the Duiker Street scene on the day before the attack. Further, he explains his role in the robbery and from that it is clear that he was very much involved in both the preparation and execution of the concerted attack on the Iveco. In light of these admissions, Ms Fitz-Patrick understandably did not make any submissions suggesting that Makoma's *mens rea* was in the form of *dolus eventualis*.

[84] When the State sought to prove previous convictions against Makoma immediately after his conviction there was an objection thereto, the basis being that his previous convictions had been deemed to have been expunged by virtue of the provisions of Section 20(10) of the Promotion of National Unity and Reconciliation Act, 34 of 1995 ("*the TRC Act*"). The parties were afforded an opportunity to prepare argument on the point over the Christmas recess but when the Court reconvened on 30 January 2012 Mr Wolmarans conceded that the objection was valid and indicated that the State agreed that Makoma should be treated as a first offender since he had been granted amnesty under the TRC Act for the deeds which formed the basis of his previous convictions.

[85] In The Citizen 1978 (Pty) Ltd and Others v McBride 2011 (8) BCLR 816 (C C) Cameron J (for the majority of the Constitutional Court) held at 838G that –

> "*[64]...The chief function of the deeming provision in Section 20(10) is to secure efficient expungment of all official documents and records, without requiring arduous physical deletion. That is why the provision was enacted. Expungment entitles the grantee of*

amnesty to full civic status. All civil disabilities are lifted. He is entitled to stand for Parliament. Should he ever be convicted of another crime, he will for sentencing purposes be deemed to be a first offender."

[86] As part of Makoma's case in mitigation of sentence Ms Fitz-Patrick led the evidence of **Mr Theo Mabusela** (a prominent member of the PAC in the Western Cape) who proceeded to tell the Court of Makoma's formative years, his introduction to active politics and his experience as a young soldier in the Azanian People's Liberation Army ("*APLA*"). In this context both Ms Fitz-Patrick and Mr Mabusela made extensive reference to the so-called "*St James Church Massacre*" in Kenilworth in 1993. It was said that Makoma had participated in this fatal attack on people who were attending a Sunday evening church service, that he had been convicted for his participation in that attack and that that conviction formed the basis of his amnesty application under the TRC Act.

[87] The Court was then confronted with the peculiar situation where the State had elected not to refer to this incident or its consequences as an aggravating factor but where the defence had put the event right back in the spotlight in the hope of persuading the Court that there were substantial and compelling circumstances arising from it, and the consequences thereof, which warranted the imposition of a sentence other than the prescribed minimum.

[88] Mr Mabusela, who by his own admission has had little contact with Makoma for the last ten years or so spoke of the stigma or "*stain*" which the incident had

left on Makoma's life and which had effectively precluded him from being gainfully employed. It was also said that the S.A. National Defence Force's preference for the employment of MK combatants and returning exiles over APLA soldiers had deprived Makoma of a life in the military where he belonged.

[89] Ms Fitz-Patrick referred to certain personal details in Makoma's life after amnesty which suggested that his past had followed him wherever he went, and that he had not only been unable to secure fixed employment, but had encountered the law as people sought to falsely accuse him of crime. She described Makoma's situation as "*unique*" and deserving of a lesser sentence *per se*. Regrettably, no context was given to this "*uniqueness*".

[90] In an attempt to understand the factual background to this "*unique*" situation, the Court requested the defence to place before it the relevant report of the TRC committee which granted Makoma amnesty. This request was refused with the excuse that it was not available to the defence notwithstanding the fact that it is readily available on the internet on the TRC website. The defence was informed that the Court was aware of this fact but that it had not accessed the report itself. Still, the defence did not place the report before the Court.

[91] To appreciate the extent of the defence's argument on this point, the Court has little before it. The St James Church Massacre was an event of great notoriety at the time and received extensive media coverage both locally and abroad. From that coverage the Court can take judicial notice that it was an event in which innocent people were attacked by a gang armed with automatic rifles and hand grenades in church while

at worship. The nature of the attack was confirmed by Ms Fitz-Patrick during argument on sentence. How many people were killed and maimed the Court does not know. And what the basis for forgiveness and amnesty towards Makoma was, the Court does not know either. But what the Court does know from Makoma himself in this case is that he has killed before, (presumably for political reasons) that he was forgiven by society for what he did, (presumably also because it was a political act falling within the ambit of the TRC Act) and that he now claims that the process of national reconciliation and forgiveness, which was the very aim and purpose of the TRC Act, has dogged his life and ultimately led to him killing again.

[92] However, this time Makoma has committed, (collectively with others) a common law offence of the worst kind – not for any political motive but out of sheer greed. Yet, he seeks to be excused therefor on the basis that he now carries a stain which society will not forget. This is a perverse argument which is not worthy of serious consideration in relation to the application of the provisions of Act 105. Makoma's is no special case which warrants treatment any different from his co-accused who are also first offenders.

[93] In McBride, Cameron J observed further as follows at 839G:

> *"[68]...The [TRC] Act's central objective was national unity and reconciliation. But moral absolution lay beyond the legal benefits the statute afforded perpetrators. Expunging moral opprobrium and condemnation lay beyond the lawgiver's powers, and the statute did not seek to confer it".*

[94] From the evidence adduced by Mr Mabusela the Court knows that Makoma is well trained in the use of military rifles. Prior to his arrest in December 2007 he had not been in formal employment for many years and he has, by his own admission in his confession, now embarked on a path of violent crime: "*we are all armed robbers*," he says of himself and his co-perpetrators. The prospects of Makoma participating in yet another killing cannot be excluded, nor can the prospect of his participation in other robberies be excluded. In making this remark I am mindful of what Cameron J said in McBride at 840G in regard to the expungment of a conviction under Section 20(10) of the TRC Act:

> "*....It does not render untrue the fact that the perpetrator was convicted, or expunge the deed that led to his or her conviction. Those remain historically true. The statute does not address these facts of history, nor does it attempt to mute their description*"

[95] Society undoubtedly looks to the Court to protect it, once and for all, against this offender. In my view, whatever the supposed "*uniqueness*" of his situation, there are manifestly no compelling and substantial circumstances which suggest that any sentence other than one of life imprisonment is the appropriate sanction on count 5 for Makoma. With or without Act 105, in my view life imprisonment is warranted.

[96] In regard to count 8 (the hijacking of the taxi in Connaught Road) however, I am of the view that the following circumstances warrant the imposition of a lighter sentence than the statutory minimum of fifteen years. They are the limited degree of

violence employed in the robbery, the fact that the robbery was not premeditated but occurred on the spur of the moment in response to the timely arrival of the police, the fact that the vehicle was recovered shortly after it was stolen, and the fact that the driver of the taxi does not appear to have sustained any lasting psychological or emotional injury.

[97] Turning to **accused no. 9**, Mr Bruinders informed the Court that Ndandani was 34 years of age and has two children aged 14 and 13 who are at high school in Cape Town. He lost his wife due to breast cancer early in 2009 at a time when he was in custody. His mother who took over the care of his children in 2009 also died at the end of 2011. Ndandani has a standard 8 education and earned R3 000.00 per week at the time of his arrest as an owner/driver of a minibus taxi.

[98] It is indeed a great personal tragedy that accused no. 9 has been in custody while members of his close family have died and his children have been deprived of a father's care. The Court does recall that Ndandani himself spoke of another case pending against him in Blue Downs at the time of his arrest on 2 January 2008. However, the reasons for the refusal of bail were not fully explained to the Court and in his case too this must be regarded as a neutral factor.

[99] Mr Bruinders put up a strong argument to suggest that accused no. 9 should be treated as a first offender. He referred to Section 271B(1)(a)(vi) of the Criminal Procedure Act which effectively provides for the expungment of a criminal record which is older than ten years in circumstances where any sentence of imprisonment was suspended in its entirety. That section requires written application for

such expungment to the Department of Justice and there is an administrative process that has to be followed before the expungment can take place. The relevant section is therefore not directly applicable in the present case because Ndandani has not made such written application. His situation is, however, analogous and because he has not been convicted of any offence since he was convicted as a youngster at the age of 19 for an inchoate offence, I am of the view that he should be treated as a first offender for purposes of this case.

[100] Aside from that, it was argued that the fact that Ndandani's *mens rea* in the form of *dolus eventualis,* when considered with his clean record, constituted substantial and compelling circumstances for purposes of the application of Act 105.

[101] I have carefully considered no. 9's position and have come to the conclusion that he, like accused nos. 2, 6 and 7, is a mature adult who participated in a well-planned crime fully conscious of the potential consequences thereof. He made this decision in the full knowledge that he was a family man with commitments to his loved ones. I can find nothing in his personal circumstances which suggest any reduced moral blameworthiness on the part of Ndandani and I am consequently of the view that there are no substantial circumstances which compel any deviation from the sentence which Parliament has said should ordinarily be imposed.

[102] **Accused no. 10** is 35 years of age and is unmarried. He has two sons of 14 and 18 years who live with their respective mothers. He has a standard 2 education from a school in the Eastern Cape and has been in Cape Town since about 2002 in

search of work. He has only managed to find casual employment in the building trade during that period. The State proved no previous convictions against Netti.

[103] In his confession, Netti says that he left for the Eastern Cape on 19 December 2007 when he heard that he was on the police's wanted-list. This probably accounts for the refusal of bail to him in the lower court, but the issue was not properly explored either before this Court.

[104] In his statement Netti also describes his role in the event in quite some detail. He indicates that he was contacted on Saturday the 1st of December 2007 and told the plans for the robbery were at an advanced stage. When he met up with his co-perpetrators on the morning of the robbery, he had already known of the preparations for at least two days. Nevertheless he willingly participated in the attack knowing full well (as he himself says) that there were heavy weapons which were going to be used. He confirms in the statement that he was armed with a 9mm pistol and suggests that he used it on the scene at Duiker Street ("*we all started shooting with firearms as we were all armed*").

[105] Of great concern to the Court is the fact that in his confession accused no. 10 said that when they proceeded to Parow on 3 December 2007 he and his co-perpetrators "*were going to work*". The Court infers from this that, like accused no. 8, Netti has made crime (and more particularly armed robbery) his way of life. In such circumstances his prospects of rehabilitation must be very limited, if at all.

[106] Upon consideration of all the relevant facts the Court can find no reason to digress from the minimum sentence in respect of accused no. 10. There is nothing in his confession which suggests any reduced moral blameworthiness and there is nothing which compels this Court to consider deviating.

[107] Finally I come to **accused no. 11**. He is currently 29 years old and was 25 at the time of the robbery. He is a good 5-6 years younger than his co-accused. The suggestion during argument by Mr Sebueng that Tikipini may have been influenced by the older members of the gang drew a noticeable response in the dock from some of his fellow accused who appeared to find this suggestion amusing.

[108] There is nothing before this Court to suggest that accused no. 11 was in any way influenced by some sort of peer pressure or the like to do what he did. Tikipini is an intelligent person with a matric and a partial post-school qualification in electrical engineering. He is married and has already fathered four children by three different mothers. He is a well built man with a strong personality, as the Court saw during his two performances in the witness box. In fact, he struck the Court as a leader rather than a follower.

[109] Tikipini claims to have earned R1 000.00 to R1 500.00 per month in 2007 as a driver in his mother-in-law's transport business. This work was confirmed by Mr Mguzulwa in evidence. As the Court observed earlier, throughout the trial Tikipini dressed fashionably in a variety of very smart outfits and was even keen to have his laptop with him in the dock at one stage. One can only but speculate as to how he was able to afford such fairly costly items on so limited a monthly salary.

[110] In his confession Tikipini told the Court of the planning which preceded the robbery and the weaponry intended to be used. One sees also from the confession that his apparent knowledge of firearms was sufficient to enable him to distinguish an R4 from an R5, something which Inspector Gerber suggested was quite difficult for a lay-person, and even for a police officer, as Constable Mdlalose's evidence demonstrates.

[111] Tikipini admits having handled an R5 rifle on the scene in the immediate proximity of Mr Selepe and the reasonable inference to be drawn from his statement in that regard is that he probably fired the R5. That such a weapon was fired on the scene is apparent too from Gerber's evidence.

[112] Mr Sebueng urged the Court to find that Tikipini's relative youthfulness and his clean record together with his *mens rea* in the form of *dolus eventualis*, make him a good candidate for rehabilitation. I regret to say that I do not agree with that submission. As noted above accused no. 11's proficiency with, and knowledge of automatic weapons is evident from his confession. And, in light of his acknowledgment that he handled a rifle on the scene, his *mens rea* may have been in the form of *dolus directus* but was certainly at the most extreme extent of *dolus eventualis*. His moral blameworthiness is therefore high. There is no evidence before us either to indicate what his prospects of rehabilitation are.

[113] The Court is not persuaded that there is any reason whatsoever to deviate from the prescribed sentence in Tikipini's case. The Court considers him to be a dangerous man with a mind of his own, and a devious mind, at that. Undoubtedly

society demands to be protected against people like him and the Court is obliged to give serious consideration to such demands. There is no doubt in the Court's mind that life imprisonment, with or without the provisions of Act 105, is the only suitable sentence for Tikipini.

[114] Before passing sentence on each accused individually, the Court directs that a copy of this judgment on sentence is to be placed on each accused's file with the Department of Correctional Services for consideration of all relevant circumstances by the Department in the event that any of the accused subsequently applies for parole. These circumstances may include the lengthy periods of time spent as awaiting trial prisoners by accused nos. 1, 6, 8, 9 and 10.

The following sentences are imposed:

Accused no. 1: Langa Paul Luke

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[F] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **thirty six (36) years** on **counts 1, 2, 4, 6, 7, 9, 10 and 12** is to run concurrently with the term of **life imprisonment** imposed on **Count 5.**

Accused no. 2: Thobela Nono

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[F] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **thirty six (36) years** on **counts 1, 2, 4, 6, 7, 9, 10 and 12** is to run concurrently with the term of **life imprisonment** imposed on **Count 5.**

Accused no. 5: Zamekile Ngqonga

On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1997.) **Ten (10) Years' Imprisonment.**

Accused no. 6: Thando Mafalala

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[F] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **thirty six (36) years** on **counts 1, 2, 4, 6, 7, 9, 10 and 12** is to run concurrently with the term of life imprisonment imposed on **Count 5** .

Accused no. 7: Thobile Pezisa

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[F] On **Count 11** (Contravening Section 3(1)(a) of the Firearms Control Act, 60 of 2000 – possession of an unlicensed firearm); **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act, 60 of 2000 - possession of a prohibited firearm: fully automatic firearms) and **Count 13** (Contravening Section 90(a) of the Firearms Control Act, 60 of 2000 – unlawful possession of ammunition) all of which are taken together for purposes of sentence: **Six (6) Years' Imprisonment.**

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **thirty six (36) years** on counts 1, 2, 4, 6, 7, 9, 10, 11, 12 and 13 is to run concurrently with the term of **life imprisonment** imposed on **Count 5**.

Accused no. 8: Gcinikhaya Makoma

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment** .

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 8** (Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977): **Ten (10) Years Imprisonment.**

[F] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[G] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **forty six (46) years** on **counts 1, 2, 4, 6, 7, 8, 9, 10 and 12** is to run concurrently with the term of **life imprisonment** imposed on **Count 5.**

Accused no. 9: Andile Ndandani

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[F] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **thirty six (36) years** on counts 1, 2, 4, 6, 7, 9, 10 and 12 is to run concurrently with the term of **life imprisonment** imposed on **Count 5.**

Accused no. 10: Zukile Sandiso Netti

[A] On **Count 1** (Theft of a motor vehicle) and **Count 2** (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[F] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **thirty six (36) years** on counts 1, 2, 4, 6, 7, 9, 10 and 12 is to run concurrently with the term of **life imprisonment** imposed on **Count 5**

Accused no. 11: Thembekile Nicholas Tikipini

[A] On **Count 1** (Theft of a motor vehicle) and Count 2 (Theft of a motor vehicle) which are taken together for purposes of sentence: **Four (4) Years' Imprisonment.**

[B] On **Count 4** (Attempted Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977.) **Ten (10) Years' Imprisonment.**

[C] On **Count 5**: **Life Imprisonment**

[D] On **Count 6** (Attempted Murder of Gerald Samuels) and **Count 7** (Attempted Murder of Wonga Mrengqwa) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment**.

[E] On **Count 8** (Robbery with Aggravating Circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977): **Ten (10) Years Imprisonment.**

[F] On **Count 9** (Attempted Murder of Constable Christopher Kleinsmith) and **Count 10** (Attempted Murder of Constable Ferdinand Van der Poel) which are taken together for purposes of sentence: **Eight (8) Years' Imprisonment.**

[G] On **Count 12** (Contravening Section 4(1((a) of the Firearms Control Act 60 of 2000 - possession of a prohibited firearm: fully automatic firearms): **Six (6) Years' Imprisonment**.

In terms of Section 39 of the Correctional Services Act, 111 of 1998 the period of imprisonment of **forty six (46) years** on counts 1, 2, 4, 6, 7, 8, 9, 10 and 12 is to run concurrently with the term of **life imprisonment** imposed on **Count 5**

P.A.L. GAMBLE

Judge of the Western Cape High Court