Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: SS49/2012

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE STATE

and

THAMSANQA DIKQACWI	**1st ACCUSED**
THANDO ABRAHAMS	**2nd ACCUSED**
LUZUKO DUMA	**3rd ACCUSED**

SENTENCE JUDGMENT DELIVERED: 15 APRIL 2013

BINNS-WARD J:

[1] It is often said that in criminal proceedings the determination of an appropriate sentence can present the most difficult challenge for the judicial officer, and so it has proved in the current case.

[2] The accused have been convicted of serious offences. The assaults committed against the complainants were of a serious nature, especially that upon the complainant in count

eight, who was rendered unconscious as a consequence. The kidnapping charges on which the accused were convicted were inextricably connected with the assaults. Both categories of offence were bound up with each other in the accuseds' conduct, which was in substance a manifestation of vigilantism. The same can be said in respect of the count of housebreaking on which accused 1 and 3 were convicted. The accused took it upon themselves to investigate and deal with allegations that might have implicated the complainants in the commission of crimes of theft and the impersonation of police officers in order to rob members of the community. The assaults were perpetrated over an extended period on the day in question and in circumstances which showed a deliberate and brazen disregard, not only for the complainants' individual rights of liberty, dignity and bodily security, but also for the rule of law. All the indications are that this course of conduct was premeditated. Thus the emotive effects on the behaviour of an individual that an inflamed crowd of persons can have, and which are referred to in the literature on mob justice and vigilantism placed before the court, and which it is argued might reduce the blameworthiness that should be ascribed to participants in mob justice, did not, in my view, play a material role in the accuseds' conduct, although I accept that once embarked upon, the course of conduct did develop a certain mob justice associated momentum. Realistically, it also cannot be overlooked that the position would probably have been more serious had it not been for the fortuitous arrival of the police at a stage when two of the complainants were being presented by the accused to an angry mob.

[3] Considered as a factor in isolation from the other factors that have to be taken into account in determining an appropriate sentence, there is no doubting that the offences of which the accused have been convicted were of such a character as would merit a substantial sentence of imprisonment. There are, however, other factors that have to be weighed in the balance. There are the interests of the community - which includes matters such as victim impact, the need for punishment to contain an appropriate element of retribution to sustain confidence in the effectiveness of criminal justice and affording some measure of deterrence, while also offering sufficient opportunity for rehabilitation and reform for the offender - and the individual characteristics of the accused; *S v Zinn* 1969 (2) SA 537 (A). Where the offenders are the sole or main providers for dependent children, as is the case in the current matter, that is also something that must be considered in the determination; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); 2007 (2) SACR 539; 2007 (12) BCLR

1312. Before turning to address those other factors in the current context, something more needs to be said about the nature of the offences.

[4] There is nothing to indicate that the accused committed the crimes for personal gain or out of a particular animus against the complainants, who were essentially unknown to them. It is evident that the crimes were committed in a peculiar social context. The commission of the crimes is a manifestation of a broad problem affecting a large section of South African society, notably those living in the widely impoverished, densely populated and under-resourced townships in our cities like Khayelitisha and Philippi, that is of persons in communities taking over and carrying out themselves the functions that in a properly functioning society would be discharged by the criminal justice system – the police and the courts. One is made aware of instances of mob justice and vigilantism almost daily through the media. Furthermore, although its establishment is matter of controversy and the subject of pending litigation, it is well-known locally that the provincial government has seen fit to appoint a commission of enquiry headed by a retired Constitutional Court judge and a former National Director of Public Prosecutions into the causes and consequences of the alleged shortcomings of the criminal justice system - in particular policing - in the Khayelitsha area of Cape Town. Counsel on both sides made passing references to the existence of the commission. This, if nothing else, supports the profile of the problem as a salient current issue. Indeed, more than a decade ago, the problem was described in the following terms in this court's judgment in *S v Schrich* 2004 (1) SACR 360 (C), to which Ms *Galloway* for the State referred in her argument:

> The learned authors [W Schärf and D Mina in *The Other Law: Non-State Ordering in South Africa* (Juta) 2001] outline the non-State ordering of South Africa by making the following comments at 6 of the work:
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> > 'Its [the State's] dilemma is living up to the promises of a very liberal Constitution by having a comprehensive embrace of all forms of ordering under the Constitution but not being able to exert sufficient power to protect its citizens from crime to a satisfactory degree. The irony is that the liberal State was supposed to reduce the need for non-State forms of ordering but the inability of the transforming State to rise to the level and scope of service delivery has had the opposite effect. Non-State forms of ordering have escalated considerably since 1994. Six years after the commencement of democratic rule the inclination on the part of civil society to perform roles that would normally be the exclusive domain of the police (at worst private security) is huge. In the absence of the State's ability to cope, citizens have appropriated that function in many of the townships. This is demonstrated most dramatically in the Western Cape where a group called People Against Gangsterism and Drugs (Pagad) has taken it upon

> itself to deter drug dealers from continuing with their business, failing which, they murder them.
>
> Similarly, in the African township of Guguletu outside Cape Town, taxi drivers became new administrators of street justice by publicly flogging suspected criminals and parading them along the streets stripped of their clothes. This was done to the cheers of frustrated community members. In other parts of the country vigilantism has developed very rapidly since 1994, thus the slow pace of the transition weakens the State's moral authority to clamp down on extra-state ordering initiatives, even if they fall manifestly into the realm of vigilantism. The vigilantes are seen to be achieving that which the State ought to but cannot do, namely, protecting ordinary citizens from unacceptably high crime

(at 365A-E)

[5] Without objection from the State, counsel for accused 2, Ms *Arnott*, put in a paper by Divya Singh of the School of Criminal Justice at the University of South Africa, '*Resorting to Community Justice when State Policing Fails: South Africa*', published in *Acta Criminologica* 18(3) 2005. The content of the paper articulates that the conduct in which the accused engaged is believed to be a manifestation, amongst other things, of seriously eroded confidence in the justice system by certain, invariably historically deprived, communities. According to the paper, these sections of the population lose all confidence in resort to the formal mechanisms of the criminal justice system due to the effects of a number of problems in the system, such as inadequate resourcing of policing, corrupt and/or ineffective policing; the slow and unresponsive court system characterised by the frequent withdrawal of criminal cases and the release of offenders back into the community on what is described as 'easy bail conditions', as well as other issues. This is not the place to determine the merit or lack thereof in the suggested bases for this societal response. The evidence adduced in the case was in any event far from adequate to qualify this court to attempt the exercise. The investigating officer's evidence did, however, confirm the extent of the problem in Khayelitsha. He described the significant portion of his caseload that was given over to what he called 'bundu court' matters. He also explained the difficulties encountered with the investigation and prosecution of such cases due to the uncooperative attitude of witnesses and the public; something that was manifest in the current case in the evasion by one of the complainants of the service of a subpoena and the failure by his sisters to comply with their subpoenas.

[6] The paper by Professor Singh records that vigilantes are seen by many in the communities in which the phenomenon of vigilantism and mob justice occurs as upstanding

and respectable members of the community, and indeed see themselves as serving the interests of their community. On reflection, even if wholly unacceptable, this much is understandable in the context of a perception by a community that the formal and constitutionally established criminal justice system is not functioning. As Ackermann J observed in *S v Makwanyane and Another* 1995 (2) SACR 1 (CC), 1995 (3) SA 391; 1995 (6) BCLR 665, at para [168] at the outset of constitutional democracy in this country:

> Members of the public are understandably concerned, often frightened, for their life and safety in a society where the incidence of violent crime is high and the rate of apprehension and conviction of the perpetrators, low. This is a pressing public concern. However important it undoubtedly is to emphasise the constitutional importance of individual rights, there is a danger that the other leg of the constitutional State compact may not enjoy the recognition it deserves. I refer to the fact that in a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the State, in the constitutional State compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa.

[7] Now in *Schrich* the phenomenon of vigilantism was dealt with in a sentencing context in connection with the interests of the community component of the *Zinn* triad. It was recognised that the phenomenon is fundamentally incompatible with the sort of society that the values of the Constitution seek to establish, and thus cannot be condoned and tolerated. In the result it was considered that severe punishments were indicated for offences committed as part of vigilantism. There can be no quarrel with that, in principle. The same approach, as a matter of principle, had indeed already been adopted in both the majority and minority judgments of the Supreme Court of Appeal in *S v Thebus and Another* 2002 (2) SACR 566 (SCA). The latter case was one in which the prescribed minimum sentencing regime in terms of the Criminal Law Amendment Act 105 of 1997 applied. In a case, like the current matter, where a prescribed sentencing regime does not apply, the approach still begs the question what form of severe punishment. It is by no means axiomatic that lengthy terms of direct imprisonment afford the only appropriate response. To incarcerate persons who are generally functioning well within society - albeit a dysfunctional society - ordinarily staying on the right side of the law, holding down stable employment and providing for their dependents, for a lengthy period risks returning to the community damaged, and even more problematic persons at the end of the exercise, and will not obviously achieve the generally accepted objects of punishment. Where such persons are responsible for the maintenance of dependants, the adverse social consequences of incarceration are obviously yet greater.

Incarceration will not address the causes of vigilantism and is unlikely, in my view, to provide an effective deterrent. On the contrary, having regard to the reported attitude of the affected communities towards vigilantes, it might well conduce to a greater alienation of the members of such communities from the formal criminal justice system. They might see lengthy terms of imprisonment as indications of the system being harsh on those who they see as the ones trying to do something effective about crime while it is otherwise soft on crime, or ineffective about it. In recording this I should not be misunderstood to suggest that such a view by the community should deter the courts from imposing imprisonment if it is appropriate. I mention it mainly to explain my view that the context of the offences is not one that if the accused were not committed to direct imprisonment the community's estimation of the criminal system would be further eroded. The context gives the remarks of Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) at 236A – C a somewhat anomalous effect. Schreiner JA, observing half a century ago that that the retributive aspect of punishment had tended to yield ground to the aspects of prevention and correction, cautioned '*But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment*'. In the current context, it is the maintenance of constitutional values rather than the indignation of the affected community that requires that the retributive or punitive aspect of punishment be accorded due weight. The challenge is how to achieve that.

[8] In weighing an appropriate sentence I think it is necessary to acknowledge that crimes committed in the context of vigilantism will often be different from the same acts perpetrated out of greed or delinquency. While their gravity should not be seen as being diminished on that account, the context does, I think, justify consideration of a different response when it comes to sentencing; one determined with especial regard to the need to promote rather than retard societal reconstruction and rehabilitation.

[9] The interests of the community must be assessed applying constitutional values. Thus there can be no question that any sentence that would appear to condone vigilantism, even if its causes are understood, would be inappropriate. A clear message has to be sent that the conduct is unacceptable and that it will be visited with the sanction of the law. The values of

the constitution do not, however, enjoin indiscriminately visiting brutal and brutalising behaviour in the context of vigilantism with uncompromising severity and formalised inhumanity. There should rather, as far as possible, be an endeavour, in the determination of punishment, a striving towards a humanising and debrutalising result. Meeting the problem and its effects with unmitigated harshness will do nothing to address the underlying causes, and does not serve the interests of the community, or promote the realisation of a society based on constitutional values. Vigilantism results in the inappropriate and primitive treatment of crime and offenders, it also results, because of its often arbitrary character, in the unconstitutional and inhuman treatment of innocents and their families. These are factors that require that punishment must be of a nature that objectively promotes confidence in the justice system. They are not factors that justify something akin to an eye for an eye approach, or indeed any approach that does not give an appropriately balanced treatment of the *Zinn* triad. The right approach to the determination of punishment in the circumstances requires that appropriate consideration be given to the full range of available sentencing options provided by the law.

[10] Accused no. 1 is 27 years of age, having been born on 24 September 1985. He is the youngest of four siblings. He comes from a stable and closely knit family background and grew up in Oudtshoorn. His father was employed by a petrol company and was a pastor in a church. His mother was a domestic worker. Both his parents are retired, but remain active in the activities of their church. The accused completed grade 12 at school and thereafter enrolled at Unisa for a four year course of study towards a baccalaureate in theology. He dropped out in his first year due to financial constraints. He thereafter completed a one year security management course in Port Elizabeth, which facilitated his subsequent acquisition of employment by the South African Air Force in 2005, where he has worked as an entrance controller. He retained his employment there until his suspension in January 2012 as a consequence of his arraignment in connection with the current matter. He achieved promotion from the rank of airman to that of corporal. He has maintained a fixed abode at the same address in Philippi in Cape Town since 2005. It is a one-bedroomed brick house consisting of a living room, kitchen, inside bathroom and a garage. He lives there with his girlfriend, with whom he has one child born on 5 February 2012. He has been in a relationship with his girlfriend for more than five years; she is employed at Truworths at Century City. He has a son by a previous relationship, who was born on 22 September 2002, and who lives with his former girlfriend in Oudtshoorn, towards whose care he contributes

financially. He is a congregant of the Methodist Church in Nyanga, where he regularly attends Sunday services and in addition regularly acts as a preacher. He has no previous convictions; on the contrary he is described in a report by a social worker from the Western Cape Government Department of Social Development as having lived 'an exemplary lifestyle' thus far.

[11] As a consequence of his convictions in the current matter Accused 1 will be discharged from the Air Force. Although he has been receiving his salary during the period he has been on suspension, the court was informed that payments received by him while under suspension will be deducted from his pension entitlement.

[12] The circumstances of Accused 1 have been assessed by a correctional official and a social worker. He has been found to be suitable candidate for correctional supervision and, notwithstanding that he persists in denying his complicity in the offences of which he has been convicted, is reported to be willing to perform community service, submit himself to rehabilitation programmes and to comply with all the conditions of a community-based sentence.

[13] Accused 2 is also from Oudtshoorn. Indeed all three accused are from that town. Their friendship is founded on their having grown up there together. Accused 2 was born on 14 May 1981. He is currently cohabitational relationship of two and a half years' standing. He has three children from two previous relationships. The children are aged 13, nine and seven, respectively. The first two, who were born of the earlier relationship, live with and are cared for by the accused's parents in Oudtshoorn. Their mother apparently shows no interest in the children and has no contact with them. The youngest child lives with her mother, to whom it would appear the accused was previously married for a short time. The accused is the sole financial provider for all three children.

[14] He comes from a relatively family stable background. Both his parents held down employment during their working lives, although his father had problems with alcohol, which led to his mother sometimes leaving the family home for short periods to stay with her parents. The accused's five siblings are all employed and live at various places in the Western Cape, apart from the youngest who is in grade 11 at high school in Oudtshoorn.

[15] The accused commenced his school career at the early age of five years. He completed his primary education with no difficulty and was reportedly a good performer. His early entry into the education system complicated the commencement of his high school

education, when he was considered too young to meet the admission requirements of the Oudtshoorn High School. As a consequence he was required to repeat his grade 7 year, which he did at a different primary school. Being artificially held back a year and then proceeding a year below his peers at primary school had an adverse effect on the accused and he did not perform as well at high school, failing grade 10, and deciding to drop out.

[16] Accused 2 thereafter enrolled at the South Cape College (George campus) in order to obtain his matric certificate. Unfortunately during that year he was involved as an unlicensed driver in a motor vehicle collision in which one of his friends was killed. As a consequence of the incident, which unsurprisingly had a profound and enduring psychological impact on the accused, he was convicted of culpable homicide, driving a vehicle while the alcohol content in his blood exceeded 0,08 grams per 100 ml, and driving without a driver's licence. The event also caused him not to complete his course at the South Cape College. He was sentenced to two years' imprisonment and released under correctional supervision after serving four months of the sentence. That period of his life (he was between 17 and 20 at the time) was also characterised by the use of cannabis. It appears that he resorted to the drug to alleviate the post traumatic symptoms he was experiencing as a consequence of the motor vehicle collision and its aftermath. The accused's report that he has been drug-free for many years was confirmed on immunoassay urinalysis testing administered by personnel from the clinical unit of the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) earlier this month. I do not regard the accused's previous convictions as relevant to the determination of sentence in the current matters. Indeed counsel for the State, quite reasonably, did not contend otherwise. He will thus be treated for sentence in this case as a first offender.

[17] Accused 2 has participated in a number of self improvement courses during the period from 2002 to 2012:

- Work Opportunity Programme (Kolping Society of South Africa) - 2002
- Computer Fundamentals Course (RPC Data South Africa) – 2004
- National Certificate: Municipal Finance Administration (South Cape College) – 2006
- National Certificate: Local Government Finance (Local Government Sector Education and Training Authority) – 2007
- Course on conflict management (CBLM Training Solutions) – 2008
- Business communication skills programme (BPG) – 2008
- Certificate in First Aid (The SA Red Cross Society) – 2010

- Lours Group Management Development Programme 2 (University of Stellenbosch, USB Executive Development Ltd) – 2012

He has held down fixed employment in successive positions since July 2002 until February 2013. His employers have included the Oudtshoorn Municipality, Sanlam, Cape Nature, the SA National Biodiversity Institute and Cape Media. He lost his position with the SA National Biodiversity Institute when he spent a month in custody after his arrest on the charges in the current matter. His contract with the Grove Group was not extended in February 2013 because of the time he was spending out of office due to the trial in the current matter. During the period 2006 to 2009, when he moved to Cape Town, accused 2 served on the Oudtshoorn Tourism Board and in the Oudtshoorn Business Chamber. In 2009 he established his own township tourism business in Oudsthoorn, which he conducts through a close corporation. The bookings are attracted via the internet and he employs a local guide to conduct the tours.

[18] The reports prepared by Nicro in respect of accused 2 suggest that were he to be incarcerated and as a result lose his income it would be detrimental to his sense of mastery and success at work, which in turn could result in him developing attitudes that could induce a sense of hopelessness placing him at risk of future offending. Whether or not this indeed a material risk, it is evident that accused 2 is not the sort of person who community interest would require to be removed from the community. It is unsurprising therefore that a correctional official has reported him to be a suitable candidate for correctional supervision.

[19] Accused 2 was the only one of the three accused to give evidence in mitigation of sentence. He confirmed his personal particulars and testified as to his fears about the negative effects incarceration might have on his life. He said that he had found conditions in Pollsmoor prison during his month long incarceration there in 2011 much worse than his experience of prison life after his conviction for culpable homicide after the motor vehicle collision referred to earlier. He said it was effectively necessary to join a gang for self protection. He said that drugs, the smuggling of weapons, racketeering and corruption were rife in the prison. The accused's depressing report of prison conditions is supported by the literature referred to in the jointly written report by Ibtisaam Peck and Arina Smit of Nicro that was put in during Ms Peck's evidence; in particular the 2007 paper[1] by Lukas Muntingh

[1] Although the details of the paper were omitted from the table of references at the end of the joint report of Ibtisaam Peck and Arina Smit, I believe that I have managed independently to identify it as '*Prisons in South Africa's Constitutional Democracy*' presented as part of the Criminal Justice Programme of the Centre for the Study of Violence and Reconciliation in October 2007.

of the Civil Society Prison Reform Initiative, with its references to the wide range of systemic challenges that characterise the South African Correctional Services reported in the Jali Commission report. As stated in the paper '*What happens inside prisons does not stay there; it goes home with released prisoners and the staff who work there: "When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them" (Gibbons and Katzenbach, 2006: 11).*[2] *Ultimately it affects the overall state of democracy: rights violations, corruption, impunity and a host of ills associated with prisons spill over into the domain of free citizens on an ideological level*.'

[20] Accused 3 is 33 years of age, having been born on 10 July 1979. He is married with two children by his wife. He has another daughter who is 16 years of age who lives in Aberdeen in the Eastern Cape with her mother. He owns the house in which he and his family reside. They have lived there for four years. He has been employed by a firm of painters since October 2007. He is required to work over weekends and after hours when the need arises. He and his wife, who is also employed at a printing company, share financial responsibility for the maintenance of their two children. The accused also contributes towards the maintenance of his daughter, who lives in Aberdeen. He comes from a closely knit family background. His parents are deceased. His sister lives in the family home at Oudtshoorn and his brother is undergoing tertiary education in George. He is a first offender and, although, like his co-accused, he persists in denying complicity in the crimes for which he has been convicted, he has indicated his willingness to submit to correctional supervision. A correctional official has confirmed that accused 3 is a suitable candidate for correctional supervision.

[21] Counsel for each of the accused argued that an appropriate sentence in the current matter would be one of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. Correctional supervision is a sentencing option that was introduced in terms of s 41(a) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991, at a time when the Prisons Act 8 of 1959 (which the Amendment Act renamed as 'the Correctional Services Act') was still in place. In *S v R* 1993 (1) SA 476 (A), 1993 (1) SACR 209, Kriegler AJA remarked on the character of the amending legislation, and its introduction of correctional supervision as a sentencing option as follows (at 487F-H SALR):

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[2] Gibbons, J and Katzenbach, N. (2006). "*Confronting confinement: A Report of the Commission on Safety and Abuse in America's Prisons*".

> Die ingrypende aard van die Wysigingswet is opvallend by die blote aanskoue van die aanhef - dit beslaan meer as 'n bladsy. Die belangrikste aspek daarvan is die klemverskuiwing vanaf gevangenisstraf na hervorming. Die benaming van Wet 8 van 1959 ('die Hoofwet') word (by art 33(1) van die Wysigingswet) verander van die Wet op Gevangenisse na die Wet op Korrektiewe Dienste, met ooreenstemmende naamsveranderings in die woordomskrywingsartikel (art 1); die missie van die herbenaamde Departement van Korrektiewe Dienste in art 2(1) van die Hoofwet word herbewoord (by art 2) om die korrektiewe strewe te benadruk; die vrylatingsadviesraad en vrylatingsrade word (by arts 7 en 5 onderskeidelik) herbenaam en die korrektiewe gerigtheid van hul werksaamhede word uitgelig; en, wat hier van besondere belang is, 'n splinternuwe hoofstuk VIIIA word (by art 28) ingevoeg waarin uitvoerig voorsiening gemaak word vir korrektiewe toesig, weereens met toepaslik ooreenstemmende wysigings (by art 1) van die woordomskrywings in art 1 van die Hoofwet.

(Act 8 of 1959 has since been repealed and replaced by the Correctional Services Act 111 of 1998.)

[22] In terms of the currently applicable statute ‘correctional supervision’ is defined as ‘a form of community corrections contemplated in Chapter VI’ (see s 1 of the Act). ‘Community corrections’ are in turn defined as meaning ‘all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department’. The objectives of community corrections are set out in s 50(1)(a) of the Act as follows:

> The objectives of community corrections are-
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> (i) to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;
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> (ii) to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;
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> (iii) to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
>
> (iv) to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.

[23] Section 52(1) of the Correctional Services Act, 1998, provides:

> When community corrections are ordered, a court, the Correctional Supervision and Parole Board, the National Commissioner or other body which has the statutory authority to do so, may, subject to the limitations contemplated in subsection (2) and the qualifications of this Chapter, stipulate that the person concerned-
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> (a) is placed under house detention;
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> (b) does community service in order to facilitate restoration of the relationship between the sentenced offenders and the community;
>
> (c) seeks employment;

(d) where possible takes up and remains in employment;
(e) pays compensation or damages to victims;
(f) takes part in treatment, development and support programmes;
(g) participates in mediation between victim and offender or in family group conferencing;
(h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
(i) is restricted to one or more magisterial districts;
(j) lives at a fixed address;
(k) refrains from using alcohol or illegal drugs;
(l) refrains from committing a criminal offence;
(m) refrains from visiting a particular place;
(n) refrains from making contact with a particular person or persons;
(o) refrains from threatening a particular person or persons by word or action;
(p) is subject to monitoring;
(q) in the case of a child, is subject to the additional conditions as contained in section 69; or
(r) is subject to such other conditions as may be appropriate in the circumstances.

[24] If a person sentenced to correctional supervision fails to abide by the terms and conditions of the sentence he may be subjected to a range of corrective measures including being arrested and brought before court for resentencing (s 70 of Act 111 of 1998 and s 276 (4) of the Criminal Procedure Act). The sentence is of a flexible character in order to promote the best achievement of its objectives. Thus, if in the opinion of the National Commissioner a change of circumstances calls for a change in the conditions, the Commissioner may apply to the court which imposed the conditions to amend them (s 71). The flexibility inherent in the power of the court imposing correctional supervision to tailor the applicable conditions was a feature emphasised by Kriegler AJA in *S v R* supra, at 488 (SALR); see also *S v M* supra, at para. 64.

[25] In *S v R* it was held (at 488G) that in devising the sentence option of correctional supervision the legislature had signalled its intention to distinguish between two types of offender, namely those who had to be isolated from the community by incarceration and those who were deserving of punishment but not required to be removed from the community. Kriegler AJA added that the introduction of the sentence option reflected that punishment, while retaining its punitive character, need not necessarily, or even primarily, be achieved by locking the offender up in a prison. The sentence is designedly an alternative to imprisonment, and its introduction represented a material shift in emphasis in the achievement of the societal objectives of sentencing. In *S v D* 1995 (1) SACR 259 (A) at

266c – d, Nicholas AJA observed '*In its nature a sentence of correctional supervision is not denunciatory. It does not follow, however, that such a sentence is necessarily inappropriate because the case is one which excites the moral indignation of the community. The question to be answered is a wider one: whether the particular offender should, having regard to his personal circumstances, the nature of his crime and the interests of society, be removed from the community.*' In *S v Williams and Others* 1995 (2) SACR 251 (CC), at para 67-8, Langa J remarked:

> [67] The introduction of correctional supervision with its prime focus on rehabilitation, through s 276 of the Act, was a milestone in the process of 'humanising' the criminal justice system. It brought along with it the possibility of several imaginative sentencing measures, including, but not limited to, house arrest, monitoring, community service and placement in employment. This assisted in the shift of emphasis from retribution to rehabilitation. This development was recognised and hailed by Kriegler AJA in *S v R* as being the introduction of a new phase in our criminal justice system allowing for the imposition of finely-tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community.
>
> [68] The development of this process must not be seen as a weakness, as the justice system having 'gone soft'. What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity.

[26] In *S v M* supra, at para. 63, Sachs J, writing for the majority in the Constitutional Court, reiterated that correctional supervision should not be categorised as a lenient alternative to direct imprisonment. The learned judge quoted, with approval, the following extract from the unreported judgment of Conradie J in *The State v Margaret Gladys Harding* CPD SS61/1992, 23 September 1992) in support of the proposition:

> '(i)n some ways it is harder than imprisonment. A cynic once said that the easiest life on earth is being a soldier or a nun: you only have to obey orders. Prison is like that. A model prisoner is the one who best obeys orders. These are not ideal circumstances, generally, for the regrowth of character. Correctional supervision gives an offender greater scope for regrowth of character. It involves a good deal of psychological strain, it takes a great deal of restraint and determination on the part of a probationer. It can be very stressful. A probationer does not have his freedom - far from it - but he is not cut off from the community altogether. His support systems are not destroyed and in this way his rehabilitation prospects are enhanced. Moreover, there is the benefit that society does not lose the skills of someone who is able to maintain himself and his dependants, as well as the family unit. Community service, which goes hand in hand with correctional supervision, is beneficial.'[3]

[3] Also quoted with approval in *S v Schutte* 1995 (1) SACR 344 (C) at 349d – g.

[27] Ms Galloway for the State argued that correctional supervision was an inappropriate sentence because of the seriousness of the offences of which the accused have been convicted. In *S v M* supra, Sachs J noted (at n 69 to para. 63) that '*coupled with the correct conditions, correctional supervision could, in appropriate cases, even be suitable for serious offenders*'.[4] The learned judge cited *S v Ingram* 1995 (1) SACR 1 (A), at 9*e-f*, in support of his observation. *Ingram* was a murder case. In *Ingram* loc cit, Smalberger JA said the following:

> As was pointed out in *S v R* (supra at 488G), the Legislature, by the introduction of this option, has sought to distinguish between two types of offenders: those who ought to be removed from society and imprisoned and those who, although deserving of punishment should not be so removed. Correctional supervision can be coupled with appropriate conditions to make it a suitably severe sentence even for serious offenders. It therefore allows for the imposition of an adequate sentence without resorting to imprisonment with all its attendant negative consequences for both the prisoner and society. As correctional supervision under s 276(1)(h) can, in terms of s 276A(1)(b), only be imposed for a period not exceeding three years, it is not a sentence that readily lends itself to the very serious category of crimes (which would normally call for higher sentences) and should therefore not be too lightly imposed in such cases.

It seems to me, with respect, that Sachs J's aforementioned observation laid the emphasis on the first part of the quoted passage from *Ingram*. Certainly, I do not read the passage from *Ingram* to suggest that correctional supervision is not an option in a case in which incarceration for more than three years would otherwise be the alternative. As mentioned, there is authority to the effect that conditions of correctional supervision can be framed so as to make it in some senses a harsher regime than imprisonment. That acknowledgment shows that it is misdirected to indiscriminately equate three years of correctional supervision with three years' direct imprisonment. The remarks made by Smalberger JA were uttered before the introduction of the minimum sentence regime in terms of Act 105 of 1997. That legislation describes a range of offences for which the legislature has determined that lengthy periods of direct imprisonment should be the norm, save where there are substantial and compelling circumstances to justify a departure from the prescribed minimum; and even where such circumstances are found to exist, the prescribed minimum still serves as a

[4] Cf. also *S v L* 2012 (2) SACR 399 (WCC), a murder case in which the convicted accused was a teenaged boy, where Cloete AJ (Yekiso J concurring) noted, at para. 26, '*Our courts have stressed on numerous occasions that judicial officers should not hesitate, in appropriate cases, to make use of correctional supervision. It has already been imposed for very serious crimes, including murder: S v Booysen 1993 (1) SACR 698 (A); S v Potgieter 1994 (1) SACR 61 (A); S v Kleynhans 1994 (1) SACR 195 (O); and S v Ingram 1995 (1) SACR 1 (A). In all of these cases the perpetrators were adults*'.

touchstone from which to measure the degree of departure that is justified. I am of the view that in the context of the currently applicable legislative framework on sentence, seen holistically, it would be in instances to which the minimum sentencing provisions apply that resort to s 276(1)(h) or (i) would be difficult, but nevertheless not impossible,[5] to justify. In my view the judgment of the full court of the Eastern Cape in *S v Mngoma* 2009 (1) SACR 435 (E), which is cited by the commentators in Du Toit et al *Commentary on the Criminal Procedure Act* in support of the proposition that there are, however, '*circumstances where correctional supervision as a sentencing option would be improper and disproportionate to the gravity of the offence*', falls to be understood in this context. In that case a sentence of five years' imprisonment had been imposed in terms of s 276(1)(i) of the Criminal Procedure Act (i.e. imprisonment from which the convicted person may be placed under correctional supervision in the discretion of the Commissioner or a parole board) in respect of an offence which carried a minimum sentence penalty of 15 years' imprisonment in terms of Act 105 of 1997. The sentence was understandably, with respect, held by the full court to be disproportionate to the gravity of the offence.

[28] The offences of which the accused have been convicted are not subject to the minimum sentencing regime. I am satisfied that it is possible to craft a set of community corrections, which, taken together with a sentence of imprisonment, which shall be wholly suspended on suitable conditions, will constitute an appropriately severe sentence to match the seriousness of the offences of which the accused have been convicted. In order to achieve this result it has been necessary to describe the conditions of community corrections in far more detail than suggested by the correctional official and apparently endorsed by the accuseds' counsel. I consider that the sentencing court should in any event have the most determinative say in the framing of conditions. Any other approach courts criticism as an abdication by the court to the Department of Correctional Services of its sentencing powers; cf. *S v Govender* 1995 (1) SACR 492 (N). As Sachs J stated in *S v M* supra, at para. 54' '*The sentencing courts must themselves identify the specifics of the correctional supervision sentence, but not necessarily the manner in which it is to be implemented. In Govender it was held that while the court should clearly indicate the duration and extent of the specific components of the sentence, it was not desirable for it to specify the manner in which the*

[5] Cf. *S v Romer* 2011 (2) SACR 153 (SCA).

sentence is to be carried out. It was held that the court must retain effective control over the sentence without compromising flexibility. This appears to be a sound principle.'[6]

[29] I have determined on this course after the most anxious consideration. I was in particular concerned about the attitude of all of the accused in refusing to admit to their complicity in the offences. I have decided on reflection that this does not materially detract from their amenability to reform and rehabilitation, if regard is had to the positive aspects of their characters as evidenced by their apparently crime-free and socially constructive lives thus far. Denial and cover-up appear in any event to be an integral characteristic of the culture of vigilantism. This is evidenced by the refusal or inability of affected communities to treat it as an evil rather than a good, and the consequent lack of cooperation with which the police and the courts have to deal in cases in which it is a feature.

[30] As already recorded, the period and conditions of correctional supervision are designed to be severe to reflect the gravity of the crimes. It is for this reason that there is deliberately no provision permitting the Commissioner of Correctional Services to ameliorate or remit any of the defined community corrections attached to the sentence. I have also sought to provide a measure of restorative justice by way of determining that each of the accused should pay a measure of monetary compensation to certain of the complainants or their families. The amounts determined are nominal and the conditions are not intended in any way to detract from the right of any affected complainant or other person to institute proceedings against any of the accused for additional compensation in damages in any amount which they are able to prove; the compensatory awards are intended to be a token or *solatium,* and not a financial measure of loss. I have omitted Zolani Ntliziyombi from the complainants to be compensated because of his non-cooperative attitude in the prosecution of the accused. The sentence of imprisonment to be imposed on accused 2 differs from those to be imposed on accused 1 and 3 so as to reflect that he was not convicted of house breaking on count five.

[31] In determining upon a sentence of correctional supervision I have decided to treat the offences of which the accused have been convicted globularly, as one, for the purposes of sentence. In adopting this approach I have not overlooked the line of authority which calls it into question; see e.g. *Director of Public Prosecutions, Transvaal v Phillips* 2013 (1) SACR 107 (SCA), at para 27, and the other cases cited there. While recognising the undesirability

[6] Footnotes omitted.

of globular sentencing as a general rule, there are circumstances when it is indicated. And the authorities to which I have just referred themselves recognise as much. It is appropriate in this case because the offences were committed as parts of the carrying out of a single course of conduct and because it would be impracticable to formulate and attach the conditions of correctional supervision to the offences in a componential manner.

[32] Taking all counts of which they were convicted as one for the purposes of sentence, ACCUSED 1 AND 3 are each sentenced to SEVEN (7) YEARS' IMPRISONMENT, which shall be wholly SUSPENDED FOR A PERIOD OF FIVE (5) YEARS on the following conditions:

1. That the accused are not convicted of any offence committed during the period of suspension involving assault, kidnapping or housebreaking for which a sentence of imprisonment without the option of a fine is imposed.

2. That the accused undergo a period of three years of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 comprising of the following community corrections:

    (a) House arrest for the full duration of the period of correctional supervision at their current fixed abodes or such other place as might be determined by the Commissioner for Correctional Services on written application by the accused and on terms to be determined by the Commissioner of Correctional Services, but which shall provide that the accused shall be confined to their places of abode for no less than eight hours on any day in which they are engaged in employment and for no less than 12 hours on any day in which they are not so engaged.

    (b) 625 hours of community service to be undertaken at the rate of not less than 16 hours of service per calendar month during the period of correctional supervision. Subject to the aforegoing, the nature of the community service and the place and times during which it shall be undertaken shall be determined by the Commissioner of Correctional Services.

    (c) The retention of his employment, or failing that, his conscientiously, and to the satisfaction of the Commissioner of Correctional Services,

seeking employment during the period of correctional supervision. In the event that the accused is for any time during the period of correctional supervision unemployed he shall submit at the end of each month to a correctional official designated by the Commissioner of Correctional Services a report detailing the steps he has taken to seek employment vouched by such supporting documentation as the Commissioner or the designated official may require. The Commissioner's attention is directed to the provisions of s 61(2) of the Correctional Services Act 111 of 1998, which require the Commissioner to assist in the attempt to find employment.

(d) The payment of compensation in the amounts fixed below to the following persons:

Lwando Sydney Somdaka in the amount of R1000

Violet Thembisa Ndabambi (the mother of the late Andile Mzamo Ndabambi) in the sum of R1000.

Xoliswa Sani in the sum of R500.

Payment of the aforementioned compensation shall occur in such instalments and at such times as may be directed by the Commissioner of Correctional Services with regard to the accused's income and reasonable expenditure requirements, proof of which may be required by the Commissioner. Written proof of payment of the compensation must be vouched by the accused to the Commissioner in accordance with his directions.

(e) Participation in such treatment, development and support programmes as may be determined by the Commissioner of Correctional Services. The accused are directed to submit to a complete assessment by a social worker of the Department of Correctional Services to facilitate the determination of the programmes in which they should participate.

(f) Payment of such amount towards the costs of the community corrections to which he is subjected in terms hereof in instalments as may be determined by the Commissioner of Correctional Services

after regard to the accused's income and reasonable expenditure requirements, proof of which may be required by the Commissioner for this purpose.

(g) Restriction to the magisterial districts of the Cape, Wynberg, Simon's Town, Bellville, Goodwood, Somerset West, Strand and Kuils River and such other districts as the Commissioner of Correctional Services may on written application by the accused determine for the purposes of facilitating the accused's engagement in employment, or for compassionate reasons.

(h) Refrains for the whole of the period of correctional supervision from the use of alcohol or illegal drugs.

(i) Prohibition during the whole of the period of correctional supervision from attendance at any place such as a tavern, pub or shebeen where alcoholic beverages are served.

(j) Monitoring by the Department of Correctional Services, including electronic tagging if so determined by the Commissioner, in order to ensure compliance with the conditions of correctional supervision.

(k) The obligation to inform the Commissioner of Correctional Services in advance of any change of residential and/or work address.

3. That the accused shall report to the Correctional Officer at 17 Corporation Street, Cape Town by no later than 14h00 on Wednesday, 17 April 2013, for the purpose of commencing his correctional supervision..

[33] Taking all counts of which he was convicted as one for the purposes of sentence, ACCUSED 2 is sentenced to six (6) years' imprisonment, which shall be wholly SUSPENDED FOR A PERIOD OF FIVE (5) YEARS on the same conditions as those set out in paragraphs 1, 2 and 3 of the conditions of suspension attached to the sentences of imprisonment imposed on accused 1 and 3, save that housebreaking shall in his case be excluded from the offences listed in paragraph 1 of the conditions.

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