IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: SS03/2013

DATE: 24 MARCH 2015

In the matter between:

THE STATE

And

MZIWABANTU MADIBA MNCWENGI	Accused 1
MZIMASI MADIBA MNCWENGI	Accused 2
BUYELWA NOKWANDISA MNCWENGI	Accused 3
LUMKO BAMBALAZA	Accused 4
XOLANI MAKAPELA	Accused 5
MAWANDE SIBOMA	Accused 6

S E N T E N C E

BOQWANA, J:

INTRODUCTION

The accused were all convicted of 3 counts of kidnapping and 3 counts of murder of Sivuyile Rola, (hereinafter referred to as 'Mshwele'), Luxolo Mpontshane, (hereinafter referred to as 'Luxolo') and Mabhuti Matinise, (hereinafter referred to as 'Mabhuti'). In addition to that accused 1, 2, 3 and 4 were convicted of assault with intent to cause grievous bodily harm

of Mphuthumi Nobanda, (hereinafter referred to as 'Mphuthumi'), who is now deceased in circumstances not related to this case.

This is one of those sad and unfortunate cases that have become known as vengeance or vigilante killings. This particular case involves the kidnapping and killing of 3 young men, namely Mshwele, Luxolo and Mabhuti, who were allegedly known to be troublemakers in Harare, Khayelitsha and the assault of Mphuthumi who managed to free himself and run away. This all began because of a stolen TV belonging to accused 1. The Court deals with the offences more fully later.

The principles applicable in determining a fair, balanced and appropriate sentence are trite. '*What has to be considered is the triad consisting of the crime, the offender and the interest of society'*. See **S v Zinn 1969 (2) SA 537 (A)** at 540G.

In determining an appropriate sentence regard must be had, *inter alia,* to the main purposes of punishment. These were described in **R v Swanepoel 1945 (AD) 444** at 455 as deterrent, preventative, reformative and retributive. In **S v Rabie 1975 (4) SA 855 (A) at 862A-B** reference was made to **Gordon, Criminal Law of Scotland 1967 at 50** where it was stated that: '*The retributive theory finds the justification for*

punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformative, preventative and deterrent all find their justification in the future in the good that what produce as a result of the punishment'.

In **S v Khumalo and Others 1984 (3) SA 327 (AD) at 330 E,** referring to **R v Swanepoel s*upra*** the Court held that **deterrence** was the "essential", "all important", "paramount" and "universally admitted" object of punishment. The Court in that matter further held that the other purposes of punishment are accessory to deterrence. In this regard it made reference to **R v Karg 1961 (1) SA 231 (A)** at 236A-B where it was held that while the deterrent effect of punishment has remained as important as ever, the retributive effect, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. It was however pointed out in the **Karg** decision 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. When determining an appropriate sentence there is as was pointed out in **S v Rabie s*upra* at 861D,** a duty on the presiding judicial officer to approach the determination with a mindset of mercy or compassion or plain humanity.

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The accused were convicted of serious offences including, *inter alia,* murder in respect of which, in this case, section 51(1), read with Part I(d) of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of life imprisonment, given that the offence was committed in the execution or furtherance of a common purpose.

In terms of section 51(3)(a), if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence. For a Court to come to that conclusion it must consider the totality of the evidence together with other relevant factors traditionally taken into account when sentencing, together with the principles set out above.

Witnesses were called in mitigation of sentence on behalf of the accused, with the exception of accused 3 and 6. Accused 1 called Nowayizeti Mqathane, his sister, as a witness to testify on his behalf in mitigation of sentence. Accused 2 testified on his own behalf. Accused 4 called his brother, Tembelani Bambalaza as a witness to testify in mitigation of sentence. Babalwa Makaphela was called as a witness for accused 5. Accused 3 and 6 did not testify or call witnesses

but argument in mitigation was given by their legal representatives *ex parte*.

All defence counsel requested an opportunity to arrange for pre-sentencing reports and proceedings were adjourned for that purpose. Ms Chantel Clarke, (hereinafter referred to as 'Ms Clarke'), who is a Probation Officer, prepared and presented reports in respect of accused 1 and 2. Probation officer's reports in respect of accused 3, 4, 5 and 6 were prepared and presented by Ms Astrid Leandra Klaasse, (hereinafter referred to as 'Ms Klaasse').

The Correctional Supervision reports in respect of all the accused were prepared and presented by Ms Ncediswa Sentile, (hereinafter referred to as 'Ms Sentile'). Ms Clarke and Klaase as well as Ms Sentile testified on their reports.

THE OFFENCES

Dealing with the offences. Evidence indicated that the deceased were brutally assaulted over a sustained period of time in circumstances which showed a deliberate and brazen disregard, not only for the deceased's individual rights of liberty, dignity and bodily security but also for the rule of law. The victims were tied either with ropes and / or wires and

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brazenly assaulted whilst in a helpless state. One of the bodies was found with burn wounds. The post-mortem examination by Dr Anthony revealed that the victims must have suffered a great deal. According to Dr Anthony the head injuries and rib fractures were indicative of a considerable amount of force. The internal contusions of the lungs and liver would have caused a lot of pain. The deceased were bleeding profusely from their heads at the time they were at accused 1's place and seen leaving with a bakkie for the last time with the accused.

The argument preferred by some of the defence counsel that the deceased were merely being taught a lesson because they were known troublemakers in the community that is marred with criminal elements, cannot be sustained in the face of evidence showing the gruesome nature of the assaults. This is clearly not a case of the so-called thugs being chastised by members of the community by being given 'a hiding' or a few lashes or a beating and being 'let go' thereafter, which behaviour is of course also not condoned.

The deceased were assaulted by the accused repeatedly, and not by a mob of community members. Community members in fact were by-standers who, according to the State witnesses, were concerned about the assaults and just wanted the stolen

TV to be found. At some point they pleaded with the accused concerned to stop beating the deceased, saying that their parents should pay for the TV. As the bakkie was leaving they were shouting 'please do not kill them.'

There was evidence that a committee structure existed in the community. According to the witnesses, when allegations of theft are reported to the members of the committee they would hold a meeting, interrogate the suspects and 'beat' them if they were not telling the truth. This apparently occurred at a place called Ezinkukwini. However, there is no evidence of any committee meeting taking place in the present matter where the young men were interrogated by the committee members about the missing TV and a decision being taken to beat them. Accused 2 mentioned that he reported the stolen TV to the committee but there is no evidence that the victims were taken to the committee. At all material times the crimes were perpetrated by accused 1 and his family members, accused 2 and 3, with the assistance of the other accused.The accused acted on untested information and rumours that the deceased were the culprits who stole the TV. Even if the deceased were known thugs and troublemakers within the community, they did not deserve to be mercilessly tortured and killed in such a manner. It is so that, after all the ordeal, the TV was never found. It is still not known where the TV is and

it was not conclusively established that the three young men were the culprits, yet they lost their lives in the process.

The accused continued to assault them even after they were bleeding profusely, and the TV not found and drove off with them, leaving them to die in a secluded area at Macassar Sand Dunes, unattended. The medical evidence showed that exposure and blood loss contributed to their death, which was as a result of multiple injuries in respect of Luxolo and Mabhuti and a head injury and consequences thereof in respect of Mshwele.

ROLES PLAYED BY EACH OF THE ACCUSED IN THE COMMISSION OF THE CRIME

Mr Colenso for accused 5 implored the Court to consider the role played by accused 5 in the commission of the offences and the exculpatory parts of his statements. Whilst maintaining his presence throughout the events, in short, accused 5, in his statements, exculpated himself by saying that he and / or another community member tried to stop the assaults and asked the victims to tell the truth so that the beatings could stop, at some point he was confused and watching whilst the assaults were taking place and he never played any role in the assaults. According to Ms Sentile, who

compiled the correctional supervision report accused 5 told her that:'*he admits guilt to this offence, he accepts the responsibility for the offence and he takes responsibility for his actions.'* The accused informed her that if his parents were still alive he was going to ask them to visit the families of the victims and apologise for what happened on his behalf. In cross-examination Ms Sentile further explained that when interviewing accused 5 in prison he told her that:

> *'He was involved in the crime and that he was there all the way. He did everything, he assaulted, he kidnapped and then he also murdered the accused.'*

Reference to 'murder the accused' is obviously an error, it should be deceased. See page 4763 of the record.

According to Ms Klaasse, who prepared the probation officers report, accused 5 however did not take any responsibility for the commission of the offences.

Mr Colenso in support of his submissions that the alleged role played by accused 5 in the commission of the offences should be taken into account referred to the judgment of **S v Ningi and Another 127/99 2000 ZACSA 184, (29 September 2000)**

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where the Court said the following at paragraph 9:

> *"It follows that for the purpose of sentence it must be accepted that the appellants participated in the activities of the mob only at a very late stage and indeed after the real damage had been done. This limited degree of participation must, furthermore, be seen in the context of events which preceded the attack on dormitory 25. The attack was in retaliation for the earlier attack on dormitory 11. To this extent there was clearly a measure of provocation. In all the circumstances it seems to me that this is an appropriate case to refer back to the Regional Magistrate to consider imposing a sentence under section 276(1)(h) of Act 51 of 1977."*

Firstly, the **Ningi** decision is distinguishable in that the accused in that case participated only at a late stage after the real damage had been done. Secondly, the exculpatory parts in the statements of accused 5 were not repeated under oath and tested in cross-examination. Same applies to accused 6. In this regard *see* ***Litako and Others v S 2014 (2) SACR 431 (SCA)*** at paragraphs 65 and 66. Thirdly, what the accused told Ms Sentile was also not repeated under oath and it

furthermore contradicts the exculpatory parts of his statement as well as what he told the probation officer.

Moreover, in this instance, events continued from accused 1's place and the bridge where witnesses observed what each of the accused were doing, to when all the accused left with the three deceased on the bakkie, injured and bleeding, which was the last time they were seen alive until their bodies were found in Macassar Sand Dunes. The Court made findings based on direct evidence and inferential reasoning that all the accused acted together with common purpose and actively associated themselves in the commission of the offences.

Accused 1, 2, 3 and 4 that testified denied any involvement in the commission of the offences. Throughout the case the accused distanced themselves from the commission of the offences and denied any involvement in the killing of the deceased. The Court found their versions to be a fabrication and false. Accused 5 and 6 elected not to testify. No testimony was placed on record by anyone, including the accused, showing any roles that any of them played in the commission of the crimes after they left the bridge to look for the TV and after the bakkie left for the last time from accused 1's place with all three deceased bleeding until the discovery of their bodies at Macassar Sand Dunes. This is therefore not

a matter to impute degrees of participation or roles played by the individual accused in committing the crimes.

THE CONTEXT IN WHICH THE CRIMES WERE COMMITTED AND THE INTEREST OF THE COMMUNITY

It has been argued that Khayelitsha residents take the law in their own hands because of police inefficiency. However, as far as this case is concerned none of the accused testified that they assaulted the deceased because of police not attending to their calls or because police tended to ignore or turn a blind eye to criminal conduct. In fact, accused 1, 2, 3 and 4 denied assaulting the victims. Accused 5 and 6 did not testify. It is clear from the evidence that from the outset the reason for the assaults was to get information and to trace the missing television. It is also important to note that the assaults took place only four days after the theft was reported to the police.

Be that as it may, Lindelwa Nobanda and Lithule Mafethe testified that they called the police when the ordeal was taking place at accused 1's place on the day in question and police never came. Members of the South African Police Services who testified in Court could not confirm such reports. The Court takes into account the fact that the crimes in question took place in a context of a Khayelitsha community that

experiences crimes of theft on a regular basis. In this regard, the Court takes note of the findings of the Khayelitsha commission report published in 2014, which found that vengeance killings of vigilantism is high in that community due to slow or non-responsive action of the police to calls or complaints made by community members and perceived police inefficiency, among other reasons.

Vigilante cases have featured many times in our Courts. One of the more recent cases is that of **S v Dikqacwi SS49/2012 2013 ZAWCHC 67, (15 April 2013)** where Binns-Ward, J referred to case law and literature that examined vigilante behaviour, which literature suggests that vigilante behaviour results primarily from lack of confidence in the criminal justice system, mainly in under-resourced communities. Reference is made to the decision of **S v Makwanyane and Another 1995 (3) SA 391** at para [168] a judgment made in the beginnings of the constitutional democracy. In that case the Court held as follows:

> *"Members of the public are understandably concerned, often frightened for their life and safety in a society where the incidents of violent crime is high and the rate of apprehension and conviction of 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 rights 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."

At paragraph 4 Binns-Ward, J observed as follows:

"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 wildly impoverished, densely populated and under-resourced townships in our cities like Khayelitsha and

Philippi, that is of persons and 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 a 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. Council 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."

Whilst it is understood by the Court that accused 1 lost his plasma TV which he must have valued, which was allegedly stolen by habitual offenders, vengeance of the kind committed

by the accused cannot be condoned by civil society.

Crime levels in our country are unacceptably high. Khayelitsha, as can be gleaned from reports of the Probation Officers has the second highest murder rate in the country with 286 murders reported over the period of 2011 / 2012. It has been reported that 20 vigilante related deaths occurred in Khayelitsha during 2012. In this regard see **Civil Society Prison Reform Initiative Community Law Centre Submission for Phase 1 of Commission of Enquiry into allegations of Police Inefficiency in Khayelitsha at paragraph 4** annexed to the Probation Officers report for accused 1.

The Court must take into account the public's interests in seeing that convicted criminals are adequately punished and seen to be adequately punished for the crimes they committed. In this regard see **S v X 1996 (2) SACR 288 (W) at 289c-d.**

The accused had no regard for human life. The Court needs to send a clear message that criminal conduct of this nature will not be tolerated. Sentences must boost the confidence of the public in our Courts and the criminal justice system. This however does not mean that accused must be sacrificed in the name of deterrence. Appropriate sentences must fit the

offence, the offender and the interest of the society. **See S v SMM 2013 (2) SACR 292 (SCA) at 303a.**

In **S v Mhlakaza and Another 1997 (1) SACR 515 (SCA) at 518E-G** the Court held that: *"The object of sentencing is not to satisfy public opinion but to serve the public interests."* It further held that: *"It remains the Court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."*

REMORSE

The issue of remorse was raised. Remorse remains an important factor. Remorse or lack thereof must however not be overemphasised in relation to the other factors that must be considered. There are many reasons why remorse may or may not be shown. It is trite that if the accused shows genuine remorse punishment will be accommodating, especially when the accused has taken steps to translate his or her remorse into action. Remorse is an indication that the accused has realised that a wrong was done and has to that extent been rehabilitated. See **S v Brand 1998 (1) SACR 296 (C) at 304a-d**. Remorse is only a valid consideration at sentence if the contrition is sincere and the accused takes the Court fully into his or her confidence. See **S v Matyityi 2011 (1) SACR 40**

(SCA) at para [13]. In the Court's view, lack of remorse, whilst it is relevant, must however not be accorded undue weight.

Pre-sentencing reports confirm that all the accused except accused 5, at the stage of the drafting of the reports still persisted to deny any involvement in the killing of the deceased and showed no remorse. Accused 5 advised Ms Sentile that he was remorseful and admitted guilt. That however was not repeated under oath by him in Court and tested, as it has already been stated. It remains the say-so of the correctional officer. Accused 5 reportedly did not accept any responsibility when interviewed by the probation officer. Accused 6 reportedly showed emotion and cried when interviewed by the probation officer. It is however clear from the report and from Ms Klaasse's evidence that accused 6 was not remorseful about the plight of the victims but was feeling sorry for himself. He maintained his denial in the involvement of the kidnapping and the killing of the deceased.

IMPACT ON THE DECEASED'S FAMILIES

Ms Klaasse reported that she consulted with the family members of the deceased. The families are reportedly very hurt and angry about losing their loved ones. They struggle to

deal with the loss. The probation officer has promised to link the families with a counselling centre in Khayelitsha in order to work through their bottled up emotions of over the past two years.

PERSONAL CIRCUMSTANCES OF THE OFFENDERS

The personal circumstances of the accused, as per the evidence led on behalf of the accused and argument relating thereto as well as information set out in the presentencing reports were taken into account.

ACCUSED 1

Starting with accused 1, he is currently 49 years old and was 47 years old at the time of the commission of the offences. He was born in Cofimvaba in the Eastern Cape. He is the second of four children and is the older brother of accused 2. He grew up in a stable family. His father has passed away and his mother, who is 80 years old, lives in the Eastern Cape. The accused has 5 children with the ages of 21, 16, 11, 7 and 6 years old. The accused was described as a loving, responsible, caring father and the pillar of the family. He is divorced. He was a breadwinner who financially supported his mother who is ill, his children and his extended family. The

accused attended school at Nquqhu Primary School in the Eastern Cape until grade 8. He left school due to financial constraints to look after his father's cattle. He moved to Cape Town in 1980 to seek employment. He then went to Gauteng and worked in a mine for three years. Thereafter he moved back to Cape Town and worked for the Argus selling newspapers and Golden Arrow as a driver for 9 years. At the time of his arrest he owned two taxis, one of which was driven by his brother, accused 2. One of the taxis has since been repossessed due to his incarceration. He was financially stable and owned a Vodacom container. He attended Zion church and was studying to be a traditional healer. The accused lived in a one bedroom shack situated next to accused 2's house. The accused has no previous convictions. He was arrested on 15 March 2012 and has been in custody since then.

ACCUSED 2

Accused 2 is a 41 year old man, married to accused 3. He was 38 at the time of the commission of the crime. He has no children. He was born in Cofimvaba in the Eastern Cape and is the third of four children. He is accused 1's brother. He shares a close bond with his brother. He attended school at Nquqhu Primary School in the Eastern Cape. He left school in

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grade 7 due to financial constraints as his mother was the breadwinner with his brother contributing. He also took care of his parents cattle when he left school. When he moved to Cape Town he worked as a tiler in Hout Bay. He commenced working as a taxi driver for his brother during 2003 / 2004. He was the only breadwinner as his wife was not employed. He also supported his mother and extended family. The accused attended Zion church. He was described as a quiet man who is always willing to help in the community. The accused has no previous convictions. He was out on bail until his conviction on 19 November 2014.

ACCUSED 3

Accused 3 is a 35 year old woman soon to turn 36 on 26 March 2015. She was also born in Cofimvaba in the Eastern Cape. She was 32 years old at the time of the commission of the offence. She is married to accused 2 and they have no children. She is the last born of three children. She was raised by her mother, who is now deceased, as her father passed away when she was 2 months old. Her one sibling passed away and the whereabouts of the surviving brother is unknown. The accused had a good upbringing. She completed grade 10 at Nonkqubela High School in Lady Frere in the Eastern Cape. She is unemployed and depended on her

husband, accused 2, for financial support. She depended on her husband's family for emotional support as she had no immediate family members. The accused, her husband and her brother-in-law were reportedly regarded as very respectable people in the community. The accused has no previous convictions. She was arrested on 15 March 2012 and has been in custody since then.

ACCUSED 4

Accused 4 is 41 years old and was 38 at the time of the commission of the offence. He was born in Cofimvaba in the Eastern Cape and is the third of six children born of his deceased parents. He was brought up in a stable family with strong Christian values. He completed grade 12 at Blawood Institution in Nqamakwe in the Eastern Cape. He moved to Cape Town in 1996 and completed two Carpentry courses at Thornton and Northlink College. He is married and has two children with his wife, aged 22 and 27 and two others with different women with ages 3 and 7. He owned a house in Khayelitsha which is currently occupied by his sister and her daughter who is mentally challenged. He became self-employed in 2008 and owned an entity called Bambalaza Construction Company, after a company he had been working for, for a period of three years collapsed. His business was

reportedly successful and he maintained himself and his family financially. He employed 20 people in his company and subcontractors. He was reportedly very active in the community and involved in issues concerning community upliftment. He was a member of a street committee and ward development forum in 2010 / 2011 and once helped the police locate a perpetrator of a crime in 2009 involving missing children who were later found dead. The accused was described as a pillar of strength by his family. He has no previous convictions and has been in custody since 15 March 2012.

ACCUSED 5

Accused 5 is a 39 year old man and was 36 at the time of the commission of the crimes. He was born in Alice in the Eastern Cape. He is the third child of the six children from his deceased parents. He reportedly comes from a close-knit and stable family. He completed grade 12 in 1996 at Siyabonga Secondary School. He did not continue with tertiary education as he had to look after his siblings financially. His family mainly resided in Fish Hoek. He moved to Cape Town in 1997. He started working as a ticket controller for Metrorail and has been on and off employment at various places. He became self-employed in 2010 buying and selling clothing. He is

unmarried and has two children ages 17 and 7. The accused supported his children and family financially. He had an interest in sport and coached an under 20 women's rugby team. He loved reggae music but did not practice Rastafarian religion despite being called Rasta. The accused has no previous convictions and has been in custody since 29 August 2012.

ACCUSED 6

Accused 6 is 27 years old and was 24 years old at the time of the commission of the offences. He was born in Cape Town and is the first of three children born of his parents who are still both alive. His upbringing was reportedly good. He passed grade 8 at Ezangweni High School in Khayelitsha. He lived with his parents in his own shack situated in their yard. He temporarily assisted his father with brick-laying and thereafter opened his own shebeen in 2010. He supported his children financially when he could and his family also depended on him financially. He is unmarried and has two children with the ages of 4 and 5 years old. The accused has no previous convictions. He was on bail in relation to this case until his conviction on 19 November 2014.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

In the seminal case of **S v Malgas 2001 (1) SACR 469 (SCA)** at page 481G-482F the Supreme Court of Appeal laid down certain guidelines that the Court should consider when deciding whether substantial and compelling circumstances are present which justify the imposition of a lesser sentence.

The Court, after having considered the totality of the evidence, comes to the conclusion that there are compelling and substantial circumstances justifying deviation from the prescribed minimum sentence of life imprisonment in respect of the murder charges and the imposition of lesser sentences than the minimum sentences prescribed in the Criminal Law Amendment Act. It can be seen from the personal circumstances of all the accused that all of them were productive and / or respected members of the society. They contributed to the well-being of their families and the society and after their conviction in this case had never been on the wrong side of the law. Furthermore, the social context in which these crimes were committed, namely, that of a community beset with crime resulting in a high incidence of vigilantism is also relevant as the Court has already found. The fact that accused 1's television was stolen by the so-called 'troublemakers' is a relevant factor whilst not an

excuse. The stolen TV spurred accused 1 and the other accused to take action against those suspected to have been culprits. There is no evidence that murder was premeditated or planned as the State submitted. Premeditation to murder was in any event not an allegation in the charge sheet. The accused sought to find a TV from the outset but then carried on assaulting the young men for a prolonged period to the point of their death, and furthermore left them to die in a secluded area with no help and where no one could easily find them. The accused were all found guilty of murder on the basis of *dolus eventualis* having acted with common purpose.

PERIOD IN CUSTODY AWAITING FINALISATION OF THE TRIAL

The Court also takes into account that accused 1, 3 and 4 were in detention awaiting finalisation of the trial for almost 3 years and accused 5 for more than 2 years. In the decision of **Director of Public Prosecutions North Gauteng Pretoria v Gewala and Others 2014 (2) SACR 337 (SCA)** at para 16 the Court approving of the findings made in **S v Radebe and Another 2013 (2) SACR 165 (SCA)** at paras 13 and 14, held that there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent in detention awaiting trial. The Court held that:

"A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. It should be noted that this Court left open the question of how to approach the matter in S v Dlamini ***2012 (2) SACR 1*** *(SCA) paragraph 41."*

It was held that a better approach is that the period in detention, pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment should be imposed as justified, i.e. whether it is proportionate to the crime committed. The test is not whether on its own that period of detention constitutes a substantial or compelling circumstance but whether the effective sentence proposes proportionate to the crime or crimes committed and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one. Ultimately, the trial Court should determine whether, in view of all the factors, substantial and compelling circumstances existed, justifying imposition of a sentence lesser than that prescribed by the

Legislator. The number of years spent in custody prior to the trial by accused 1, 3, 4 and 5 is taken into account as a factor amongst others, warranting deviation from the prescribed sentence. The Court is also mindful of the few months that accused 2 and 6 have spent in prison since their conviction.

APPROPRIATE SENTENCE

All defence counsel submitted that the appropriate sentence in the circumstances would be correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act, which provides for imprisonment from which such a convicted person may be placed under correctional supervision in the discretion of the Commissioner or the Parole Board.

Correctional supervision must be used in appropriate cases. In **S v Bergh 2006 (2) SACR 225 (N) at 235e,** the Court observed that the legislature has, by introducing correctional supervision as a sentencing option, distinguished between two types of offenders, namely, those who ought to be removed from society by means of imprisonment, and those who, although deserving of punishment, should not be removed from society.

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Probation officers' reports that were requested by the defence

in respect of all the accused did not consider correctional supervision and / or suspended sentences to be appropriate in the circumstances, considering the seriousness of the offences, the fact that the accused did not accept responsibility for the actions, the impact the death of the three deceased had on their families and the prominence of the crimes in Khayelitsha area. The probations officers recommended direct imprisonment as an appropriate sentence. Defence counsel contended that lack of remorse and seriousness of the case were overemphasised by the probation officers. The Court deals with its view on this aspect later.

Correctional supervision reports recommended that all the accused with the exception of accused 5 are not suitable candidates for placement on a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act having regard to the fact that the accused did not show any remorse for their actions. When challenged on the question of remorse under cross-examination, Ms Sentile testified that remorse was an important consideration because there would be no purpose of implementing rehabilitation programs if a person claims to have done nothing wrong.

The Court has considered the pre-sentencing reports and the evidence in relation thereto and is of the view that there were

no grounds for questioning the quality and / or value of the experts' opinions. Their opinions have been properly motivated and comprehensive. Whilst the Court retains its discretion on the appropriate sentence, the information and recommendations contained in those reports have been quite valuable.

Defence counsel also referred to the decision of **Dikqacwi** and, most importantly, to the effect that correctional supervision and non-custodial sentences were imposed in that decision. They however lose sight of the fact that in that case minimum sentence legislation was not applicable. It is apposite to refer to a passage in **Dikqacwi** judgment confirming this fact. The Court held as follows in paragraph 7:

> *"Now in Schrich the phenomenon of vigilantism was dealt with in a sentencing context in connection with the interest 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*

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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 sentences 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."*

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In **Dikqacwi**, unlike in this case, the prescribed sentencing regime did not apply. Furthermore, the offences committed by the accused in the **Dikqacwi** case were less serious than in the present matter.

The Court is of the view that in light of the seriousness of the offences and the provisions of the Minimum Sentences legislation, correctional supervision would not be an appropriate sentence. The fact that accused 5 was deemed

suitable to be placed on a correctional supervision sentence in terms of section 276 (1)(h) of the Criminal Procedure Act by Ms Sentile does not necessarily mean that such sentence is the appropriate one in the circumstances.

A message must be sent out that those who are intent on bringing their own brand of justice to bear on communities, without regard for the lives of others, of the law and of order, will face the full force of the law. See **S v Thebus and Another 2002 (2) SACR 566 (SCA) at paragraph 33**. The accused participated in cruel actions that led to tragic deaths of three young men. Even though the three deceased were known to be troublemakers in their communities; they still were sons and brothers of their families. They also, like any other person, had rights in terms of the Constitution and the law, to life and liberty.

Vigilantism can never be tolerated by the Courts and people should never be allowed, despite the circumstances, to take the law in their own hands. Whilst the Court has taken into consideration the circumstances under which these offences occurred, the fact remains that three young men were deprived of their liberty and murdered.

Aggravating circumstances of this case are that the deceased

were brutally assaulted over a period of time on the day of the commission of the offences and that the accused persisted not to take responsibility for their actions and to show any remorse. In the Court's view direct imprisonment is the only appropriate sentence in light of the circumstances of this case in respect of the murder charges.

As regards the counts of kidnapping, the Court took into account that the deceased were kidnapped in the afternoon in the process of finding the TV, tied up, whilst being assaulted, driven up and down in the bakkie for long periods of time to different places until they were found dead. In view of all the circumstances the Court also finds direct imprisonment to be an appropriate sentence for these offences.

In respect of the assault with intent to do grievous bodily harm on Mphuthumi, the Court finds that in light of the evidence led during the trial, including the fact that Mphuthumi managed to free himself and run away, taken together with all the other factors relevant to sentencing, the imposition of a suspended sentenced would be just and appropriate.

CONCLUSION

Having considered all the relevant circumstances before

imposing sentence, the Court will take into account the cumulative effect of the sentences that the Court will impose and as a show of mercy will order that certain sentences run concurrently.

In the result the following sentences are imposed:

ACCUSED 1:

ON COUNTS 1, 2 AND 3 OF KIDNAPPING, THE THREE COUNTS TAKEN TOGETHER FOR PURPOSES OF SENTENCE, THE SENTENCE IS SIX (6) YEARS IMPRISONMENT.

ON COUNT 5 OF ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM, THE SENTENCE IS TWELVE (12) MONTHS IMPRISONMENT, WHOLLY SUSPENDED FOR A PERIOD OF FIVE (5) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM COMMITTED DURING THE PERIOD OF SUSPENSION.

ON COUNTS 6, 7 AND 8 OF MURDER, THE ACCUSED IS SENTENCED TO 18 (EIGHTEEN) YEARS IMPRISONMENT ON EACH COUNT. IT IS ORDERED THAT THE SENTENCES ON COUNTS 1, 2, 3, 6 AND 7 RUN CONCURRENTLY WITH THE SENTENCE ON COUNT 8.

ACCUSED 1 IS EFFECTIVELY SENTENCED TO 18

(EIGHTEEN) YEARS IMPRISONMENT.

ACCUSED 2:

ACCUSED 2, ON COUNTS 1, 2 AND 3 OF KIDNAPPING, THE THREE COUNTS TAKEN TOGETHER FOR PURPOSES OF SENTENCE, THE SENTENCE IS SIX (6) YEARS IMPRISONMENT.

ON COUNT 5 OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM, THE SENTENCE IS TWELVE (12) MONTHS IMPRISONMENT, WHOLLY SUSPENDED FOR A PERIOD OF FIVE (5) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM COMMITTED DURING THE PERIOD OF SUSPENSION.

ON COUNTS 6, 7 AND 8 OF MURDER, THE ACCUSED IS SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT ON EACH COUNT.

IT IS ORDERED THAT THE SENTENCES ON COUNTS 1, 2, 3, 6 AND 7 RUN CONCURRENTLY WITH THE SENTENCE ON COUNT 8.

ACCUSED 2 IS EFFECTIVELY SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT.

ACCUSED 3:

ON COUNTS 1, 2 AND 3 OF KIDNAPPING, THE THREE

COUNTS TAKEN TOGETHER FOR PURPOSES OF SENTENCE, THE ACCUSED IS SENTENCED TO SIX (6) YEARS IMPRISONMENT.

ON COUNT 5 OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM, THE SENTENCE IS TWELVE (12) MONTHS IMPRISONMENT, WHOLLY SUSPENDED FOR A PERIOD OF FIVE (5) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM COMMITTED DURING THE PERIOD OF SUSPENSION.

ON COUNTS 6, 7 AND 8 OF MURDER, THE ACCUSED IS SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT ON EACH COUNT.

IT IS ORDERED THAT THE SENTENCES ON COUNTS 1, 2, 3, 6 AND 7 RUN CONCURRENTLY WITH THE SENTENCE ON COUNT 8.

ACCUSED 3 IS EFFECTIVELY SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT.

ACCUSED 4:

ON COUNTS 1, 2 AND 3 OF KIDNAPPING, THE THREE COUNTS TAKEN TOGETHER FOR PURPOSES OF SENTENCE, THE SENTENCE IS SIX (6) YEARS IMPRISONMENT.

ON COUNT 5 OF ASSAULT WITH INTENT TO CAUSE

GRIEVOUS BODILY HARM, THE SENTENCE IS TWELVE (12) MONTHS IMPRISONMENT, WHOLLY SUSPENDED FOR A PERIOD OF FIVE (5) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM COMMITTED DURING THE PERIOD OF SUSPENSION.

ON COUNTS 6, 7 AND 8 OF MURDER, THE ACCUSED IS SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT ON EACH COUNT.

IT IS ORDERED THAT THE SENTENCES ON COUNTS 1, 2, 3, 6 AND 7 RUN CONCURRENTLY WITH THE SENTENCE ON COUNT 8.

ACCUSED 4 IS EFFECTIVELY SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT.

ACCUSED 5:

ON COUNTS 1, 2 AND 3 OF KIDNAPPING, THE THREE COUNTS TAKEN TOGETHER FOR PURPOSES OF SENTENCE, THE SENTENCE IS SIX (6) YEARS IMPRISONMENT.

ON COUNTS 6, 7 AND 8 OF MURDER, THE ACCUSED IS SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT ON EACH COUNT.

IT IS ORDERED THAT THE SENTENCES ON COUNTS 1, 2, 3, 6 AND 7 RUN CONCURRENTLY WITH THE SENTENCE ON

COUNT 8.

ACCUSED 5 IS EFFECTIVELY SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT.

ACCUSED 6:

ON COUNTS 1, 2 AND 3 OF KIDNAPPING, THE THREE COUNTS TAKEN TOGETHER FOR PURPOSES OF SENTENCE, THE SENTENCE IS SIX (6) YEARS IMPRISONMENT.

ON COUNTS 6, 7 AND 8 OF MURDER, THE ACCUSED IS SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT ON EACH COUNT.

IT IS ORDERED THAT THE SENTENCES ON COUNTS 1, 2, 3, 6 AND 7 RUN CONCURRENTLY WITH THE SENTENCE ON COUNT 8.

ACCUSED 6 IS EFFECTIVELY SENTENCED TO EIGHTEEN (18) YEARS IMPRISONMENT.

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BOQWANA, J