



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC 08/2019

In the matter between:

THE STATE

v

BLESSING BVENI

Accused

Court: Justice J Cloete

Heard: 25 January 2021

Delivered: 28 January 2021

JUDGMENT ON SENTENCE

CLOETE J:**Introduction**

- [1] In imposing a suitable sentence this court is bound to weigh up various factors, namely the personal circumstances of the accused, the seriousness of the offences, and the interests of society.
- [2] In so doing, the court must take care not to overemphasise one factor at the expense of the others, and should also be mindful of the need, if reasonably possible, to blend the sentence to be imposed with mercy.
- [3] At the outset of the trial, the accused was warned of the minimum sentence provisions applicable to counts 2, 5, 6 and 8 to 10. Counts 2, 5, 8 and 9 pertain to robbery with aggravating circumstances (of M, Mr Douglas Notten, Mr Malcolm Esterhuizen and Mr Ian McPherson) and counts 6 and 10 relate to the murders of Mr Notten and Mr McPherson during the course of committing their robberies.
- [4] In regard to these counts, this court is obliged, in terms of s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997, to impose the prescribed minimum sentences unless satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.
- [5] For a first offender, each count of robbery with aggravating circumstances attracts a minimum sentence of 15 years imprisonment, whereas the murder counts (this court

having found that the murders were committed during the course of robberies with aggravating circumstances) each attract a minimum sentence of life imprisonment.

- [6] In *State v Malgas*¹ it was made clear that although the prescribed minimum sentences are '*ordinarily appropriate*' where there is no strong justification to impose a lesser sentence, courts nevertheless have a duty to approach such sentencing on an individualised basis. Accordingly, if a court is satisfied, for objectively convincing reasons, that the circumstances of a particular case would result in the minimum sentence being disproportionate to the crime concerned, the offender and the legitimate needs of society, such circumstances will be considered to be '*substantial and compelling*'.
- [7] This approach was confirmed by the Constitutional Court in *State v Dodo*², and in *State v Vilakazi*³ it was stated that the essence of *Malgas* and *Dodo* '*...is that disproportionate sentences are not to be imposed... courts are not vehicles for injustice... punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings “ought to be treated as ends in themselves, never merely as means to an end”*'.
- [8] In *Vilakazi* the Supreme Court of Appeal however added an important qualification,⁴ namely that in cases of serious crime the personal circumstances of the offender, by

¹ 2001 (1) SACR 469 (SCA) paras [22] – [25].

² 2001 (1) SACR 594 (CC) para [40].

³ 2009 (1) SACR 552 (SCA) para [18].

⁴ Para [58].

themselves, will of necessity carry less weight, although they are nonetheless relevant in another respect, which is whether the accused can be expected to offend again.

- [9] Our law is also that it is appropriate to take into account, as one of the factors, the period of imprisonment spent by an accused awaiting trial.⁵

The evidence

- [10] During the course of the trial I heard, not only the evidence of the five complainants who survived, but also that of Mrs Allyn McPherson (Mr McPherson's widow) and his son Robert, as well as the complainant Mrs Julia Notten about her late husband (Mr Douglas Notten) and the effect of these two brutal murders on them and other loved ones.
- [11] Mrs McPherson was visibly distraught during her testimony. Her evidence was that she and her husband had been married for almost 47 years at the time of his murder. The cruel irony is that they had lived in Zimbabwe (the same country as that of the accused) before moving to Fish Hoek in 2006 to start a new life. In her words, her late husband was her life and his death also emotionally destroyed his siblings.
- [12] Mr Robert McPherson described the loss of his father as having turned the family inside out. His father was their family's '*centre of gravity*'. His mother could not cope and he decided that for her health and safety she would need to move to live with him

⁵ See *inter alia* Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others 2014 (2) SACR 337 (SCA) at paras [15] – [19].

in the United Kingdom, where she now resides. This of course meant that, not only did she lose her husband, she also lost her home and had to leave behind her friends and her community.

- [13] Mr Robert McPherson also testified that, as a result of this decision, he had to quit his job at the time and also buy a second property in the United Kingdom to accommodate his mother. It was only by the time he testified (almost two years after his father's murder) that his mother had settled sufficiently to permit him to obtain a proper full time job again.
- [14] Mrs Notten testified that she and her husband had been married for almost 27 years at the time of his murder. They have three children. Another cruel irony is that he accompanied her on their hike on the day of his murder to protect her in light of the previous attacks they had heard about. She had to witness the attack and leave her helpless, bleeding husband to run for help. Her undisputed evidence was also that the couple had nothing of value with them from which the accused could have benefitted financially. He did not even bother to establish this before murdering Mr Notten.
- [15] She described her late husband, a helicopter pilot, as a kind, gentle, considerate and supportive husband and father who was loved by many. She now feels that a part of her is missing. As stated in my judgment on conviction she was also still traumatised when she testified over two years later.
- [16] The forensic evidence showed that both Mr Notten and Mr McPherson were subjected to brutal, frenzied attacks with the clear purpose of making sure they would not survive.

Both must have died in agony. Mrs Notten witnessed her husband's suffering. As far as Mr McPherson is concerned, this is supported by the evidence of Mr Howells.

- [17] The medical evidence also established that Mr Esterhuizen's survival of his attack was probably a miracle. Were it not for his strong survival instinct, his fitness and self-defence training, and the fact that he happened to be speaking on his cell phone at the time, the accused would in all probability have been facing a third sentence of life imprisonment.
- [18] There is every indication that the aim of the accused was to viciously attack Mr Esterhuizen as he had previously Mr Notten and subsequently Mr McPherson, and leave him to die. If this was not the case, the accused would not have stabbed Mr Esterhuizen repeatedly, and despite Mr Esterhuizen's best efforts, the accused still succeeded in inflicting at least nine stab wounds including one which punctured his lung. These factors place the attempted murder of Mr Esterhuizen in the most serious category.
- [19] The evidence also established that the accused planned the attacks and either stalked his victims, or at the very least preyed on defenceless people in fairly remote areas, knowing full well that they would find it very difficult to call for help.
- [20] He looked for targets who would be unlikely to be able to defend themselves, including lone cyclists (one of whom was elderly), a woman and two children. These factors demonstrate that he is a coward. The attacks on Mr Notten, Mr Esterhuizen and Mr McPherson also demonstrate that the accused has no respect for human life, and

had no concern for how his crimes might devastate the loved ones of his murdered victims. He thus appears to be a cruel and cold-hearted individual. He shows no remorse.

- [21] The sequence of the crimes further shows that his level of brutality quickly escalated, moving from two assaults with intent to cause grievous bodily harm to armed robberies, murder, a near murder and a further murder.

The accused's personal circumstances

- [22] The accused did not testify in mitigation, but his counsel addressed the court ex parte on his behalf and his written submissions were co-signed by the accused.
- [23] The SAP 69, handed in as Exhibit "CC", reflects that the accused has no previous convictions. Although in the trial he testified that he is 33 years old, according to the SAP 69 his date of birth is 7 August 1988 and he is therefore 32 years old, which was confirmed through his counsel. Youth therefore plays no mitigating role.
- [24] The accused attained the equivalent of Grade 6 at school in Zimbabwe before leaving to assist his mother and siblings by doing odd jobs, and buying and selling goods to generate an income.
- [25] Due to political unrest in Zimbabwe and lack of opportunities, he decided to look for better ones in South Africa. As stated in my judgment on conviction, he first entered

South Africa from Zimbabwe in 2012 and returned there in 2014. He re-entered South Africa in 2016 and has remained here ever since.

[26] According to him, his presence in South Africa has always been illegal, having moved between Zimbabwe and South Africa by paying bribes and without ever holding a passport or any form of residence permit.

[27] After arriving in South Africa in 2016 he was at first able to get construction work on a temporary basis. When this dried up he started buying and selling goods for other people. He became quite successful and started up his own business doing this, which enabled him to generate sufficient income to send money to his mother and wife in Zimbabwe. At the time of his arrest on 14 March 2018 he was earning between R4 000 to R5 000 per month.

[28] He has been married for 14 years. His wife in Zimbabwe has no permanent work but generates an income doing odd jobs. The couple have three children aged 7, 5 and 3 years respectively. His wife and children live with her family in Zimbabwe.

[29] The accused is in good health. He has been in custody as an awaiting trial prisoner since his arrest for 2 years and 10 months.

Evaluation

[30] The mitigating factors are that, on the basis of the evidence, the accused did not resort to crime before reaching the age of 29 years which, taken on its own, indicates that he

notionally has a prospect of rehabilitation. He is also a husband and the father of three young children. For some time he was gainfully employed before resorting to violence for the purpose of obtaining goods to sell for his own profit. His awaiting trial period must also be taken into account.

[31] Counsel for the accused referred me to *State v Nkomo*⁶ where the Supreme Court of Appeal found that the fact that the appellant was a first offender had to be regarded as a substantial and compelling circumstance justifying a lesser sentence. He also referred me to the earlier decision of *State v Sikipha*⁷ where the Supreme Court of Appeal found that a first offender is a mitigating factor. I am bound by these decisions.

[32] It is true that, as both counsel submitted, the assault with intent to cause grievous bodily harm on Mr Bucklow (count 1) did not result in the accused's intention being realised. This too is a mitigating factor which I am obliged to take into account, despite the strong indicators that it was Mr Bucklow's own swift reactions which prevented it. Of course this mitigating factor only extends to the accused's conviction on this particular count.

[33] It is my view that to impose the minimum sentence on count 2, being robbery with aggravating circumstances of M, would be disproportionate having regard to those particular facts, including the absence of physical violence, allowing her to keep her sim card, and to run away. This incident was also the second in the series of crimes committed by the accused, and account must also be taken of this. Similar

⁶ 2007 (2) SACR 198 (SCA) para [21].

⁷ 2006 (2) SACR 439 (SCA) para [18].

considerations apply to count 3, being the attempted robbery with aggravating circumstances of D, although the minimum sentence legislation does not apply to that count.

[34] Although the factors that I have outlined are mitigating, they obviously almost exclusively pertain only to the accused's personal circumstances and, as held by the Supreme Court of Appeal in *Vilakazi*, must '*recede into the background*' when the very serious crimes are considered.

[35] I am of the view that when it comes to counts 5 and 6 (Mr Notten's murder and robbery with aggravating circumstances) and 8 to 10 (the robbery with aggravating circumstances of Mr Esterhuizen, and the offences relating to Mr McPherson) the accused's personal circumstances are nothing more than a neutral factor, and cannot constitute substantial and compelling circumstances.

[36] Moreover, the aggravating features far outweigh the mitigating ones on these counts. The same applies to the attempted murder of Mr Esterhuizen. In addition, and while it is true that the accused started his crime spree at the age of 29 years, his own actions have demonstrated that he has a very strong likelihood of re-offending and that his prospects of rehabilitation, at least at this stage, are remote.

[37] As far as the assault with intent to cause grievous bodily harm on Mrs Notten is concerned, the evidence established that the accused deliberately assaulted her in order to prevent her from coming to her husband's assistance. However, I am obliged

to take into account that the focus of his attack was Mr Notten and that she did not sustain any serious physical injury.

[38] I must also take into account that the armed robberies of Mr Notten, Mr Esterhuizen and Mr McPherson occurred during the physical attacks on them, and to this extent, were essentially part of each incident. While the Supreme Court of Appeal has on occasion cautioned against the practice of taking counts as one for purposes of sentence⁸, it has also been held by the same Court in other cases⁹ that this is not prohibited, nor does it constitute a misdirection¹⁰ and is sometimes a useful, practical way to avoid unnecessary duplication of sentences.

[39] Both counsel submitted that certain of the sentences to be imposed ought to be ordered to run concurrently. I deal with this in the Order that follows.

[40] **The accused is sentenced as follows:**

1. **Count 1: Assault with intent to cause grievous bodily harm (Mr David Bucklow): 2 (two) years imprisonment.**
2. **Count 2: Robbery with aggravating circumstances (Ms Megan Steel): 7 (seven) years imprisonment.**
3. **Count 3: Attempted robbery with aggravating circumstances (Mr Damien Steel): 3 (three) years imprisonment.**
4. **Count 4: Assault with intent to cause grievous bodily harm (Mrs Julia Notten): 3 (three) years imprisonment.**

⁸ See for example *DPP Transvaal v Phillips* 2013 (1) SACR 107 (SCA) para [27].

⁹ See for example *State v Kruger* 2012 (2) SACR 369 (SCA) para [10].

¹⁰ See *State v Swart* 2000 (2) SACR 566 (SCA) para [20].

5. Counts 5 and 6: Robbery with aggravating circumstances and murder (Mr Douglas Notten): these counts are taken as one for purposes of sentence: life imprisonment.
6. Counts 7 and 8: Attempted murder and robbery with aggravating circumstances (Mr Malcolm Esterhuizen): these counts are taken as one for purposes of sentence: 18 (eighteen) years imprisonment.
7. Counts 9 and 10: Robbery with aggravating circumstances and murder (Mr Ian McPherson): these counts are taken as one for purposes of sentence: life imprisonment.
8. Because life imprisonment has been imposed, all of these sentences automatically run concurrently in terms of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

A handwritten signature in dark ink, appearing to read 'J I Cloete', is written over a horizontal line.

J I CLOETE