REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNEBURG)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER: 227/2013

In the matter of

THE STATE

V

DUMISANI COLLEN KHUMALO **ACCUSED ONE**
SIMPHIWE JOSEPH SIMELANE **ACCUSED TWO**

JUDGMENT

DOSIO AJ:

SENTENCE

[1] The accused have pleaded guilty to all four counts. Count one is the crime of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with the provisions of section 51(2) and schedule 2 of the Criminal law Amendment Act 105 of 1997 as amended ("Criminal Law Amendment Act"). Count two is the crime of murder read with the provisions of section 51(1) and schedule 2 of the Criminal Law

Amendment Act. Count three is unlawful possession of unlicensed firearms, which is a contravention of section 3 of the Firearms Control Act 60 of 2000 ("Firearm Control Act"). Count four is unlawful possession of ammunition, which is a contravention of section 90 of the Firearm Control Act.

[2] For purposes of sentence this court has taken into consideration the accused's personal circumstances, the seriousness of the offences and the interests of the community. The court has borne in mind the main purposes of sentence which is deterrence, retribution, reformation and prevention.

[3] The personal circumstances of the accused are;

Accused one

Accused one was born on the 31st of July 1977 and is thirty-seven years and nine months old. He was raised by his single mother and was the only child at home. He left school in Standard 6/Grade 8. He was employed at the mine as a planter and he was earning R2300 per month. He was retrenched in 2013. He was the bread winner at home providing for his children and his mother. He is single and unmarried. He has two children, aged eleven (11) and eight (8) years respectively. He was arrested on the 17th of October 2013. He has been in prison for one year and six months.

Accused two

Accused two is twenty-eight (28) years old. He is the first born, followed by three younger brothers. He grew up under the care of his mother as his father passed away when he was ten (10) years old. He passed grade ten (10) at Kgaiso High School in 2003. He left school because his mother could not pay for his studies. He is unmarried but has two children aged ten (10) years and four (4) years old respectively. The last born stays with his mother. The accused was employed at Piements as a freezer packer. He was earning R2400 per month. He was the sole provider for his family as his mother was unemployed. He is a first offender.

[4] In respect to the seriousness of the offences this court would like to state as follows:

[5] In respect to count 1

The vehicle of the deceased Abram Moyo was parked in a veld in Slovoville. The time was 12h00. Accused one went to the passenger's side of the vehicle and accused two

went to the driver's side of the vehicle. Accused one pointed a loaded firearm towards the complainant Sitheni Betty and demanded money and valuables. Accused two then pulled off her weddings rings. It is clear accused two was the main perpetrator in the commission of this robbery and that accused two acted as an accomplice. It is clear this robbery was planned in that shortly after robbing the complainant Sitheni Betty, the accused sold the rings for financial gain. The crime was driven by greed and not need. It was executed in an organised manner.

[6] This country has witnessed an ever-increasing wave of violence. Robbery with aggravating circumstances is ever-prevalent. Innocent and defenceless victims continue to fall prey to these types of offences. Most people live with the fear that sooner or later they will become a victim of an armed robbery.

[7] In respect to count 2

Before accused two reached the driver's door the deceased jumped out. Accused one ran after him and fired eight (8) shots at the deceased. Both accused then fled the scene. It is clear accused one was the main perpetrator and that accused two acted as an accomplice. It is clear that accused one acted in flagrant disregard of the sanctity of the deceased's life as the deceased was trying to run away to save himself when accused one killed him. They went into action with loaded firearms and shot a man who was running away. Six bullets penetrated his body. The cause of death was multiple gunshot wounds. At the time of the shooting the deceased was no longer an obstruction to either accused and posed no threat to them. The deceased was an innocent and defenceless victim.

[8] Murder is the most serious of crimes. It not only ended the deceased's life, but it left hardship for the family members left behind. The wife of the deceased, Mrs Sindiswo Moyo, who is a Captain in the South African Police testified and stated that she and the deceased had two children. The eldest one is a police officer herself and at the time this incident she was in hospital and on hearing of the death of her father she developed chronic depression. This has affected the work of her daughter. She was previously a detective but now has been deployed as a data typist as her ability to do field and investigative work for the police has been seriously impaired. The second born of the deceased has also been affected in that after identifying her father's body at the morgue, her school work has deteriorated. The deceased who was unemployed at the time used to do the cooking on occasion and would always take his daughter to

dancing classes. Their grand-daughter also severally misses the deceased who she referred to as “Papa”. The deceased was a friend and good brother-in-law to her family. Although they have all been for counselling, it has not helped. It is clear this family was and still are affected by his untimely death. Not only has this offence impacted on the emotions of this family, it has also impacted on the ability of the wife of the deceased to do her work. Both the wife of the deceased and her daughter were employed in crime prevention and field work in similar offences and both are now severally affected in doing this type of work. This impacts directly on the community who needs people of their calibre to do crime prevention. Without such law enforcers in our community, the country suffers.

[9] In respect to count 3

The firearm that accused one had in his possession was a 9 mm parabellum Vector model Z88 which is a semi-automatic pistol. Accused two was found in possession of a 9mm Star Pistol.

[10] On a more frequent basis, crimes in this country are committed using illegal firearms. In fact the proliferation of illegal firearms throughout the country has contributed to the high incidents of violent crime. The frequent use of illegal firearms in the commission of violent offences has contributed to the fear that members of the community live with. They fear driving and stopping their cars in remote places as they may become victims of crime. The behaviour of the accused and others like them, impacts negatively on the quality of freedom of all living in South Africa.

The possession of unlicensed firearms continues and it is important that this court send a clear message to potential offenders that this conduct will not be tolerated by the courts.

[11] In respect to count 4

What makes this offence serious is that both accused were in possession of loaded firearms which were used during the commission of both offences.

Accused one was in possession of 8 live rounds at the time of the commission of the offence. He fired all eight rounds at the scene. Accused two was in possession of one (1) round of ammunition.

[12] This court has differentiated between main perpetrators and accomplices in its judgment, however, seen in the light that both accused were acting with a common

purpose to rob and kill, this court finds no reason to differentiate between the sentences they will both receive. It is clear they went out in search of someone to rob. The fact they were both armed with loaded firearms suggests to this court they were ready to use them and kill if necessary.

[13] In respect to the interests of the community, this court has taken note of the fact that the community observes the sentences that courts impose and the community expect that the criminal law be enforced and that offenders be punished. The community must receive some recognition in the sentences the courts impose, otherwise the community will take the law into their own hands. If a proper sentence is imposed it may deter others from committing these crimes. Due to the fact that murder and armed robbery have reached high levels, the community craves the assistance of the courts.

[14] The robbery on count one is one as intended in terms of section 1 of the Criminal Procedure Act. The provisions of the Criminal Law Amendment Act with specific reference to section 51 (2) dictates that notwithstanding any other law but subject to subsection (3) and (6), an accused who has been convicted of a Part two of Schedule 2 offence, which includes robbery with aggravating circumstances, shall in the case of a first offender be sentenced to a period of imprisonment for a period of not less than 15 years, and in respect of a second offender to imprisonment for a period not less than 20 years.

[15] The murder on count two was planned, and it was committed by a group of persons acting in the execution or furtherance of a common purpose. In addition, the death of the deceased was caused by the accused committing the offence of robbery with aggravating circumstances. The degree and culpability of the accused is extremely high, in that three scenarios that the legislature deems as serious were prevalent in the conduct of both accused. The provisions of the Criminal Law Amendment Act with specific reference to section 51 (1) dictates that if an accused has been convicted of an offence referred to in part 1 of schedule 2, he shall be sentenced to life imprisonment.

[16] In respect to count three, the firearm in accused one’s possession is a semi-automatic firearm. It accordingly falls within the ambit of a part two of schedule two offence. The Criminal law Amendment Act dictates that a first offender shall be sentenced to fifteen (15) years imprisonment, and in respect to a second offender to imprisonment of twenty (20) years and in respect to a third offender to imprisonment for a period not

less than twenty (25) years. There is no evidence placed before this court that the previous conviction of accused one in 2005 was for possession of a semi-automatic firearm. Accordingly, for purposes of this sentence accused one will be sentenced in respect to count three (3) as if he is a first offender of being in possession of a semi-automatic firearm.

[17] In respect to count three, there is no evidence that the firearm found in accused two's possession was a semi-automatic firearm, accordingly he will be sentenced in terms of the provisions of the Firearms Control Act, which dictates that if an accused is convicted of a contravention of section 3 he may be sentenced to fifteen (15) years imprisonment.

[18] In respect to count four the Firearm Control Act dictates that if an accused is convicted of a contravention of section 90, he may be sentenced to fifteen (15) years imprisonment.

[19] Section 51 (3) of the Criminal Law Amendment Act states that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[20] As stated by the learned Marais JA in the case of *S v Malgas* 2001 (1) SACR 469 SCA, paragraph I;

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

[21] Counsel for accused one requested this court to take into consideration that the accused has pleaded guilty and has shown signs of remorse. Counsel submitted that he also co-operated with the police during the investigation and because he is still young he can be rehabilitated.

[22] Counsel for accused two requested this court to consider the following as substantial and compelling circumstances, namely;

i. That the accused is a first offender and showed remorse for his actions in pleading guilty. He grew up without a father figure and was the sole provider of his family.

ii. He is twenty-eight (28) years old and is a candidate for rehabilitation.

[23] The court has notwithstanding the application of the prescribed minimum sentences, considered other sentencing options. This court does not find that a fine, a suspended sentence or correctional supervision is appropriate in these circumstances.

[24] This court cannot only consider the accused's personal circumstances, but must also consider the interests of the community as well as prevention and deterrence. To focus on the well-being of the accused to the detriment of the interests of the community would result in a distorted and warped sentence. The accused are a danger to the community.

[25] Accused one has many previous convictions. In 1992 he was found guilty of theft and sentenced to 5 cuts with a light cane. In 1993 he was convicted of theft and sentenced to 7 cuts with a light cane. In 1994 he was convicted of robbery and sentenced to 8 years imprisonment. In 2000 he was convicted of theft and sentenced to 30 months direct imprisonment. In 2005 he was convicted of possession of a firearm without a licence and sentenced to 5 years imprisonment of which two years were suspended for a period 5 years on condition the accused was not again found guilty of a contravention of section 3 of the Firearms Control Act 60 of 2000. In 2012 he was convicted of having in his possession dependence producing drugs and was fined R40. There is evidence before this court that the robbery committed in 1994 was robbery of a motor vehicle using a knife. However, the SAP 69 does not reflect this offence as amounting to robbery with aggravating circumstances as envisaged in Part two of schedule 2.
Accordingly this court will deal with accused one as if he is a first offender of robbery with aggravating circumstances.

[26] Although accused one and two have pleaded guilty, Counsel for the State submitted the accused have not shown remorse. Counsel submitted that they both evaded arrest and were prepared to proceed on trial. Captain Ndwandwe who was called by the State in aggravation of sentence testified that although the offence was committed on the 27th of May 2013 he only arrested accused one on the 17th of October 2013. It is

through the engagement of informers that accused one was traced. It is due to circumstantial evidence of a palm print found in the car of the deceased that the police were able to state the palm print belonged to accused one. Counsel for the State argued that there was a strong case against the accused, as they would have had difficulty to dispute the confessions and the pointing out as they were properly carried out in accordance with the Criminal Procedure Act 51 of 1977.

[27] In respect to their respective pleas of guilty, Counsel for the State argues that both accused had two years to expedite this case and plead guilty. Only on the day of the commencement of the trial did they agree to plead guilty. If they truly felt sorry for what they had done, they would have pleaded guilty sooner. Had they shown genuine remorse, they could have intimated this to the family sooner. Counsel for the State argued that to say on the day of sentence that the accused feel sorry for what they have done, is not sufficient.

[28] Counsel for the State argued that the frequency in which these heinous crimes are committed, is reflective of the fact that sentences imposed by courts are not having the desired effect. Counsel requested this court to be cautious in departing from the prescribed sentence of life imprisonment in respect to count two and fifteen (15) years imprisonment in respect to count one. Counsel argued the prescribed sentences on both counts are suitable and appropriate and will also give effect to the element of retribution.

[29] In the case of *S v Matyityi* 2010 ZASCA 127 the learned Ponnan JA referred to the case of *S v Seegers* 1970 (2) SA 506 (A) where it was stated that; in order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. In the case of *Matyityi supra*, at paragraph [13], the learned Ponnan JA stated;

"Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."

[30] Apart from the plea of guilty, there is no explanation to this court what the circumstances were why accused one and two attacked these innocent members of the public. Although they have both stated to their respective counsel that they are sorry for what has happened, there is no indication what has since provoked their change of heart to plead guilty and say they are sorry. Counsel for accused one stated on instructions from accused one that *"If he had a way of reversing the situation he would do so".* This is something accused one should have thought of on the day of the killing. Had he shot once and said he was sorry, that may have had some recognizable effect on the sentence, however, after having emptied six bullets into the deceased and then say he is sorry is negligible. The same applies to accused two who states that he "regrets what happened on that day. It happened haphazardly". This court disagrees. Both accused had a mission to rob and kill if necessary. This they executed with precision and planning.

[31] In the case of *S v Matyityi supra* the facts were quite similar to the facts before this court, in that the complainants in that matter had also stopped their car in a remote spot when they were attacked by the accused. They were robbed and the one complainant was raped whereas her boyfriend was murdered by the three accused. The deceased was stabbed in his back while he was trying to flee from the accused. One of the accused, namely Matyityi, pleaded guilty and was sentenced to 25 years imprisonment on each of the murder and rape charges and in respect to the robbery charges to 13 years imprisonment. The sentences were ordered to run concurrently. He was sentenced to an effective term of 25 years imprisonment. The Director of Public Prosecutions took this matter on appeal in terms of section 316B of the Criminal Procedure Act and the Supreme Court of Appeal changed the 25 years imprisonment on the murder count and rape count to two life imprisonments. The accused was also not a first offender as he had a previous conviction of possession of unlicensed firearm. He was also 27 years old.

[32] The fact that accused two (2) is twenty-eight years old and is a first offender, is not a substantial and compelling circumstance.

[33] The learned Poonen JA in of *S v Matyityi supra* at paragraph [14] stated that;

"at the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor".

[34] The learned PoonenJA stated further at paragraph [24];

> "Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming…one notices all to frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons… As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences…Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's notion of fairness."

[35] Accused one although he was convicted previously of an unlawful possession of a firearm, and robbery, and was sentenced to long periods of imprisonment, he still has not changed his ways. He has not rehabilitated. The terms of imprisonment did not deter him from once again obtaining an unlicensed firearm and committing the crime of robbery and murder.

[36] In my view there are no substantial and compelling circumstances present that warrant a departure from the prescribed statutory norm in respect to count one or two.

[37] In respect to count one irrespective of the fact that accused one watched as accused two robbed the complainant Sitheni Betty, and that he was an accomplice, he still had the intention to rob both the occupants in the car.

[38] In respect to count two, irrespective of the fact that accused two did not fire the shots that killed the deceased, accused two still reconciled himself with the actions of accused one.

[39] In respect to count three, there are no substantial and compelling circumstances why accused one should not be sentenced to the minimum sentence prescribed.

[40] Accused one has spent one and a half years in prison. Accused two has been in custody for one year and five (5) months.

[41] The cumulative effect of sentences has been considered by this court. All these offences arise from the single intent of robbing the deceased and the complainant on count one. Accordingly this court will order the concurrent running of sentences as the offences are inextricably linked in terms of locality and time.

[42] This court has also been mindful of the fact that accused two is a first offender and accordingly will consider this when deciding on the cumulative effect of the sentences in respect to accused two.

[43] In the result the following order is made:

Count 1
Accused one is sentenced to fifteen (15) years imprisonment
Accused two is sentenced to fifteen (15) years imprisonment

Count 2
Accused one is sentenced to life imprisonment
Accused two is sentenced to life imprisonment

Count 3
Accused one is sentenced to fifteen (15) years imprisonment
Accused two is sentenced to ten (10) years imprisonment

Count 4
Accused one is sentenced to five (5) years imprisonment
Accused two is sentenced to three (3) years imprisonment

[44] In terms of section 280(2) of the Criminal Procedure Act, the court orders that in respect to accused one that the sentence of fifteen (15) years imprisonment imposed on count one (1) , the fifteen (15) years imprisonment imposed on count three (3) and the five (5) years imprisonment imposed on count four (4) will all run concurrently with the life imprisonment imposed on count two (2).

[45] In terms of section 280(2) of the Criminal Procedure Act, the court orders that in

respect to accused two that the sentence of fifteen (15) years imprisonment imposed on count one (1) , the ten (10) years imprisonment imposed on count three (3) and three (3) years imprisonment imposed on count four (4) will all run concurrently with the life imprisonment imposed on count two (2).

[46] In terms of section 103 (1) (g) of the Firearms Control Act 60 of 2000, accused two is declared unfit to possess a firearm. Accused one was already declared unfit in 2005.

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D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the State	Adv Naidoo
On behalf of the Accused one	Adv Potwana
On behalf of Accused two	Adv Soko
Date Heard:	4 May 2015
Handed down Sentence:	4 May 2015