IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC 48 / 2019

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

In the matter between

THE STATE

and

MANOKO STANFORD DIHANGOANE Accused No 3

JUDGMENT ON SENTENCE

MORRISON AJ:

[1] Manoko Stanford Dihangoane, (Accused No 3 in the Indictment) was convicted on 22 July 2020 of the following offences:

Count 1 (formerly counts 1 and 2 in the indictment) Contravention of section 3 read with sections 1, 103, 117, 120, and 121(a) read with Schedule 4 of the Firearms control Act 60 of 2000 and further read with section 250 of 1977, unlawful possession of firearms, a 5.56 x 45mm calibre Vektor model LM5 semi-automatic assault rifle and a 5.56 x 45mm calibre Dashprod model SAR M14 semi-automatic rifle on 6 July 2018 at Soshanguve;

Count 2 (formerly counts 3 and 4 in the indictment) Contravention of section 90 read with sections 1, 103, 117, 120(1)(a), and 121 read with Schedule 4 of the Firearms control Act 60 of 2000 and further read with section 250 of 1977, unlawful possession of ammunition, 5.56 x 45mm calibre ammunition on 6 July 2018 at Soshanguve

Count 4 (formerly count 6 in the indictment) Murder read with the provisions of section 51(1) of Act 105 of 1997, in that on 10 December 2017 at or near Marikana village the accused unlawfully and intentionally killed Klaas Mshoto Sehemo, an adult male by shooting him with a firearm.

Count 5 (formerly count 7 in the indictment) Murder read with the provisions of section 51(1) of Act 105 of 1997, in that on 10 December 2017 and or near Marikana village the accused unlawfully and intentionally killed Isaac Lebtla Mathiba an adult male by shooting him with a firearm.

Count 6 (formerly count 8 in the indictment) Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault Legeshe Gaborone Phoshoko, Klaas Sehemo, Isaac Mathiba and Boitumelo Mogale and with threats and violence take

from them cash in the amount of R641 790.00, the property of Fidelity Cash Solutions or in their lawful possession.

Count 7 (formerly count 9 in the indictment) Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault Legeshe Gaborone Phoshoko and with threats and violence take from him a firearm, to wit a 9mm pistol with serial number 0511174 containing 15 rounds of live ammunition, the property of Legeshe Gaborone Phoshoko or in his lawful possession.

Count 8 (formerly count 10 in the indictment) Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault Boitumelo Mogale and with threats and violence take from him a firearm, to wit a ARO M16 rifle with serial number 851537 containing 30 live rounds of ammunition, the property of Fidelity Cash Solutions or in the lawful possession of the said Boitumelo Mogale.

Count 9 (formerly count 11 in the indictment) Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault and with threats and violence take from Isaac Mathiba a firearm, to wit a 9mm pistol, the property or in the lawful possession of Isaac Mathiba.

Count 10 (formerly count 12 in the indictment) Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault or with threats and violence take from Mpho Government Mlambo a firearm, to wit a 9mm pistol (P99), with serial number 02370 containing 15 live rounds of ammunition.

Count 11 (formerly count 13 and 15 in the indictment) Contravention of section 22(2) of the Explosives Act No. 15 of 2003 read with sections 29(1)(a) and 15(1) of the said Act, in that upon or about 10 December 2017 and at or near Marikana Village the accused unlawfully and intentionally delivered, placed, discharged, detonated or initiated explosives with intent to cause death or serious bodily injury to any other person or to damage or destroy any place, facility or system.

Count 12 (formerly count 14 in the indictment) Malicious Injury to property, in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally damage the property of Fidelity Cash Solutions, to wit an Isuzu bakkie with registration number DM 55 MF GP by shooting at it with firearms causing it to collide with another vehicle to wit a Golf 5 with registration number DJ 94 CN GP.

Count 13 (formerly count 16 in the indictment) Malicious Injury to Property, in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally damage the property of Mpho Mlambo, by shooting at a Fidelity Cash Solutions' vehicle causing it to collide with his vehicle, to wit a Golf 5 with registration number DJ 94 CN GP.

[2] The reference [1] to section 51(1) of the Criminal Law Amendment Act No. 105 of 1997 (hereinafter referred to as the CLAA) in Counts 6 to 10, the Robberies with aggravating circumstances, as pointed out in argument in Court on 23 July 2020 by Counsel for the Defence, is erroneous and ought to be a reference to section 51(2) of the said Act. Both parties for the State and Defence accepted this.

Discretionary minimum sentences for certain serious offences in terms of the Criminal Law Amendment Act No. 105 of 1997 ("CLAA"):

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1 *Cf* Judgment paragraph [123]

[3] The relevant provisions of section 51 of the CLAA in respect of discretionary minimum sentences read as follows:

> *"**51 Discretionary minimum sentences for certain serious offences***
>
> *(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.*
>
> *(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-*
>
> *(a) Part II of Schedule 2, in the case of-*
>
> *(i) a first offender, to imprisonment for a period not less than 15 years;"*

Part 1 of Schedule 2 of the CLAA, pertaining to the offence of murder reads as follows:

> *"Murder, when-*
>
> *(a) it was planned or premeditated;*
>
> *(b) . . .*
>
> *(ii) . . .*
>
> *(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:*
>
> *(i) ....*
>
> *(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);*
>
> *(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy;"*

Part II of Schedule 2 of the CLAA, pertaining to the offence of robbery reads as follows:

"Robbery-

(a) when there are aggravating circumstances; or

(b) . . . . ."

[4] The Criminal Procedure Act defines 'Aggravating circumstances' as follows

" 'aggravating circumstances', in relation to-

(a) .....

(b) robbery or attempted robbery, means-

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;"

[5] The convictions for the Murders in Counts 4 and Count 5 on the facts of this case brings the Accused within the purview of section 51(1) of the CLAA as it is an offence specified in Part I of Schedule 2 thereof, in that the provisions of (c) and (d) in paragraph 2.2 *supra* would be applicable, as the murder was committed in the course of a robbery with aggravating circumstances and / or by a group of persons acting in the execution or furtherance of a common purpose. The murders were not planned or premeditated, therefore the provisions of (a) of the Part I of Schedule 2 do not apply *in casu*.

[6] The Robberies in Counts 6 to 10 on Count 6 of which the Accused was convicted attracts a discretionary minimum sentence of fifteen years in terms of

section 51(2) read with Part 2 of Schedule 2 of the CLAA, in that there were aggravating circumstances as defined by section 1(1) of the Criminal Procedure Act 51 of 1977 as aforementioned in paragraph [4] *supra*.

[7] The Honourable Court may impose lesser sentences that the minimum sentences prescribed in respect of Counts 7 and 6, but then it must be satisfied that substantial and compelling circumstances exist. In this regard section 51(3)(a) of the CLAA provides:

> "*51(3)(a) 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 those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: . . . .*"

The correct approach

[8] In *S v N* 2000 (1) SACR 209 (W) at p225 A-D the Honourable Labe J held that:

> *"The correct approach to the exercise of the discretion conferred on the Court in s 51(3)(a) of the Act is thus the following:*
>
> *(1) The starting point is that the prescribed minimum sentence must be imposed.*
>
> *(2) It is only if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, that it may do so.*
>
> *(3) In deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts. The Court is required to look at all factors - mitigating and aggravating - and consider them cumulatively.*

(4) If the Court concludes in a particular case that the minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate - bearing in mind that the Legislature perceives the necessity for sentences emphasising the deterrent component, but equally bearing in mind that this does not necessarily lead to an automatic increase of sentences previously imposed - it is entitled to impose a lesser sentence."

And at page 225 I to 226A:

" It is clear that it is not enough for there to be substantial circumstances justifying a lighter sentence, but those circumstances should also be compelling. In regard to the meaning of the word 'compelling' and the word 'substantial', Cloete J said this at page 4 of his unreported judgment: [2]

'I understand "substantial" to mean weighty, as opposed to trifling or insignificant; and "compelling" to import the notion of being urged irresistibly, constrained or obliged.' " (The underlining is my own)

[9] In *S v Malgas* 2001 (1) SACR 469 (SCA) the Honourable Marais JA dealt expansively with the legislation in question and more specifically with the imposition of life imprisonment as a discretionary minimum sentence in a case of murder, and held that:

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

Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

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2 In *S v Blaauw* 1999 (2) SACR 295 (W)

The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

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

All factors (other than those set … above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

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

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.

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

Application

[10] The Honourable Lewis JA in *S v Radebe and Another* 2013 (2) SACR 165 (SCA) held as regards the period of incarceration of an accused as a potential substantial and compelling circumstance that:

"Accordingly, in determining, in the present case in respect of the charge of robbery with aggravating circumstances, whether 'substantial and compelling circumstances' warranted a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test was not whether on its own that period of detention constituted a 'substantial and compelling circumstance', but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one.

[11] In the case of *S v Ndlovu* 2007 (1) SACR 535 (SCA) at 538, which followed the *Malgas* decision, regarding substantial and compelling circumstances and as regards the appellant's youth, the ineptness with which the robbery was committed as well as the fact that he had been in custody for four months, held as follows:

"[13] The appellant's youth is certainly a factor the magistrate ought to have considered more seriously. While one appreciates the magistrate's frustration at the current levels of crime, he did not properly take into account that in the present case the degree of violence involved in the robbery was limited. Furthermore, a significant number of the articles removed from the optometrist was recovered. The robbery was executed in a clumsy and inept manner. The appellant spent approximately four months in custody pending the finalisation of the trial. These are factors not given due weight by the

magistrate or by the Court below. In my view, and considering the dicta in this Court's judgment in S v Malgas I 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) at 476g - 477a and 477c - g (SACR) and 1230E - G and 1231A - D (SA), these factors cumulatively constitute substantial and compelling circumstances. We must guard against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders." (The underlining is my own).

[12] In S v *Matyityi* 2011 (1) SACR 40 (SCA) at 48G and 49A to 49C the Honourable Ponnan JA stated that:

"The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. (The underlining is my own.) Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. 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. Nothing in it served, without more, to reduce his moral blameworthiness."

[13] In his submissions to the Court, Defence Counsel submitted that the fact that the period of the Accused's detentions in custody ought to be considered by this Court as a substantial and compelling circumstance as he has been in custody since 6 July 2018, a period of two years and 18 days. He did however concede that the accused's age, 29 years of age at the time is not substantial and compelling and that the accused was not immature.

The 'Zinn triad' approach.

[14] In *S v Zinn*, 1969 (2) SA 537 (A) at p. 540G the Honourable Rumpff JA as he then was held:

> "It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society."

The proper approach to sentence is to balance the gravity of the offence on the one hand against the interests of personality of the criminal on the other. *Cf S v Whitehead and Another* 1971 (4) SA 613 (A).

Interests of society and the gravity of the offences

[15] Counsel for the Defence conceded that the crimes of which the Accused was convicted are serious crimes and are prevalent. State Counsel made the same submission.

[16] Society expects to be protected from the reign of terror of cash in transit robberies which are executed with senseless violence and no regard for the sanctity of human life. In the present matter the robberies were committed with extreme callousness, excessive force, the wielding and excessive firing of assault rifles as well as the use of explosives endangering human life, The overwhelming armed assault on the convoy of Fidelity Cash Solutions convoy and the Fidelity employees, who offered no resistance, and more especially the senseless execution of the two deceased, was a barbaric display of unconscionable ruthless brutality, which evokes a sense of shock and revulsion. Moreover, it severely traumatised the surviving victims.

[17] It is trite that a trial Court has to weigh the interests of the Accused against the objective gravity of these offences, their prevalence in South Africa and the legitimate expectations of society that crimes of Murder and Robbery with aggravating circumstances must be severely punished. In this regard see *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and Others* 2012 (1) SACR 423 (SCA) at 429 [18] and [19].

[18] As regards the interests of our society, in *S v Matyityi* 2011 (1) SACR 40 (SCA) the Honourable Ponnan JA at 48 stated that:

> *"16] An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa 25 seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity."*

The Accused's personal circumstances.

[19] State Counsel in formed the Court that he Accused has no previous convictions.

[20] Defence Counsel called the Accused to testify as to his personal circumstances.

[21] He testified that his date of birth was 20 April 1989 and at the time of the events on 10 December 2017 he was 29 years old. At present he is 32 years of age.

[22] He is married and has two children, aged 6years and 2 years from the marriage. He also has five other children from five different mothers. These children are 8 years, 5 years, 4 years, 3 years and 1 year eight months old. He testified that he had been supporting all his children, providing food, clothing and paying for schooling. His wife's children receive social grants but is unsure as to whether the other five do.

[23] He has four siblings.

[24] He was a sub-contractor providing services for waste management for municipalities, with varying earnings between R20 000 to R30 000 per month.

[25] He has other income from leasing accommodation that he had set up at Malopane block N. He has three stands there with erected structures and rents out rooms.

[26] He has been in custody for just over two years, but has not been taking courses in prison as he could not find one to suit him.

[27] He is a member of the ZCC church.

[28] He owns two sedans, a Golf 6 and a Kia Picanto, In addition he has a Venture van which operates as a taxi. He also owns two motor-cycles.

[29] His home at Soshanguve as well as his vehicles, including the motor-cycles are all fully paid.

[30] His brother Reginald Dihangoane is looking after his affairs while he is in custody, but his wife when she visited him at the prison told him she is struggling as her life has changed drastically due to his absence at home. He is dissatisfied with his brother, who, according to him, is not maintaining his property and mismanaging his affairs.

[31] His family live in Mpumulanga and he is the only one living in Soshanguve. They are struggling financially. His siblings at Mpumulanga are unemployed. His mother is still living but his father has passed away. The family however farm at Vaalberg with 32 head of cattle.

[32] State Counsel asked him in cross-examination if he is remorseful now that he has been convicted, to which he replied that he is heartbroken as he has been convicted of offence he knows nothing about.

[33] He was asked if he felt sorry about the death of the two deceased and he replied that he is unable to say something about people who died in a place he knows nothing about.

[34] State Counsel asked him directly if he was remorseful and he replied that he was heartbroken about the conviction.

[35] He stated under cross-examination that he was not satisfied about the way his brother is overseeing his affairs.

[36] Asked as to what was lacking he replied that managing seven children is a problem as their financial support is not as it used to be.

[37] The vehicles he stated were being used by his wife and family. On being asked if it would make his life easier if he sold them to generate funds, he answered that if they were nit redundant as his mother who has trouble walking has to be transported. He has paid off the vehicle and if they were sold, he would suffer losses. If matters became worse he would contemplate selling the motor-cycles.

[38] His wife still lives in the house at Soshanguve with the two children.

Submissions by Defence Counsel on accused's circumstances

[39] Defence Counsel referred me to *S v Malgas* 2001 (1) SACR 469 (SCA) to which I refer in paragraph [9] of my judgment accentuating the excerpt from that case below, which is also evident from *S v Whitehead* 1969(2) SA 540 A to the same effect that:

"All factors (other than those set ... above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process."

[40] He also referred to *S v Nkomo* 2007 (2) SACR 198 (SCA), a rape case. The judgment of the Honourable Lewis JA is summarised in the headnote as follows:

> *"The appellant had raped the complainant five times during the course of a night; he had slapped and kicked her, and forced her to perform oral sex on him; he had H held her captive in a room while he had demeaned and hurt her, forcing himself repeatedly on her, even after she had seriously injured herself in an attempt to escape; and he had shown no remorse. In his favour, on the other hand, were the facts that he was relatively young at the time (29 years of age), that he was employed, and that there may have been a chance of rehabilitation, even though no evidence had been led to that effect. These were substantial and compelling circumstances which the Court below had not taken into account. A sentence of life imprisonment was unjust in the circumstances, entitling the Court to interfere and to impose an appropriate sentence."*

[41] Counsel for the defence argued that the accused is a good candidate for rehabilitation, although no evidence was led *in casu* either. He contended that the accused was useful and would fit in with society. I have taken this argument into consideration.

[42] Another decision on the aspect of rehabilitation I was referred to is *S v Sikhipa* 2006 (2) SACR 439 SCA in which Lewis JA set aside a sentence of life

imprisonment which had been imposed for rape substituted a sentence of 20 years. The Honourable Lewis JA at 445 paragraphs [18] and [19] he held the following:

> *"[18] Factors in mitigation include the fact that the appellant is a first offender; that he has a wife and children dependent upon him; that he has a trade (he is a bricklayer) and makes a living from his work; that he was 31 years old at the time of the trial, and that he is capable of rehabilitation. Moreover, the complainant was not seriously injured.*
> *However, no evidence was led as to the psychological consequences for her of the rape. But there can be no doubt that the rape was traumatic for her. She was only 13 when a neighbour, a married man, more than twice her age, dragged her across his yard and had sexual intercourse with her against her will. Her injuries may have been minor, but she must have been severely affected.*
>
> *[19] The sentence of life imprisonment required by the Legislature is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation. Moreover, the mitigating factors are not speculative or flimsy. In my view, life imprisonment is not a just sentence for the appellant. However, a lengthy sentence of imprisonment is warranted. I consider that a period of 20 years' imprisonment will send a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message."*

[43] In conclusion Defence Counsel argued that on all the mitigating factors traditionally raised, the prospect of rehabilitation and be useful in society, that the accused is a churchgoer, the lengthy term is custody and that the convictions hinged on common purpose only, the Court should find that there are substantial and compelling circumstances justifying a departure from the discretionary minimum sentences not only in respect of the murder counts but the robbery counts as well.

[44] In mitigation of sentence with regard to the conviction on Count 11 (formerly covered by counts 13 and 15 of the Indictment) submitted that the accused had not

performed any of the actual acts set out in the provisions of section 22(2) of the Explosives Act No 15 of 2003 and referred to my judgment wherein I imputed to the accused the act of another on the basis of common purpose, one that he shared consciously with those actually perpetrating the assault and *in casu* the explosion as well, in accordance with the decision of *S v Mgedezi and Others* 1989 (1) SA 687 (A). His argument in this regard is that it is a mitigating factor that the accused was not the actual person perpetrating the assault or placing the explosives and detonating them to gain access to the cash vault in the cash truck . In Mgedezi the Honourable Botha JA held that:

> "*Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person. A 'common' purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former.*"

> And held further

> *"In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims (in casu, group violence on a number of victims) can be held liable for those events on the basis of the decision in S v Safatsa and Others 1988 (1) SA 868 (A) only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, the requisite mens rea ; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."*

[45] This is a serious crime and carries a severe penalty of 25 years imprisonment, however, I shall take Counsel for the Defences submissions into account when meting out sentence on this count, bearing in mind also that I held in my judgment on the merits that a conviction on count 11 would not amount to a duplication of Count 6 (formerly count 8 in the Indictment) as the offence of contravening section 22(2) of the Explosives Act No 15 of 2003 is aimed at combatting the unlawful and intentional delivery, placing, discharging, detonation or initiation of explosives with intent to cause death or serious injury to any other person or to damage or destroy any place facility.

[46] State Counsel argued in reply that the discretionary minimum sentences ought to be imposed.

Findings and sentencing

[47] I have had due regard to all the factors raised by Defence Counsel. I have approached sentencing in accordance with the Zinn triad as well as to the decisions cited above as to the correct approach to the exercise of the discretion conferred on the Court in s 51(3)(a) of the Act. As stated in the Malgas decision The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

[48] With regard to the cases cited by Defence Counsel I take cognisance of the caveat voiced in the *Malgas* decision that

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

Both *Nkomo* and *Sikhipa* are appeals against sentence. Moreover the gravity of the offences committed and the facts *in casu* are incomparable with what happened in *Nkomo* and *Sikhipa*. In N's case cited above in [8] In deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts.

[49] On consideration of the circumstances of this case, in order to determine if lesser sentences are warranted, I am not satisfied that they render the prescribed sentences unjust in that they will be disproportionate to the crimes, the criminal and the needs of society, and find that no injustice will be done by imposing the prescribed minimum sentences under section 51(1) of the Criminal Law Amendment Act 105 of 1997 in respect of the murder charges and the prescribed minimum sentences under section 51(2) of the Criminal Law Amendment Act 105 of 1997 in respect of the robberies with aggravating circumstances.

[50] In accordance with *S v Malgas*, cited *supra*, *"in the absence of weighty justification"*, I find that there are no truly convincing reasons as to why the discretionary minimum sentences ought not to be imposed.

[51] I sentence the accused as follows:

On count 1:	Fifteen years' imprisonment
On count 2:	Five years' imprisonment
On count 4:	Life imprisonment
On count 5:	Life imprisonment
On count 6:	Fifteen years' imprisonment
On count 7:	Fifteen years' imprisonment

On count 8: Fifteen years' imprisonment

On count 9: Fifteen years' imprisonment

On count 10: Fifteen years' imprisonment

On count 11: Twenty-five years' imprisonment of which ten years' imprisonment is suspended for five years on condition the accused is not convicted of the commission of the offence of contravening section 22(2) of the Explosives Act No. 15 of 2003, committed during the period of suspension.

On count 12: Five years' imprisonment

On count 13: Five years' imprisonment

[52] I order that all the sentences run concurrently.

[53] I declare that the accused is disqualified from possessing a firearm in terms of the provisions of the Firearms Control Act No 60 of 2000

[54] I declare further that accused is unfit to possess explosives in terms of section 30(1) of the Explosives Act No 15 of 2003

B G MORRISON AJ

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: **23 JULY 2020**

DATE OF JUDGMENT: **24 JULY 2020**

APPEARANCE FOR THE STATE: ADV A KOALEPE

APPEARANCE FOR THE DEFENCE: MR M MADIRA