

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

25/1/2023
DATE

SIGNATURE

CASE NUMBER: SS53/2021

In the matter between:

THE STATE

and

SIMPHIWE THANDO NDIMANDE
PHINDA TATI
ANDILE NDWE
BONGINKOSI MASANGO

ACCUSED 1
ACCUSED 2
ACCUSED 3
ACCUSED 4

JUDGMENT - SENTENCE

DOSIO J:

SENTENCE

[1] The four accused were found guilty of two counts. Count one is a count of murder read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') and count two is a charge of robbery with aggravating circumstances read with s51(1) of Act 105 of 1997.

[2] For purposes of sentence, this Court has taken into consideration the personal circumstances of all four accused, the seriousness of the offences for which they have been found guilty and the interests of the community.

THE PERSONAL CIRCUMSTANCES OF THE ACCUSED

[3] The personal circumstances of the four accused are as follows:

[4] Accused one is 36 years old and was born on 8 February 1987 in Tembisa. He is the father of 5 children born from different mothers. The children are aged 18 years, 13 years, 10 years, 8 years and 4 years-old respectively. The highest standard passed by accused one is standard eight in 2008. The accused has no tertiary education. His father passed away and he has one sibling and his mother is a pensioner. At the time of his arrest he was selling clothes as a street vendor and was earning R8000 per month. He used this money to take care of his children and their mothers who are unemployed. He would pay all school fees and groceries.

[5] Accused one's counsel stated that accused one pleaded not guilty but that he had no intention to delay the proceedings. Counsel argued that accused one is fairly young. He was arrested on 28 August 2020 and has been in custody ever since. He has a previous conviction of possession of an illegal firearm in terms of s3 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000') where he was sentenced in 2012 to five years imprisonment, which is more than 10 years ago. Counsel argued that the accused served 10 months imprisonment in respect to this charge and this served as an eye-opener.

[6] Accused two was born on 27 January 1998. He is 35 years old and not married. The highest standard passed by accused two is grade 12 in 2007. His father passed away in 2011 and his mother lives in the Eastern Cape. He has no tertiary education. He was arrested on 1 September 2020 and has been in custody ever since. At the time of his arrest he had a business washing cars and he also transported schoolchildren in his motor vehicle. He earned R10 000 from transporting the children and earned R6000 washing cars. He is the father of five children, two of them are aged 17 years and were born from different mothers. The other three children are aged 11 years, eight years old and four years old respectively. The two children

aged eight and four years old are staying with his mother in the Eastern Cape. He was taking care of his children and paid for the maintenance, school fees and groceries. He has no previous convictions.

[7] Accused three was born on 14 November 1990 and is 32 years old and a first offender. He is divorced with two children aged 16 years and two years old respectively. The accused founded an NGO which is called 'Black Child is Possible'. This NGO works closely with the department of correctional services and assists with the education and reintegration of people into the community. The 16-year-old child is also supported by this NGO. As regards the two-year-old child, this child is supported by the accused's ex-wife who is a teacher. Accused three completed his matric.

[8] Accused four is 35 years old and was born on 21 August 1987. He obtained a grade 11. He is single and has three children aged 11 years, seven years and three years-old respectively. The 11-year-old child resides with the accused's mother and the other two children reside with the biological mother. Due to the fact that accused four is incarcerated he is unable to contribute to the finances of his children. He has no previous convictions and was working for his mother, earning between R3500 and R4500 per month, transporting children. Accused four suffers from chronic conditions namely diabetes, HIV and eczema.

THE SERIOUSNESS OF THE OFFENCE

[9] On 28 August 2020 and at 7 Nuwejaarsvoel street, Chloorkop, Birchacres, the accused shot and killed David Nutall-Smith. They also robbed him of R20 000-00 in cash. These offences were meticulously planned and executed with extreme precision. The deceased was killed in the confines of his workplace where he was attacked in a viscous manner and shots were immediately fired towards his person, before he could effectively defend himself. The deceased was not only shot once to disable him, he was shot multiple times which accentuates the heinousness of this crime.

[10] Murder is the most serious of crimes. Not only does it end the life of a loved family member, leaving much hardship and pain for the remaining family members, but in this case, it also left many employees without an employer, affecting the smooth running of this business and its dependant employees.

[11] Even though Mrs Coetzee identified accused one, two and four from previous video footage, and also accused three on the video capturing these events, all the accused still chose

to embark on a lengthy trial. Accused two, three and four disputed that they were ever at the Northmead Square mall. It is only when accused two's girlfriend testified and identified accused two as being present at the Northmead Square mall, that the versions of accused two, three and four changed to state they were in fact at the Northmead Square mall. It is clear that accused two, three and four all took a chance to mislead this court, which unfortunately for them failed.

[12] Accused one also attempted to mislead this court by stating he was shot at the MTN taxi rank, even though there was conclusive DNA evidence found at the deceased's work place where he was injured by the deceased who shot back at the robbers to defend himself. Due to the bare denial of all four accused, this trial became lengthy and lasted for nine weeks with the State calling 21 witnesses. The video evidence used by the State, in order to prove the identity of all four accused also contributed to the lengthy trial. Had the four accused played open cards with the court, this trial would have been finalised much sooner.

[13] The State called three witnesses in aggravation of sentence, namely Mrs Nutall- Smith, Maureen Coetzee and the investigating officer, namely sergeant Raselomane.

[14] Mrs Nutall-Smith testified that she was married to the deceased for 30 years and that two sons were born of this marriage. The deceased was a hero to her two sons, namely Rory and Daniel. Many people were affected by the passing of the deceased, namely, family and very close friends who had known him for 35 years or less. His passing was commiserated by friends and family all over the world who knew him. Mrs Nutall-Smith mourns the loss of not only her best friend, but someone who's sense of humour, love of life and knowledge, filled the lives of many, including hers. Many people who depended on the deceased with their daily survival, namely those who sold him his daily newspaper and those who cooked his daily meal whilst at work, no longer have this source of income. The Red Cross nursery schools on the East Rand to which the deceased donated generously, are also no longer receiving the donations or services that the deceased rendered to them. The company which the deceased opened in 1990, called DNS, suffered a considerable financial loss after the deceased's death and the employees who had worked for the deceased, some going back to 32 years, also lost their jobs. The specialized bespoke balustrading which the deceased's company made and which is visible in many well-known places locally and outside of the country, is a testimony to the excellence of the deceased's work. Many of the companies who supplied material to the deceased's company also closed down due to the lack of support from DNS.

[15] It is quite remarkable that notwithstanding the momentous disruption caused to the deceased's family and employees that accused three and four instructed their legal representative to place on record that they are not remorseful for the crime they been found guilty of and maintain their innocence. It is noteworthy that neither accused one or two have expressed any remorse.

[16] From the evidence of Maureen Coetzee, who is an information specialist and who deals with the gathering of information in respect to syndicate groups, especially in respect to bank associated robberies and followings, it is evident that robbers usually follow victims from a secure area, like the bank, to areas with less security, namely at the houses or business premises where victims are easily attacked and robbed. She reiterated her evidence in chief that spotters seldom form part of the robbery and only assist and guide the gunmen to the scene of the crime. She stated that due to the usage of burner phones these crimes are very difficult to investigate and finalize. She also stated that there is a great economic impact on the banks as well as victims, in that the bank will pay money to the victim if the loss occurred on the banking premises, however in situations where the money is robbed off the banking premises, the victim is not compensated. This is because the bank's insurance does not cover the latter situation. She testified that the arrest and incarceration of the four accused has had a significant impact on these types of incidents. She compared the period before the suspects were incarcerated with the period after they were arrested. The statistics were collected from the ABSA crime management system and Bidvest Protea Coin on behalf of FNB bank and Nedbank. The South African Banking Risk Information Center ('SABRIC') was also approached in order to obtain statistics pertaining to the prevalence of bank associated robberies. As per exhibit 'QQ', it is clear that from 2016 to 2018 the bank associated robberies were high and that in respect to ABSA bank, Nedbank and FNB bank there was a decrease in these crimes after the accused's were arrested in late 2020. The SABRIC statistics also show a decrease of bank associated robberies after these four accused were incarcerated in late 2020. It is true that these statistics are national statistics, however as stated by Mrs Coetzee, the prevalence of the bank associated robberies and followings are mostly in Gauteng, with other provinces contributing minimally to this crime.

[17] The investigating officer namely sergeant Raselomane testified that accused one, two and four are awaiting the completion of a case in the Kempton Park Regional Court where the accused are facing similar charges of bank associated robberies. The matter is part-heard and the accused have not as yet been convicted or acquitted.

INTERESTS OF THE COMMUNITY

[18] This country has witnessed an ever-increasing wave of violence. Innocent and defenceless victims continue to fall prey to these types of offences. In this instance, an employer and business man was killed, whose demise has left a serious void not only in his family and friends, but the business community.

[19] 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 of helpless and innocent victims has reached high levels, the community craves the assistance of the courts.

[20] In *S v Msimanga and Another*¹, The Supreme Court of Appeal s held that violence in any form is no longer tolerated, and our Courts, by imposing heavier sentences, must send out a message both to prospective criminals that their conduct is not to be endured, and to the public that Courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.

[21] In respect to the murder count, s51 (1) of Act 105 of 1997 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.

[22] Section 51 (3) of Act 105 of 1997 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.

[23] In the case of *S v Malgas*², the Supreme Court of Appeal held that:

¹ *S v Msimanga and Another* 2005 (1) SACR 377 (A)

² *S v Malgas* 2001 (1) SACR 469 SCA

'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.'³

[24] Notwithstanding the application of the prescribed minimum sentences in respect to count 1 and 2, this court has considered other sentencing options, however direct imprisonment is the only suitable sentence as all four accused are a danger to the community.

[25] 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 sentence.

[26] The fact that accused one is 36 years old, accused two is 35 years old, accused three is 32 years old and accused four is 35 years old is certainly a positive factor in their favour, but it can hardly be a substantial and compelling circumstance on its own. (see *Shubane v The State* (073/14) 2014 ZASCA 148 26 September 2014).

[27] In the case of *S v Matyityi*⁴ the Supreme Court of Appeal held 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'.⁵

[28] *Matyityi*⁶ stated further that:

'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 too 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

³ Ibid para 1

⁴ *S v Matyityi* 2011 (1) SACR 40 SCA

⁵ Ibid para 14

⁶ *Matyityi* (Note 4 above) para 24

youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's notion of fairness.⁷

[29] Any offence which has the effect of holding a human life cheap and involves any loss of life is serious. This sentiment should be reflected in the sentence imposed by the courts.⁸

[30] The charge of murder on count one falls under the provisions of part 1 of schedule 2 in that the offence was premeditated and was committed by a group of persons acting in the execution or furtherance of a common purpose.

[31] On behalf of the third and fourth accused, it was argued that the substantial and compelling circumstances which exist are that both have no previous convictions and they spent a long time awaiting trial in prison. It was also argued on behalf of accused three that because he was a spotter and was not present when the shooting of the deceased occurred, that this should be regarded as a substantial and compelling reason not to impose the minimum sentences. In addition, on behalf of accused four it was argued that because he stood at the gate of the work premises when the shooting occurred, that he too should not be sentenced as per the minimum prescribed sentences.

[32] This court finds that although the BMW turned right in Nuwejaarsvoel street, it had followed the deceased's vehicle all the time and the occupants of that vehicle, although they were not in the premises of the deceased's business grounds, a prior agreement had been reached that the VW Polo would follow the deceased into the business premises. The role that the BMW occupants had played as spotters, had been executed. As agreed, the duty to rob and shoot the deceased now passed over to the occupants of the VW Polo. As a result, this Court found that both the occupants of the BMW and the occupants of the VW Polo had a common purpose to rob and shoot the deceased. This prior agreement to shoot is clear from the evidence of Patrick Dinglelela who stated that before the deceased could even finish asking what the robbers were doing in his business premises, he was shot. The role of the spotters is just as heinous as the role of the gunmen who pulled the trigger as the spotters enabled the completion and fulfilment of the crime. This Court finds no reason to impose different sentences in respect to all four accused. They are all equally guilty of this very serious crime.

[33] As regards the fact that accused two, three and four have no previous convictions is not

⁷ *Matyityi* (Note 4 above) para 24

⁸ see *Human* 1979 (3) SA 331 (E) AT 337 C and *Khumalo* 1984 (4) SA 642 (W) AT 643 E

a substantial and compelling circumstance to depart from the minimum prescribed sentence.

[34] Count two falls under the provisions of schedule 2 part 11 and the minimum prescribed sentence is 15 years imprisonment applicable for a first offender of robbery with aggravating circumstances. All four accused were working prior to their incarceration in this matter. Accordingly, the crimes were not committed out of need but out of greed.

[35] This Court finds there are no substantial and compelling circumstances present in respect to the accused that warrants a departure from the prescribed statutory sentence in respect to count one or count two.

[36] All four accused have been in custody since between August and October 2020. In the case of *DPP v Gcwala*⁹, it was held 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 to be imposed is justified and whether it is proportionate to the crimes committed. It was further stated in this case that the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence is a just one. This Court has taken into consideration the period of the detention of all four accused, however, this Court finds that a term of life imprisonment in respect to count one is still justified.

[37] In the result, the following order is made:

Count 1

In respect to count 1, all four accused are sentenced to life imprisonment.

Count 2

In respect to count 2, all four accused are sentenced to 15 years imprisonment.

In terms of s103(1)(g) of Act 60 of 2000, accused two, three and four are declared unfit to possess a firearm.

⁹ *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014)

Date Heard : 24 January 2023
Judgment handed down: 25 January 2023

Appearances:

On behalf of the State	Adv Le Roux
On behalf of the Accused 1 and 2	Adv Moloï
On behalf of Accused 3 and 4	Ms Simpson