

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	
14 August 2023	

DATE	SIGNATURE

CASE NUMBER:

SS83/2022

In the matter between:

THE STATE

and

R M

ACCUSED

SENTENCE

DOSIO J:

Sentence

[1] The accused has been found guilty of murder read with the provisions of s51(1) of the

Criminal Law Amendment Act 105 of and 1997 ('Act 105 of 1997') on count two, attempted murder on count three, robbery with aggravating circumstances in respect to count 5 and count 6 which is a contravention of s49 (1) of Act 13 of 2002.

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

The personal circumstances of the accused

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

- (a) He is 27 years old and was born on 4 April 1996.
- (b) He is from Lesotho and entered South Africa with a valid visa which expired, making him illegal in South Africa.
- (c) He completed standard two and then left school to go and tend the livestock at his home.
- (d) He is married according to tradition but has no children.
- (e) His mother was buried on 5 August 2023.
- (f) He has four siblings who are all working.
- (g) Prior to his arrest he was doing illegal mining and would sometimes make R60 000 in two weeks if he found gold.
- (h) He is still suffering from pain in his stomach and hand as a result of the shot wound he sustained.

The seriousness of the offence

[4] The deceased was killed whilst he was investigating a matter. He was a policeman and accordingly, the provisions of s51(1) of Act 105 of 1997 apply and life imprisonment is applicable.

[5] Murder is the most serious of crimes. Not only does it end the life of a loved family member but it leaves much hardship and pain for the remaining family members.

[6] The State called the wife of the deceased Siweya, namely Moneth Layaani Siweya. She stated she was married for 22 years. When they married, the deceased already was the father of two boys and when she married the deceased she gave birth to three more boys. She

was uncertain about the ages of the two boys of the deceased, but the ages of the boys born of their marriage are roughly 21, 17 and 9 years old respectively. She testified that the deceased was the breadwinner and after his death the family has suffered financially. Even though the Government has helped, the money she is receiving both from her salary and the Government assistance is not enough. She stated that the deceased was very involved in the lives of his sons and even on the day he was on his way to register the 17- year old boy for soccer. The death of the deceased has particularly impacted on the life of the nine-year old son as the child has withdrawn from his classmates and his school marks have deteriorated. Although the boys have been receiving psychological help and counselling, it has not helped.

[7] The seriousness of this offence is that not only was a family deprived of a husband and father, but the country has lost one of its protectors as a result of the callous and cold blooded killing of an individual who is not even a legal citizen of this country. The accused has deprived five boys/men of their father's love and guidance.

Interests of the community

[8] 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 have reached high levels, the community craves the assistance of the courts.

[9] In *S v Msimanga and Another*,¹ the Supreme Court of Appeal 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.

[10] Section 51 (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.

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

[11] Count five falls under the provisions of schedule 2 part 11 of Act 105 of 1997 and the minimum prescribed sentence is 15 years imprisonment applicable for a first offender of robbery with aggravating circumstances.

[12] 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.

[13] As stated in the case of *S v Malgas*,² the Supreme Court of Appeal held that: '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

[14] Notwithstanding the application of the prescribed minimum sentences this court has considered other sentencing options, however, direct imprisonment is the only suitable sentence as the accused is a danger to the community.

[15] 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.

[16] Violence against policemen is has been on the increase for a few years now. This is impacting on the work that policemen do, because they are aware that their lives are at risk and instead of being fearless, they are now affected and it may impact on their ability to do their work effectively.

[17] In the matter of *S v Matyityi*,⁴ the Supreme Court of Appeal held 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

² *S v Malgas* 2001 (1) SACR 469 SCA.

³ *Ibid* para i

⁴ *S v Matyityi* 2011 (1) SACR 40 SCA.

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.⁵

[18] The accused has not shown any remorse in this matter. He decided to plead not guilty, which although it is his constitutional right, he had the choice to come to the witness bench and plead mercy knowing that he had been found guilty of killing the deceased, yet he persists with his belief that he is innocent. As a result, this Court finds no remorse on the part of the accused. The defence counsel has asked that this court find that the following are compelling and substantial circumstances to depart from the minimum prescribed sentence, namely:

- (a) that the accused is a first offender.
- (b) that the accused was awaiting trial for more than a year.
- (c) that the health of the accused is not good.

This court has considered the fact that the accused is 27 years old, however, as stated in the matter of *S v Matyityi*,⁶ 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'. As a result, this Court finds there are no substantial and compelling circumstances present in respect to the accused on count two and five that warrants a departure from the prescribed statutory sentences.

[19] The accused has been in custody for more than a year, but as stated in the matter of *DPP v Gcwala*,⁷ the Supreme Court of Appeal 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 finds the sentence of life imprisonment in respect to count two is a just sentence in the circumstances of this case.

⁵ Ibid para 24.

⁶ Ibid.

⁷ *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014).

[20] In the result, the accused is sentenced to the following sentences:

- (a) Life imprisonment in respect to count two.
- (b) Ten (10) years imprisonment in respect to count three.
- (c) Fifteen years imprisonment in respect to count five.
- (d) Six (6) months imprisonment in respect to count six.

The court orders that the sentences imposed on count three, five and six run concurrently with the sentence imposed on count two. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date Heard: 02 August 2023

Judgment handed down: 14 August 2023

Appearances:

On behalf of the State: Adv C. Ryan

On behalf of the Accused: Adv M. Mzamane