

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF
GAUTENG DIVISION,**



**SOUTH AFRICA
PRETORIA**

CASE NO: CC72/2019

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

13-05-2022

PD. PHAHLANE

DATE

SIGNATURE

In the matter between:

THE STATE

And

J

L

ACCUSED

JUDGMENT ON SENTENCE

PHAHLANE, J

[1] On 31 January 2022 the accused was convicted of three counts, namely:

- 1. Count 1:** Murder, read with the provisions of sections 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Act”).
- 2. Count 2:** Robbery with aggravating circumstances (read with the provisions of section 51(2) of the same Act; and
- 3. Count 3:** Contravening the provisions of section 49(14) (Presentation of a fraudulent temporary asylum seeker permit) read with subsection (1) of the Immigration Act 13 of 2002.

[2] The matter was postponed to 28 March 2022 for the pre-sentence report to be compiled on behalf of the accused, and the victims impact reports to be compiled on behalf of the State. However, the Swahili interpreter was not available on that day, and the matter had to be postponed to 20 April 2022 for that purpose. On the 20th of April, as the court was about to proceed with the sentencing procedure, Mr. Motsweni on behalf of the accused informed the court that he does not have instructions to proceed with the matter as the accused has expressed his dissatisfaction on the ruling of this court as regards his conviction, and as a result thereof, the accused terminated his mandate.

[3] The accused then informed the court that he would prefer to have another counsel represent him, and that he wished for Legal Aid South Africa to instruct another counsel on his behalf as he did not have the financial means to appoint his own counsel. The legal aid was informed of the situation and they in turn requested the accused to write a letter to explain why he wanted another counsel to be appointed. The matter had to be postponed further to the 4th of May 2022, at the request of the legal aid, in order to enable it to have deliberations and decide on whether another counsel can be appointed on behalf of the accused.

[4] In his letter to the Legal Aid dated 20 April 2022, which is titled, "Application for another legal representative", the accused expressed that counsel did not represent him the way he wanted because he did not challenge the witnesses, and that he wanted his case to be reopened so that the investigating officer can bring all convincing evidence before court. This letter was handed in as Exhibit H. It appeared that after writing the letter to the legal aid, the accused had a change of heart, and no longer wished for the legal aid to appoint another counsel, but wanted Mr Motsweni to proceed representing him. He thereafter wrote another letter to the legal aid which was an application to have Mr Motsweni re-instated as his legal representative, and indicated that he wishes to abandon his previous request. This letter is dated 26 April 2022 and was admitted as Exhibit J.

[5] As already indicated that the pre-sentence and victim's impact reports had to be compiled, both parties have since obtained their reports, and that having been done, it is now the duty of this court to pass sentence on the accused. It is often said by courts that imposing sentence is one of the most difficult tasks which a presiding officer has to grapple with, and has been described as a 'painfully difficult problem' which involves a careful and dispassionate consideration of all the factors.

[6] It is trite law that sentencing the accused should be directed at addressing the judicial purposes of punishment, which are deterrence; prevention; retribution and rehabilitation. In considering an appropriate sentence, the court must have regard to the "triad" factors pertaining to sentence as enunciated in **S v Zinn**¹ namely: - the offence, the offender, and the interests of society. This means that the court must take into account, the nature of the crimes you

¹ 1969 (2) SA 537 (A).

committed, including the gravity and extent thereof Mr L; your personal circumstances; as well as the interests of society. These fits perfectly into the principle that the sentence or punishment to be imposed should fit the crime, as well as the criminal, and it must be fair to society.

- [7] With regards to the first leg of the triad – ie. the offense, there is a constitutional requirement that the punishment to be imposed, including where it is set by statute, must not be disproportionate to the offense. This is ascertained by looking at the applicable aggravating and mitigating circumstances. Several aggravating factors relating to the crime may be considered, and one such factor being the severity of the crime. In other words, the seriousness of the offences committed by the accused and the circumstances under which they were committed, are relevant factors to be taken into consideration by the court. With regards to the second leg of the triad – considering the personal circumstance of the offender requires that the sentence fit the offender. The third leg of the triad requires that a sentence serve the interest of society, which is the protection of society’s needs, and the deterrence of would-be criminals. All these incorporates the traditional purposes of punishment into the sentencing considerations.
- [8] Due to the seriousness of offences, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the accused should be accorded a smaller role. The Supreme Court of Appeal in ***S v Mhlakaza & another***² also pointed out that, given the high levels of violent and serious crimes in the country, when sentencing such crimes, emphasis should be on retribution and deterrence. Is it therefore not wrong to conclude that the natural indignation of interested persons, and of the community

² 1997 (1) SACR 515 (SCA).

at large, should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and victims of crime, may be inclined to take the law into their own hands³.

- [9] In affirming that retribution should carry more weight because of the seriousness of the offences which an accused person has been convicted of – when the court considers the aspects relating to the purpose of punishment, the Supreme Court of Appeal in the case of **S v Swart**⁴ stated the following:

“In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each, according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role”.

- [10] The offences which the accused has been convicted for, are very serious in nature. The deceased was killed in a ruthless manner where the accused had no regard for human life. This is confirmed by the *post-mortem* report and the photographs of the body of the deceased which were admitted by the accused in terms of section 220 of the CPA. I had in my judgment indicated that the post-mortem report revealed the cause of the deceased’s death as **perforating stab wound through the heart**. This stab wound which has been identified as *Stab wound A*, penetrated the anterior and the posterior

³ See: R v Karg 1961 (1) SA 231 (A) at 236A-B.

⁴ 2004 (2) SACR 370 (SCA).

pericardium and then perforated through-and-through the ventricles of the heart. It is also noted on the post-mortem report that the left anterior descending coronary artery had been severed by *stab wound A*.

[11] In addition to what is noted on the post-mortem report, the photographs of the heart of the deceased tell a story of their own. It is visible from these photographs that the deceased's heart had a large wound which shows that the object used was inserted from the front and piercing through to the back where it exited. This clearly shows the horrendous and cold-blooded manner in which the deceased was murdered.

[12] The deceased was robbed and stabbed to death for his cellphone. Robbery has been described by the courts as an aggravated form of theft, namely, theft committed with violence. The stabbing of the deceased constitutes an act of violence which is a requirement or one of the elements for the crime of robbery. It was a means by which the unlawful possession of his property was obtained. The court in **S v Mhlakaza** *supra* stated the following regarding the offence of robbery and the sentence to be imposed: "*robbery is the most feared and despicable crime. The sentence must express the indignation of society about the crime. The more heinous the crime in the view of the law-abiding public, the more severe the sentence needs to be*".

[13] The Constitution⁵ of our country provides in section 11 that "*everyone has the right to life*". It is therefore the duty of the courts to protect the citizens of this country and the society in general, from the scourge of these violent actions, and to send a clear message that this behaviour is unacceptable.

⁵ Act 108 of 1996.

[14] Mr Motsweni argued that what happened to the deceased was a robbery gone wrong as the accused robbed the deceased when he saw the opportunity and that he did not plan or have the intent to kill the deceased.

[15] Mr Nethononda on the other hand argued that this was not a robbery gone wrong because the accused was armed with a weapon and had told himself that should the victim of robbery try to defend himself or retaliate, he would use the weapon to harm the victim, because he had a clear intent to kill. He submitted that the manner in which the offence was committed was severe and that statistics shows that the country has a high crime rate of violent crimes of murder and robbery which are escalating on a daily basis.

[16] Turning to the issue of the minimum sentences, it is important to note that because of serious and violent crimes, Parliament saw it fit to step in and address the problem, hence the Legislature passed the Criminal Law Amendment Act 105 of 1997. This Act was intended to prescribe a variety of mandatory minimum sentences to be imposed by our courts in respect of a wide range of serious and violent crimes. The relevant sections being sections 51(1) and 51(2), which have been explained to the accused at the beginning of the trial. These are offences which fall under Part I schedule 2 and Part II schedule 2 of the Act respectively, and the mandatory sentence is life imprisonment on the count of Murder and 15 years' imprisonment on the count of Robbery for the first offender.

[17] Having said that, the court is also enjoined with the powers to depart from imposing the prescribed minimum sentences where substantial and compelling circumstances exist. However, the specified sentences are not be departed from lightly, and for flimsy reasons as

enunciated by the Supreme Court of Appeal in **S v Malgas**⁶. Where the court departs from imposing the prescribed sentence, there must truly be convincing reasons to depart therefrom, which reasons must be specified. Each case must be determined according to its own merits and it is for this reason that courts have not attempted to define what is meant by substantial and compelling circumstances. This is in keeping with the principle that the imposition of sentence is pre-eminently in the domain of a sentencing court.

[18] In this regard, the general principles governing the imposition of a sentence in terms of the Minimum Sentences Act as pronounced by the Supreme Court of Appeal in the case of **Malgas** is that:

“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 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.”

[19] The Supreme Court of Appeal in **S v Matyityi**⁷ referred to **Malgas** and reaffirmed as follows:

“The starting point for a court that is required to impose a sentence in terms of Act 105 of 1997 is not a clean slate on which the court is free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation”.

[20] The decision whether the circumstances of this case calls for the imposition of a lesser sentence than the prescribed minimum

⁶ 2001 (1) SACR 469 (SCA)

⁷ 2011 (1) SACR 40 (SCA)

sentence ordained by the legislature, means the mitigating factors would have to be weighed with the aggravating factors⁸. Mr Motsweni addressed the court from the bar in mitigation and placed the following personal circumstances of the accused on record:

1. He is 37 years old, born on 25 November 1983, in Tanzania
2. He is unmarried.
3. At the time of his arrest, he was staying at Parkview flats with his girlfriend and her 11 years old child. The accused does not have children of his own.
4. He was self-employed running a business of selling clothes and shoe repair
5. He earned R3000,00 per month which he used to support his girlfriend and her child.
6. He went as far as grade 7 in school, which he passed in Tanzania.
7. He has six siblings who are all in Tanzania, save for his brother Good-luck who was killed back in Tanzania.
8. The accused's parents divorced when he was still young and his father was never involved in his upbringing.
9. He was brought up by his grandfather and when the grandfather passed away, the accused had no one to guide him, and had no father figure.
10. He left Tanzania in 2003 when he was 20 years old, coming to South Africa using his passport.
11. He has been in custody for three years since his arrest.
12. He has two previous convictions for possession of drugs for 02 November 2015 where he was cautioned and discharged by the Randburg Magistrate court, and on 06 June 2016 where he paid the admission of guilt fine in the amount of R400,00 at Pretoria central.

⁸ See: S v Sikhapha 2006 (2) SACR 439 (SCA) at para 16.

[21] It was submitted on behalf of the accused that the court should consider the accused's personal circumstances and the time he spent in custody awaiting trial, as substantial and compelling circumstances that should persuade the court not to impose the prescribed minimum sentences. Mr Motsweni further submitted that the accused lost both parents at a young age and the traumatic experience which he found himself in as a result of his upbringing, should work in his favour. He also submitted that the court should have mercy on the accused, but that he cannot address the court with regards to the issue of remorse, as the accused still maintains his innocence.

[22] On the other hand, the State argued that the court is obliged to impose mandatory sentences prescribed by legislature and that the accused's personal circumstances do not warrant a deviation from the imposition of the prescribed sentences because the accused is not remorseful for his actions.

[23] The accused contends that he is not responsible for the death of the deceased. He denied that he has robbed him and still insists that he was at his place of residence on the evening of the incident. It is on record that the accused also displayed a refusal to appreciate the wrongfulness of his actions on the 20th of April when he fired his counsel and said he wished to directly address the court. He indicated that he did not kill the deceased and that he was framed because on the day of his arrest, the media arrived with the police and took his pictures, and published that he is the person who robbed and killed the deceased. This aspect was never raised during his evidence, and neither was it put to the investigating officer who happens to be the arresting officer.

[24] The accused was identified by three witnesses at the crime scene who managed to also describe his clothing, which was confirmed by the

accused himself during cross-examination. Two of these witnesses, witnessed the accused stabbing the deceased. What cannot be overlooked is the fact that the malicious attack and the violence displayed by the accused in the course of brutally killing the deceased, left an indelible mark on the deceased's family; the Entertainment industry; Arts and Culture, but more particularly the deceased's friend and colleague, Tebatso Mashishi, as well as Mbali Mncube and Tsakane Maluleke who were overcome by emotions and cried throughout their testimony. Tebatso told the court that he went to therapy for two years, but clearly the counselling sessions did not assist much because on the day he was called to come and testify, he broke down in tears, even before he started giving his evidence, and had to be assisted by a therapist, Ms Van Dansen who told the court that it has been a difficult journey for Tebatso as he was not coping.

[25] Mbali Mncube on the other hand was the most affected, in my view, because on the day an inspection *in loco* was supposed to be conducted, she was hysterical and indicated that she wanted to go back home to KZN, than relive the trauma she experienced on the day of the incident. As such, an inspection *in loco* could not be held and was cancelled. Not only was this witness overcome with emotions and appear to be traumatised, but she had difficulty testifying in open court for days, for fear of being in the same court room with the accused - and the court had to adjourn throughout, to allow her to recover. Under the circumstances, the State made an application in terms of s153(2) of the CPA to have the witness testify via CCTV, and the application was granted in the interest of justice.

[26] Ms Amokelane Mashele, is a court preparation officer whose duties involve counselling and assisting witnesses and victims of crime to come and testify in court. She had counselling sessions with Mbali and Tsakane Maluleke. She told the court that she had two hour

sessions on different occasions with Mbali, and that during those sessions, Mbali could not continue with therapy because she was still traumatized and crying throughout the session. She compiled a report where she expressed the following about Mbali:

“The ordeal has had a negative impact on her academic performance at the Tshwane University of Technology (TUT) and that Mbali was academically excluded and expelled from varsity. The stress associated with the case has had a negative impact in her wellbeing as well - as she decided to move away from Sunnyside and she has not been to Sterland ever since the incident. She further reported that she (Mbali) fears the accused, and having been in the same courtroom with the accused was very traumatic, and she would like to not see the accused with her eyes as it brings back flashbacks of the night of the incident. An in-depth counseling session with the social worker had already been arranged”.

[27] With regards to the pre-sentence report admitted as Exhibit “M”, compiled by Ms H. Buhrow, in which she stated that it forms the core of a factual and diagnostic study of the accused having considered the circumstances and problems of the accused, shows that she conducted an interview with the accused on the 8th and 22nd of March 2022, and also had telephonic interviews with Alex, the cousin of the accused; his girlfriend, Gertruida de Wee; and his uncle Thomviso Munuo. She noted the following in her report:

- 1) **Criminal event and behaviour of the accused after the crime was committed:** The accused maintains that he is innocent and that he did not commit this offence. He still states that he was with his girlfriend at home and he feels that he is framed and is not sure why. He shows no remorse.

- 2) **Overview of family history and accused's own development:** he is the eldest of the two children born of his parents. His parents separated when he was still young, and his father who became mentally ill, was absent in his development. The accused was brought up by his grandfather who took care of him - and his mother who stayed nearby was not fully involved in his development. His mother abused alcohol and his brother who was an albino and taken care of by his mother, was killed in 2002 as a result of the myths around Tanzania that body parts of an albino can be used in witchcraft to bring good luck. In 2003 his mother was killed in the forest. His grandmother passed away in 1997 and his grandfather in 1999.
- 3) **School years:** the accused completed his Grade 7 in 1999 in Tanzania, and was not motivated to return to school after the loss of his grandfather. He was taken care of by his father's brother Philemon from 1999 until 2002.
- 4) **Work record:** he came to South Africa in 2003 after leaving school, in search for job opportunities. He was using a passport when he came to South Africa and when it expired, he applied for an asylum seeker permit. He stayed with friends from 2003 until 2008 and in 2010, he decided to move to Pretoria after he met his girlfriend. He alleges that due to corruption at the Home Affairs, he did not have the right papers and had paid regularly for a permit.
- 5) **Interpersonal relationships:** he never had an emotional bond with his parents and he lacked a strong father figure in life. He met his girlfriend in 2007 and they moved in together in 2010. They have no children together but the girlfriend has two children from a previous relationship. He is identified as a loner who build his life around his work and girlfriend.
- 6) **Health:** He was checked medically for chronic diseases but showed no signs.

- 7) With regards to the impact of the offence on society, Ms. Buhrow referred to several newspaper articles and Tweets of people from the media industry who raised concerns and dissatisfaction about the crime rate in the country and made comments thereto. One such comment expressed the following: *“Another promising talent had been stolen from the country by crime”*, while the other expressed that: *“How long will it take for us to realize we have a crime problem as a country, and how many people must die before we do something. Who must we trust to protect our families?”*
- i. She noted the following: *“The accused learned to plan and get involved in violent crimes by socialising with people who commit crimes. It seems that the accused was more exposed to community violence seeing that his mother and brother were brutally killed. The accused still denied he committed the offence of murder and robbery. Because of this, it cannot be determined that he is remorseful.*
 - ii. *The accused used violence mainly to gain control over his situation and is classified as an opportunistic robber who commit offences as the opportunity arises”.*
- 8) The probation officer also noted that the deceased was defenceless; that he reacted after his phone was robbed and was brutally killed when protecting his property, and further that his death was meaningless. She noted that a high level of violence was used and that after stabbing the deceased, the accused left him behind to die. It is also noted that *“information from his childhood cannot be a contributing factor that led to his aggressive behaviour”*.
- 9) Ms. Buhrow concluded her report by stating that *“considering all the factors, the aggravating factors far outweigh the mitigating factors and rehabilitation might be unlikely since the accused does not take responsibility and has no insight into the consequences of the crime he committed.”* She further noted that

she is not satisfied that substantial and compelling circumstances exist that warrant a deviation from imposing the prescribed sentence in terms of Act 105 of 1997, and that the reason for not considering any other sentence is that the accused shows no remorse and takes no responsibility.

10) She recommended that the court should consider imposing imprisonment in terms of the provisions of section 276(1)(b) of the CPA, read with section 51(1) of the Minimum Sentences Act.

[28] For the sake of completeness and understanding of what section 276(1)(b) entails, the section provides as follows:

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely

(a)

(b) imprisonment, including imprisonment for life, or imprisonment for an indefinite period as referred to in section 286B (1)

- which relates to the court declaring a person a dangerous criminal and sentencing such a person to undergo imprisonment for an indefinite period.

[29] The State presented victim impact reports of Mr Nelson Khwinana, the father of the deceased and Tebatso Mashishi (a colleague and friend of the deceased who I have already mentioned, and was with the deceased on the day of the incident) The reports were admitted as Exhibit "L", and Exhibit "N" respectively.

[30] With regards to **Mr Nelson Khwinana**, he indicated that the crime affected his entire family and he has been struggling to cope with moving on in life without his son. He is now suffering from uncontrollable high blood pressure since the death of his son and has been warned by the doctor to stop attending court proceedings. He indicated that he has been attending the court proceedings on his

own because no one in his family has the strength to cope and listen to the evidence of how the deceased was killed. He stated that he is struggling to sleep because he always dreams about cleaning the deceased's blood at the crime scene. He stated that his wife is also not coping and has not been well physically and psychologically. The deceased's death also had an impact on his niece who was admitted several times for stress related illness and ultimately died shortly thereafter.

[31] A report compiled for **Tebatso Mashishi** reveals that days after the deceased passed on, he had trouble sleeping. He stated that the incident kept playing in his mind over and over, as all he could think about was how his friend died whilst he was trying to save him. As an actor, he struggled shooting scenes where paramedics are involved as they trigger his memory or remind him of how his friend could not be assisted by paramedics. In order to cope, he started drinking heavily and struggles being in crowded places as he sees everyone as a potential killer. This is because he did not see who killed his friend and blames himself that he should have been more focused and aware of what was happening around him. He suffers from severe depression and is suicidal as he has on several occasions tried to end his life, because the pain of what happened on the day of the incident is unbearable.

a) I will quote Tebatso's message as he expressed his feelings about the incident:

"1st of March 2019 is the day I died but I was still alive. I saw a close friend, a colleague, and someone I regarded as a brother die slowly as he attempted to save his life after he was stabbed for a phone. When I got to him, he was still alive, fighting to stay alive. Sibusiso was the future of the entertainment industry. He inspired me and many other artists.

The image of Sibusiso taking his last breath haunts me everyday of my life. I blame myself everyday for not being able to save his life. I feel like I failed Sibusiso, myself and everyone that loved him. My therapist saved my life countless times. I will have to take therapy for the rest of my life and take anti-depressants because I am a danger to myself”.

[32] With regards to the count 3 relating to presentation of a fraudulent temporary asylum seeker permit, it is on record that the accused has been illegal in the country for 19 years with no proper documentation – meaning, he does not have the necessary authorisation from the Department of Home Affairs to be in the country. He admitted during cross-examination that the temporary asylum permit admitted as Exhibit G2 reflecting his alleged permit number and a photograph of another person whom he says he does not know but is from Tanzania, and Exhibit G1 depicting his own photograph and personal particulars are fraudulent. These aspects were conceded and confirmed by his counsel during trial proceedings when he addressed the court. It is not in dispute that the Department of Home Affairs declined the accused’s application to grant him temporary asylum permit. This therefore makes the accused an **illegal foreigner**.

[33] In terms of the Immigration Act, an **illegal foreigner** means a foreigner who is in the Republic of South Africa in contravention of this Act and includes a prohibited person; whereas a **prohibited person** means any person referred to in section 29 of this Act –and as contemplated in section 29(1)(b),-- a prohibited person is a foreigner against whom or a conviction has been secured in the Republic in respect of the offence of, among others, murder.

[34] I interpose to state that, according to a research conducted by Statistics South Africa in 2018, there were 6.2 million foreigners living in South Africa, and between 1 200 000 and 1 500 000 were undocumented. According to the High Commissioner for Refugees Representative for South Africa, a research done by the United Nations High Commissioner for Refugees (UNHCR) on refugees in South Africa, there are 1.1 million asylum applications lodged with the UNHCR. As for the challenges faced by South Africa, statistics shows that there are 200 000 asylum seekers of which 65 000 have recognised status, leading to the conclusion that the remainder are unaccounted for, or are in the country illegally. It was also reported that refugees are flouting the regulations. UNHCR Regional Protection Officer referred to the issue of people not giving their true nationality. The Chairperson of the UNHCR reported that the system for asylum seekers is currently clogged by people who utilise it when they do not deserve to be recognised, thus creating a problem for the DHA and causes backlogs, in that genuine applications will not be considered and processed in time.

[35] This court has earlier indicated that, not only will it make a balance between the personal circumstances of the accused; the interests of society; and the offence which the accused has been convicted of, but it will also look at the purposes of punishment. Having regard to the purposes of punishment and the seriousness of the crimes committed by the accused, there is no doubt in my mind that the only appropriate punishment for the accused is a sentence of long-term imprisonment.

[36] The probation officer noted in the pre-sentence report that the accused had not shown any remorse. Remorse remains an important factor in the imposition of sentence and lack thereof, may aggravate the severity of sentence, but it must however - not be

overemphasised in relation to the other factors that must be considered. It is trite that if the accused shows genuine remorse, punishment will be accommodating, especially where the accused takes the court fully into his confidence about the facts of the case and the circumstances of the offence, and has also taken steps to translate his remorse into action. However, this is not the case with the accused before court.

[37] It is evident from Ms. Buhrow's report that the accused refuses to appreciate the wrongfulness of his actions and does not want to take responsibility. This was made clearer when the accused told the court that he is innocent and insisted that he is not responsible for the death of the deceased.

[38] It seems to me that the accused does not understand the importance of taking the oath or of telling the truth. It was on the 20th of December 2021 when the accused took the witness stand and told the court that he has one child, a boy, with his girlfriend Getruda. He said on the day of the incident, he went straight home after he knocked off from work, and stayed home and never left the house. He explained that his girlfriend left the house around 21:00 to go out with her friends and locked him and the child in the house.

[39] When asked where the child was born, he explained that the child was born at Steve Biko hospital, and struggled to give the age of the child. He ultimately said the child was 11 years old, born on 7 March 2012, - which was obviously the incorrect age because the child would have been 9 years old at the time. Surprisingly, he informed the probation officer that he does not have any children with his girlfriend, as also submitted by his counsel in his address in mitigation.

[40] He also testified during trial proceedings that he went to the Home Affairs to apply for an asylum permit, but an official told him that it will cost R2 500,00 to get a permit, which he did not have, and he never went back. Under cross-examination, he said he tried three times to get a permit and was informed by an official that he cannot get 'free service'. When asked by the court to explain what he meant by 'free service', he changed his version again and said, the people at the home affairs did not assist him but his friend is the one who told him that he had to pay the R2 500,00. He could not explain why he kept changing his version. This is in contradiction with the allegations he made when he consulted with the probation officer. Common sense dictates that one cannot allege that he did not have the right papers for lack of finance, while at the same time claiming that he paid regularly for a permit.

[41] It must be made very clear that the accused did not qualify to be granted an asylum permit in terms of the Act and was not entitled to get one. This is so because he testified that he entered the country with his passport, wanting to better his life in South Africa - and this is the information he gave to the probation officer when he stated that he came to South Africa in search for job opportunities. (Emphasis added)

[42] The Act describes an asylum seeker as a person who has fled his or her country of origin and is seeking recognition and protection as a refugee in the Republic of South Africa, while a refugee is described as a person who has been granted asylum status and protection in terms of section 24 of Refugee Act. It follows that the accused's position is not included in this category and the accused cannot be described as someone who needed protection in terms of the Act.

[43] With regards to the question whether the accused is remorseful for having killed the deceased, I am inclined to agree with the submissions made by the State and the probation officer that the accused has not shown any remorse because he does not want to admit liability for his actions. This is an indication that he cannot be rehabilitated. It is for this reason that the Supreme Court of Appeal in ***S v Mabuza***⁹ recognised that remorse or the lack thereof may be considered when determining sentence.

[44] I therefore align myself with the authorities which find that the expression of remorse, is an indication that an accused person has realised that - the wrong has been done, and that it will only be validly taken into consideration if he takes the court into his confidence. I am of the view that the accused have not shown any remorse.

[45] Mr L, your counsel was at pains trying to convince this court that, even though he does not condone what you have done, had the deceased not followed you, you would not have stabbed him - and that is why he submitted that this was a robbery gone wrong which was committed when you saw the opportunity. I do not agree with this submission.

[46] The State correctly argued that when you went to Sterland Mall on the day of the incident, you armed yourself with a weapon because you knew exactly that you had planned to rob and kill your victim, should he retaliate. It is the State's submission that the sentence to be imposed by this court should send a clear message that crime will not be tolerated.

⁹ 2009 (2) SACR 435 (SCA)

[47] The violent attack by the accused, in the course of viciously and brutally killing the deceased by stabbing him with a sharp object on his heart and left him for dead, is an aggravating factor which the court cannot turn a blind eye to. Without a doubt, this is one of those cases where the court must not lose sight of the fact that the legislature has ordained specific sentences for the offences which the accused has been convicted for.

[48] In considering the appropriate punishment to be meted on the accused, this court took into account, all the relevant factors such as the personal circumstances of the accused in mitigation, including the aggravating features of the offences; the accused's lack of remorse; the purposes of punishment; and all the other factors to be considered when imposing sentence. Regarding the accused's personal circumstances, I take note of the views which classifies the personality of the accused by the probation officer and the finding that the *"information from his childhood cannot be a contributing factor that led to his aggressive behaviour"*. I believe that this finding was not arrived at lightly.

[49] I therefore do not agree with the defence submission that the accused had a traumatic upbringing because no evidence was led in that regard. The evidence before court is that the accused was brought up and taken care of by his grandfather and when he passed on, he was taken care of by his father's brother Philemon, as stated in Exhibit "M".

[50] In ***S v Vilakazi***¹⁰ Nugent JA stated the following regarding the personal circumstance of an accused person:

¹⁰ S v Vilakazi 2009 (1) SACR 552 (SCA) at para 58 (3 September 2008).

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided”.

[51] In the case of **Matyiti** *supra*, respondent who was 27 years old was convicted on one count each of murder and rape, and on two counts of robbery. He was sentenced to an effective term of 25 years imprisonment. Regarding the issue of remorse, the Supreme Court of Appeal held that before the court could find that an accused was genuinely remorseful, it needed to have a proper appreciation of what motivated the accused to commit the offences. As to the question of age, the court stated that at the age of 27, the respondent was hardly a youth or immature. It held that the circumstances of the crimes were breathtakingly brazen, and executed with callous brutality. It further held that the offences committed by the respondent were heinous and that the respondent had given no explanation for why it had been necessary for the deceased to have been killed or raped. Having regard to all the circumstance, it held that the prescribed minimum sentences of life imprisonment were manifestly fair and just, and further held that “neither the age of the respondent nor his background and circumstances, constituted substantial and compelling circumstances”. It accordingly altered the sentence of 25 years imprisonment imposed by the trial court, to one of life imprisonment on each count.

[52] In **S v Ro and Another**¹¹ the majority of the Supreme Court of Appeal held that:

“To elevate the personal circumstances of the accused above that of society in general and the victims in particular, would not serve the well-established aims of sentencing, including deterrence and retribution”.

[53] With regards to the pre-sentence detention, it is common cause that the accused was arrested on 8 March 2019 and has been in custody for 3 years awaiting finalisation of his case. However, this does not mean that the court should overlook all other factors which must be taken into account cumulatively, in the exercise of its sentencing discretion. There is no rule of thumb in respect of the calculation of the weight to be given to the time spent by an accused awaiting trial. The Supreme Court of appeal in **S v Livanje**¹² considered the role played by the period that a person spends in detention while awaiting finalisation of the case. The court preferred to reiterate what it had held in **S v Radebe**¹³ namely 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 crime committed: whether the sentence in all the circumstances, including the period spent in detention, prior to conviction and sentencing, is a just one.

[54] The court in **Radebe** rejected what has been suggested in the case of [**S v Brophy**¹⁴- that a convicted person should be credited, not only with the period spent in detention awaiting completion of the trial, but double this period] – and stated that, instead of a so-called mechanical approach, a better approach...is that the period in

¹¹ 2010 (2) SACR 248 (SCA)

¹² 2020 (2) SACR 451 (SCA).

¹³ 2013 (2) SACR 165 (SCA) at para 14.

¹⁴ 2007 (2) SACR 56 (W).

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 crime committed.

[55] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. As stated by the court in *Malgas*, “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”.

[56] It remains the paramount function of this court to exercise its sentencing discretion properly and reasonably in considering what an appropriate sentence should be, in the light of the circumstances of this case. Consequently, the question whether the period spent by the accused in custody awaiting trial, having regard to the period of imprisonment to be imposed, justify a departure from the sentence prescribed by the legislature. In my view, the time spent by the accused in custody awaiting finalisation of his case, does not justify any departure as it is not proportionate to the crimes he committed. For purposes of the offence of robbery, the accused will be regarded as a first offender.

[57] Having considered all the circumstances of this case, and the question whether substantial and compelling circumstances exist which call for the imposition of a lesser sentence than the prescribed minimum sentences in terms of the Act, I am of the view that the aggravating factors in this case far outweigh the mitigating factors, and there are **no** substantial and compelling circumstances which warrant a deviation from the imposition of the prescribed minimum

sentence. It is also my considered view that the personal circumstances of the accused are just ordinary circumstances, and I can find no other suitable sentence other than the one of life imprisonment on the count of murder, and 15 years imprisonment on the count of robbery. I cannot find any justification why this court should depart from imposing the prescribed sentences.

[58] It is very sad that people such as the accused would enter the country illegally; commit an offence; and tarnish the image of the Department of Home Affairs by stating that the officials at the department are corrupt, knowing very well that, that did not happen. Mr L, you have been a guest and housed by this country without any harassment from anyone for the past 19 years, and yet you failed to appreciate the hospitality you received when you robbed this country of a talent of a young man who was beginning his career as a rising star in the film industry, and who was contributing to the economy of this country. You need to appreciate that as a guest, you must respect the laws of the country you visit.

[59] Speaking at a joint sitting of the National Assembly and National Council of Provinces (NCOP) on 18 September 2019, President Cyril Ramaphosa, concerned with the influx of people crossing the borders illegally, said government will ensure that there are tight regulations to deter illegal immigration. He stated that:

“All who live in south Africa, must be legally permitted to do so. That is why government has prioritized border control and security and ensure that we tighten up regulations to deter this illegal immigration”.

[60] Pursuant to section 32(2) of the Immigration Act, any illegal foreigner shall be deported. Having said that, the accused is prohibited under

section 29(1)(b) of this Act to remain in the country as he has been convicted by this court. Thus, the section requires mandatory departure from the Republic of South Africa, in the form of permanent deportation of illegal foreigners. As the accused has already been found to be an illegal foreigner by this court as contemplated in the Act, the provisions of section 49(14) of the Act which the accused has been found guilty of contravening, - deals with offences. The section provides as follows:

*“(14) Any person who for the purpose of entering or remaining in, or departing from, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **eight years**”.*

[61] In respect of count 3, in light of the facts of this case in so far as it relates to Exhibit G1 and G2, I see no reason why this court should not impose the maximum term of imprisonment.

[62] In affirming that illegal foreigners should be deported, Millar AJ, as he then was, in the unreported judgment of **Maphosa v S**¹⁵ stated the following:

¹⁵ (A198/2020) [2021] ZAGPPHC 84 (1 March 2021).

“[28] Firstly, having regard to the offence for which the appellant has been convicted, he is disqualified from ever entering temporarily or remaining permanently in the Republic lawfully. This is apparent from the provisions of section 29(1)(b) of the Immigration Act”.

[63] This court referred to the decision of the full bench of this court in **Luis Alberto Cuna v S**, and stated at paragraph [29] as follows:

[29] A full bench in Luis Alberto Cuna v S, an unreported decision of the full bench of this Court under case number A6/2020 handed down on 15 December 2020 at paragraphs 3.1.16 and 3.1.20 of this Court held that:

“Once an accused has been found guilty in terms of section 49(1) and sentenced either to a fine or imprisonment, the trial Court must in addition, make an order for her or his deportation.”

And

“...in every case where an order for the deportation of an illegal foreigner has been made, the judgement must be brought to the attention of all the Departments of Government that deal or are entrusted with the deportation of illegal foreigners and all the other institutions in the value chain.”

[30] *The full bench carefully set out the various State Departments to whose specific attention a deportation order should be brought and the reasons therefore. These are:*

“3.1.20.1 the National Department of Public Prosecutions, so that it is brought to the attention of prosecutors that when arguing sentence, a deportation order should be one of the orders that a prosecutor requests from the trial court;

3.1.20.2 the Director General of the Department of Justice so that it be brought to the attention of judicial officers that when a court convicts an illegal foreigner in terms of section 49(1) of the Immigration Act, an order for the deportation of such a person is made, as well;

3.1.20.3 the Commissioner of the Correctional Services in order to facilitate the deportation of the person so convicted when his or her sentence comes to an end; and

3.1.20.4 the Department of Home Affairs so as to commence with the process of the deportation of the illegal foreigner once sentence has been served.”

[64] This court is bound by the doctrine of *stare decisis* and by statute, and it follows that the accused **must** be deported after serving his sentence.

[65] In the circumstances, the following sentence is imposed:

1. In respect of **Count 1** (Murder): - Life imprisonment
2. In respect of **Count 2** (Robbery with aggravating circumstances):
- Fifteen (15) years imprisonment

3. In respect of **Count 3** (Presentation of a fraudulent temporary asylum seeker permit): - Eight (8) years imprisonment.
4. It is ordered that the accused be deported after serving his sentence.
5. A copy of this judgment should be forwarded to:
 - 5.1 The National Director of Public Prosecutions.
 - 5.2 The Minister of Home Affairs.
 - 5.3 The Department of Home Affairs.
 - 5.4 The Department of Justice and Correctional Services, and
 - 5.5 The Commissioner of Correctional Services.



PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the State	: Adv Nethononda
Instructed by	: Director of Public Prosecutions, Pretoria
For the Defendant	: Adv Motsweni
Instructed by	: Legal Aid South Africa
Date of Judgment	: 13 May 2022