

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. SS118/2008

DPP Ref. No. JPV2007/416

In the matter between:

THE STATE

and

JOHNSON TSHEPO CHIRWA	Accused 1
DUMISANI SIBUSISO XULU	Accused 2
GILBERT MOSADI	Accused 3
CELIWE MBOKAZI	Accused 5

MEYER, J

[1] Mr. Johnson Tshepo Chirwa (accused no 1), Mr Dumisani Sibusiso Xulu (accused no 2), Mr Gilbert Mosadi (accused no 3), and Ms Celiwe Mbokazi (accused no 5) have been convicted of the robbery of the late Mr. Franz Xaver Richter ('the deceased') of R23 213.35 with aggravating circumstances (count 1), and of the murder of the deceased (count 2).

Accused no 3 was further convicted of the unlawful possession of a firearm (count 3), and of the unlawful possession of ammunition (count 4). Accused no 1 and accused no 3 were also convicted of a contravention of s 11(2)(b)(iv) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ('corrupt activities') (count 5).

[2] The threshold requirements set out in ss 51(1) and 51(2)(a)(i) and in Parts I and II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 have been met and imprisonment for life must be imposed upon each accused for the murder conviction and imprisonment for a period not less than fifteen years for the robbery with aggravating circumstances conviction, unless 'substantial and compelling' circumstances within the meaning of s 51(3) exist which justify the imposition of lesser sentences than those prescribed. See: Schedule 2: Part I Murder (a), (c), (d); Part II Robbery (a).

[3] In considering whether or not substantial and compelling circumstances exist, a court is enjoined to take into account all considerations relevant to the imposition of an appropriate sentence, '... including the personal circumstances of the accused, the interests of society and the gravity of the offence and to give due recognition to the fact that when 'considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.' Footnote omitted. Mitigating factors '...cannot be considered *in vacuo*, but due weight must be given to them in the context of the given case and together with all of the other factors before the Court, such as the aggravating features of the case and the interests of the community.'

Per: Mthiyane, JA in *S v Vermeulen* 2004 (2) SACR 174 (SCA), paras [22] and [28].

[4] The state led no *viva voce* evidence in aggravation of sentence. The accused also led no *viva voce* evidence in mitigation of sentence and each accused elected not to testify, but their counsel placed facts before me in mitigation of their sentences from the bar. Counsel for the State and counsel for each accused addressed me on the matter of sentence.

[5] The murder and robbery crimes committed by the accused in this matter are very serious and horrendous. Accused no 5, at least on the morning of 28 November 2007, conspired with accused no 2 to commit the offences of murder and robbery of the deceased or to aid in their commission. She also, in the execution of the conspiracy, assisted in the commission of the offences. The robbers would not have been able to embark upon the ambush if they had not been informed when to strike and such information was conveyed by accused no 5 to accused no 2.

[6] The enormity of the crimes committed by accused no 1, by accused no 2, and by accused no 3, is magnified by their pre-planning and method of execution. The surprise attack on the deceased was executed in a military fashion. This appears from the confessions of each accused. Accused no 2 recruited accused no 1, accused no 3, and another person for the robbery. The execution thereof was pre-planned and accused no 2, by his own admission, chaired the pre-planning. Accused no 3 and the other person

were armed with firearms. They formed the front line. They pointed the firearms at the deceased and he was shot in cold blood. Accused no 1 followed behind accused no 3 and the other person and he took the money or a substantial part of it. Accused no 2 was at all times present, and from his hiding place he had a view of everything that was happening. All three of them participated in the planning, in the execution of the plan, and in running away once the plan was executed. They undertook their surprise attack upon the deceased when he was defenseless and in the presence of his 'adopted' children. They acted with callousness. Each one's participation, irrespective of their various roles in the whole operation, was no less reprehensible than that of the others.

[7] The personal circumstances of accused no 1: He was born on 25 October 1984. He had two siblings, a brother and a sister. His brother died during March 2009 while he was in custody awaiting the finalisation of this criminal trial. He achieved standard 9 at school and was, due to financial constraints, unable to continue or further his education. He is unmarried. He is the father of two children. They reside with their mother in the Free State Province. He was a 'loan shark' and a gambler at the time of his arrest earning an income of about R4, 000.00 per month. He contributed financially to the support of his children.

[8] The personal circumstances of accused no 2: He was born on 6 April 1970 in Eshowe, KwaZulu-Natal, which he considers his permanent home and that is where his family, wife and three children of ages 11, 7 and 3

reside. His wife is employed and two of their three children attend school. Accused no 2 came to Johannesburg during the year 2006 in search of employment. He was employed at Heia Safari for a while. He was unemployed at the time of his arrest.

[9] The personal circumstances of accused no 3: He was born on 12 March 1976 in Zeerust, North-West Province. He is from a family of five. His father passed away during 2008 while he was in custody. He is not married. He has a daughter of three years old. She resides with her mother. At the time of his arrest accused no 3 earned an income from selling perfume and from gambling. He contributed financially to the maintenance of his child.

[10] The personal circumstances of accused no 5: She was born on 5 September 1972 in Empangeni, KwaZulu-Natal. She came to Johannesburg to work for the deceased. They fell in love. They lived together as husband and wife since she was fifteen years of age. During the last few years before he died she was not satisfied sexually by the deceased due to his age. This made her vulnerable to and explains the love affair between her and Mr. Ronnie Khumalo and her subsequent pregnancy. She now has a child of two years old by him.

[11] The factors advanced on behalf of all the accused as 'substantial and compelling circumstances' are that they were first offenders; the findings of *dolus eventualis* insofar as the murder convictions are concerned; and that they have been in prison awaiting the finalisation of this criminal trial since 28

November 2007, and in the case of accused no 5 since 7 December 2007 but excluding the period from 25 August 2009 until 4 March 2010 when she was on bail.

[12] I should mention that Mr. Biyana, who appeared for accused no 2, informed us from the bar that accused no 2 is presently serving a sentence of two years imprisonment for the unlawful pointing of a firearm, which sentence will have been served by him during June 2010. Accused no 2 did not confirm this and the State did not prove any previous convictions against him. He is accordingly considered a first offender for the purpose of these proceedings.

[13] The findings of *dolus eventualis* insofar as the murder convictions are concerned, do not, in the light of all the circumstances of this case, give rise to mitigating circumstances of any substance for any one of the accused. The finding of *dolus eventualis* in the case of accused no 5 is not the principal finding. As far as the other accused are concerned, their planning and execution of the robbery involved the overpowering of the deceased by means of the use of two firearms. The risks to the deceased's life must have been within the contemplation of each accused and each one of them accepted the plan to put the deceased's life at risk. This is a case in which there was a deliberate and complete disregard of the risk to the deceased's life in the planning and in its execution. See: *S v Mafela and Another* 1980 (3) SA 825 (A), at pp 826H – 829B. To consider the findings of *dolus eventualis* as mitigating would amount to unjust concessions in favour of the accused.

[14] Further factors advanced on behalf of accused no 1 as 'substantial and compelling circumstances' are that he was 23 years of age at the time of the commission of the offences and accordingly the youngest amongst his co-accused and susceptible to their influence.

[15] Further factors advanced on behalf accused no 3 are that he came from Zeerust, he did not know the area, he was susceptible to persuasion by the other accused, he was not part of the planning, and the general planning did not involve the shooting of the deceased. He, in terms of his confession, was persuaded by others to participate in the commission of the robbery, but it should also be borne in mind that he was an adult man in his early thirties at the time of the commission of the offences. Also, in terms of his confession, accused no 3 became a party to the planning of the robbery even though this happened shortly before the commission of the offences. He foresaw the possibility of the deceased being killed and that he performed his acts of association with recklessness as to whether or not death was to ensue. This finding was favourable to accused no 3 and founded on his own confession. In terms thereof only he and one other attacker were armed with firearms. Outside his confession it was proved that three bullet entrance wounds were found in the body of the deceased. Two spent bullets were found in the body of the deceased and one in his vehicle. Two of them were of .38 calibre and one of 9 mm calibre. The only inference is that at least one bullet that contributed to the death of the deceased was fired from the firearm that he carried.

[16] Other factors advanced on behalf of accused no 5 as 'substantial and compelling circumstances' are that she is not a danger to society and therefore not a person who needs to be removed from society permanently. It was also submitted that she played a minimal role in the commission of the crimes of which she was convicted. She did not pull the trigger, but her role cannot in my judgment be said to be minimal. On the contrary, it was of key and great importance. Accused no 5's participation was at best for her no less reprehensible than that of the others.

[17] The picture that emerged from the evidence as to why accused no 5 conspired with accused no 2 to commit the offences of murder and robbery of the deceased or to aid in their commission and why she, in the execution of the conspiracy, assisted in their commission is this: Accused no 5, having been married by customary union to the deceased, shared in the privileges of his lifestyle. She was a beneficiary in terms of his last will and testament which was executed a little more than four months before he met his untimely death. Her denial of any knowledge about the will was rejected. She and Mr. Khumalo had commenced a love affair during 2006 and it continues to this day, or at least to the day when Mr. Khumalo testified. This relationship resulted in her falling pregnant. Accused no 5 stated in her post-arrest statement (exhibit 'O') that she informed the deceased of her pregnancy during August 2007, that he told her to give birth at her home in Natal, and that she should then come back to Johannesburg for work with other people. The deceased's plan was for accused no 5 to leave for Natal on 16 December

2007. The inevitable inference is that the deceased's rejection of her or her ongoing relationship with Mr. Khumalo or both motivated her to attempt at securing her inheritance by means of the criminal conduct for which she was convicted.

[18] In any event, circumstances detracting from the serious aggravating circumstances of her conspiring and of her assistance rendered in the commission of the offences are not to be found in the evidence. There is no suggestion that her conduct was the result of any form of threat or abuse. The evidence points rather to the deceased having been a good and kind person. Her case is also not one 'of a wife driven to desperation and seeing no other solution such as divorce.' Her position is no different from someone who made use of a hired killer, which is a serious aggravating factor. *S v Kgafela* 2003 (4) SACR 176 (SCA), paras [6] and [9].

[19] Not one of the accused has shown any remorse whatsoever, which makes their individual prognosis towards rehabilitation negative and a mere speculative possibility. Accused no 5 shed tears when I withdrew her bail on 4 March 2010, but such tears cannot be said to have demonstrated any remorse.

[20] Our country suffers an unacceptable and distressing incidence of crime, and especially robbery with aggravating circumstances and murder, and the needs of society require courts to deal severely with offenders such as the accused. Our courts have repeatedly emphasised the seriousness of

such offences and that severe punishments will be imposed upon such perpetrators, unless the circumstances of a particular case dictate otherwise. The actions of the accused in this case defy the community and determinate sentences of lengthy imprisonment would not be regarded as effective sanctions against the grave crimes committed by them.

[21] Giving due weight to all the relevant circumstances, including the personal circumstances of each accused, the few mitigating factors in each one's favour, the aggravating features of the case, the enormity of the crimes, and the interests of the community, leads me to the conclusion that there are no substantial and compelling circumstances present in this case in respect of any one of the accused.

[22] Turning to the other convictions, I consider the imposition upon accused no 3 of a period of three years' imprisonment and a period of one year imprisonment appropriate for his convictions of the unlawful possession of a firearm (count 3) and of ammunition (count 4). I also consider the imposition of a period of two years imprisonment upon accused no 1 and a period of two years imprisonment upon accused no 3 appropriate for their respective convictions of the charges of corrupt activities (count 5).

[23] In the result:

A. Accused No. 1, Mr. Johnson Tshepo Chirwa:

1. You are hereby sentenced to:

- 1.1 imprisonment for fifteen years for your conviction of the robbery of the deceased with aggravating circumstances (count 1);
 - 1.2 imprisonment for life for your conviction of murder of the deceased (count 2); and
 - 1.3 imprisonment for two years for your conviction of the charge of corrupt activities (count 5).
2. Your sentences of fifteen years imprisonment and of two years imprisonment for robbery with aggravating circumstances and for corrupt activities run concurrently with your sentence of life imprisonment for murder.
 3. You are declared unfit to possess a firearm.

B. Accused No. 2, Mr Dumisani Sibusiso Xulu:

1. You are hereby sentenced to:
 - 1.1 imprisonment for fifteen years for your conviction of the robbery of the deceased with aggravating circumstances (count 1);
 - 1.2 imprisonment for life for your conviction of murder of the deceased (count 2);
2. Your sentence of fifteen years imprisonment for robbery with aggravating circumstances runs concurrently with your sentence of life imprisonment for murder.
3. You are declared unfit to possess a firearm.

C. Accused No. 3, Mr Gilbert Mosadi;

1. You are hereby sentenced to:

- 1.1 imprisonment for fifteen years for your conviction of the robbery of the deceased with aggravating circumstances (count 1);
- 1.2 imprisonment for life for your conviction of murder of the deceased (count 2);
- 1.3 imprisonment for three years for your conviction of unlawful possession of a firearm (count 3);
- 1.4 imprisonment for one year for your conviction of unlawful possession of ammunition (count 4); and
- 1.5 imprisonment for two years for your conviction of the charge of corrupt activities (count 5).
2. Your sentences of fifteen years imprisonment, of three years imprisonment, of one year imprisonment, and of two years imprisonment for robbery with aggravating circumstances, for unlawful possession of a firearm, for unlawful possession of ammunition and for corrupt activities respectively run concurrently with your sentence of life imprisonment for murder.
3. You are declared unfit to possess a firearm.

D. Accused No. 5, Ms Celiwe Mbokazi;

1. You are hereby sentenced to:
 - 1.1 imprisonment for fifteen years for your conviction of the robbery of the deceased with aggravating circumstances (count 1); and
 - 1.2 imprisonment for life for your conviction of murder of the deceased (count 2).

2. Your sentence of fifteen years imprisonment for robbery with aggravating circumstances runs concurrently with your sentence of life imprisonment for murder.
3. You are declared unfit to possess a firearm.

P.A. MEYER
JUDGE OF THE HIGH COURT

15 March 2010