

REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: SS 119/2021

 30 November 2023

In the matter between:

THE STATE

And

**MOREMANE, TSHEGOFATSO
THLOELE, GONTSE
KOAILE, MARGARET
MMOLA, PORTIA**

**Accused 1
Accused 2
Accused 3
Accused 4**

JUDGMENT

Mdalana-Mayisela J

- [1] This is the judgment on sentence. I have already delivered the judgment in respect of the trial and conviction which followed upon it. The two judgments should be read together.
- [2] The accused were charged on count 1 with murder of Lethukuthula Sifisokuhle Zulu ("the deceased"), read with section 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended ("the CLAA") and also read with the provisions of section 91 and 258 of the Criminal Procedure Act 51 of 1977 ("the CPA"); count 2 with theft; and count 3 with the contravention of section 4(b) read with sections 1, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 (" Possession of Drugs") ("the offences").
- [3] They pleaded not guilty to all counts. On 31 August 2023 they were acquitted on counts 1 and 3. They were convicted on count 2. This is the sentence judgment on theft. The specific details of the offence of theft are as follow. The state alleged that the accused did unlawfully and intentionally steal the following items to wit: a silver microwave, two cell phones, laptop, television set, 6 Johnny Walker glasses, two blankets and R60,000.00 cash. The property was in the lawful possession of Nkosi Msimang and/or the deceased.
- [4] The state proved no previous convictions against accused 1, 2 and 4. It proved previous conviction of robbery against accused 3, on which she was sentenced to six months direct imprisonment on 24 May 2003.
- [5] After conviction, upon enquiry by this court, the accused stated that they did not require the probation officer's report. By agreement between the parties, the state submitted the victim impact report prepared by Nkosi Msimang. The state made an application for another victim impact report prepared to be admitted as evidence in aggravation of sentence. The defence counsel for all the accused objected on the ground that it is irrelevant to the offence of theft. The report dealt with the impact of the deceased's death on the Royal family. After hearing all the parties on this issue, I refused to admit the aforesaid report because it is irrelevant to theft.
- [6] It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad, namely, the crime, offender and interest of society. The sentence must be individualized, and each matter dealt with on its own peculiar facts. It

must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence, a balance has to be struck.¹ The court also has to take into account the purposes of punishment, which are aimed at rehabilitation, deterrence and retribution. Punishment must fit the crime and criminal.²

- [7] The personal circumstances of the accused are as follow. Accused 1 was born on 21 March 1990. She is now 33 years old. She has a matric educational qualification. After completing her schooling, she worked part time as a vendor selling food, earning R1500.00 per week. Her father passed away in 2005. She has two daughters aged 11 and 14 years. She was the sole supporter of her children. Their father does not maintain them. Since her arrest on 20 November 2020, they have been cared for and supported by her mother with the help of her siblings who are gainfully employed. She is a first offender. She spent 3 years in custody awaiting trial. After her arrest she took the police to her apartment, where some of the stolen items were recovered.
- [8] Accused 2 was born on 27 August 1993. She is 30 years old. She has grade 10 level of education. She was doing part-time jobs earning R500 per week. She has no children. She is single. Her father passed away when she was 4 years old. She was raised by her mother. She spent 3 years in prison awaiting trial. She is a first offender.
- [9] Accused 3 was born on 21 September 1978. She is 45 years old. She is single. She has grade 6 level of education. She was working as a vendor earning R500 per fortnight. She has three children aged 28 years, 18 years and 10 years. The 10 years old child is receiving child support grant. Since her arrest her mother is taking care of the 18 years and 10 years old children. She spent three years in prison awaiting trial. She has a previous conviction of robbery. I will not take it into account for sentencing because it is 20 years old.
- [10] Accused 4 was born on 8 February 1992. She is 31 years old. She does not know her father. Her mother passed away in 2018. She was raised by her grandmother who passed away in 2022. She has grade 7 level of education. She was doing part-time jobs

¹ *S v Samuels 2011 (1) SACR 9 (SCA).*

² *R v Motsepe 1923 TPD 380.*

earning R180 per day. She is single. She has two children aged 16 years and 11 years. Since her arrest her aunt and their paternal grandmother are taking care of them. She was informed whilst incarcerated that her children are not coping without her. She has intermittent episodes of short breath and is currently taking TB treatment. She spent three years in prison awaiting trial. She is a first offender.

- [11] Counsel for accused number 1 submitted that the court should impose a suspended sentence or a fine considering the personal circumstances, particularly, the three years spent in prison awaiting trial, and that some stolen items were recovered. She referred me to the previous decision of *Kwenamore v S*³, where the SCA reduced the sentence of 22 years for 10 counts of theft imposed on the 18 years old appellant to 7 years. In turn I referred her to the previous decision of *Kubheka and another v S*⁴, where the SCA restored a sentence of 4 years of which 2 years was suspended for 5 years, imposed on the appellant for one count of theft of cell phone and iPod out of a motor vehicle. The nature of the theft in the current matter is more serious than Kubheka case, as it will become clear when I deal with the aggravating factors. The wholly suspended sentence or a fine will not be an appropriate sentence in the circumstances of this case.
- [12] Counsel for accused 3 and 4 submitted that the interests of the accused's minor children should also be considered. I agree with counsel for accused no 3 and 4. However, to elevate the accused's personal circumstances above that of the society in general and the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution.⁵
- [13] The state presented the victim impact report of Nkosi Msimang in aggravation of the sentence. In his testimony during the trial, he testified that he and the deceased were business partners. The R60 000.00 cash stolen by the accused belonged to him and the deceased. Part of that amount was meant to be given to the deceased's child. The main items that were stolen such as the Television set, laptop, R60 000.00 cash, 2 cell phones and some minor items were not recovered. In his victim impact statement, he stated that he has not replaced the items that were not recovered due to lack of finances. He lost great opportunities they have established and constantly working on.

³ 2004(1) SACR 385 (SCA).

⁴ (200/2020) [2021] ZASCA 25.

⁵ *S v RO and another* 2010 (2) SACR 248 (SCA) para 20.

He could not afford to pay South African Revenue Services. As a result, they lost their business. He had to move out of the residential place he was renting after this offence was committed because he could not afford it. He sold his car and bought a piece of land in Mpumalanga. He installed a tent in that piece of land and is residing there. This incident has affected his social and family life negatively. He has stopped going out to public places and have serious paranoia issues because of it.

- [14] The accused has committed a serious offence of theft. They stole valuable items. Some of them administered anti-depressants pills or sleeping pills to the victims. This act was reckless and posed a health risk to the victims. Msimang was found disoriented the following day. It took him a week to recover. The anti-depressants were found in his body when he went for a test. Accused 3 in his admission stated that this was their modus operandi when committing theft from the victims. They stole from the victims who showed kindness to them. The victims bought alcohol and opened their home for the accused to spend a night. The accused, after administering anti-depressants they stole the items mentioned in the chargesheet. They called their regular driver to pick them up and left the victims' place.
- [15] This offence was planned by the accused. The evidence before me shows that all the accused were working at the time of the commission of this offence. Accused 3's minor child was receiving child support. On the night of the incident, all the accused had money to spend on transport to and from Randburg and to buy alcohol. The valuable items they stole were not essential items for their subsistence. Their counsel conceded that it was committed out of greed and no need.
- [16] All the accused testified that they took the items out of need. They did not confess to theft. They did not take full responsibility for their actions. They were not honest to this court. I find that they have not shown genuine remorse.
- [17] The offence of theft is prevalent in our society. A clear message of deterrence needs to be sent to the would-be criminals to know that our courts will not tolerate this kind of offence. The citizens of this country should be free to go out to places of entertainment without fear of being targeted for crime by people like the accused.



[18] As aggravating circumstances, I consider the nature and seriousness of the offence, the value of the items stolen, the motive for the commission of the offence, the impact of the crime on the victims, lack of remorse and the prevalence of the offence.

[19] As mitigating factors, I consider the accused's personal circumstances, particularly, the period spent in prison awaiting trial and that some of the items were recovered. That is the reason that part of the sentence will be suspended. In my view the sentence to be imposed befits the accused as well as the crime.

Order

[20] In the premises, on count 2 the following order is made:

1. Accused 1 is sentenced to 5 years' imprisonment of which 1 year six months is suspended on condition that accused 1 is not convicted of theft or any offence involving an element of dishonesty during the period of suspension.
2. Accused 2 is sentenced to 5 years' imprisonment of which 1 year six months is suspended on condition that accused 2 is not convicted of theft or any offence involving an element of dishonesty during the period of suspension.
3. Accused 3 is sentenced to 5 years' imprisonment of which 1 year six months is suspended on condition that accused 3 is not convicted of theft or any offence involving an element of dishonesty during the period of suspension.
4. Accused 4 is sentenced to 5 years' imprisonment of which 1 year six months is suspended on condition that accused 4 is not convicted of theft or any offence involving an element of dishonesty during the period of suspension.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division,
Johannesburg

Date of delivery: 30 November 2023

Appearances:

On behalf of the State: Adv SJ Khumalo

Instructed by: National Prosecuting Authority

On behalf of Accused 1: Adv S Johnson
Instructed by: Legal Aid SA

On behalf of Accused 2: Adv V Soko
Instructed by: Legal Aid SA

On behalf of Accused 3 & 4: Adv P Lebea
(Pro Bono)