

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

23/05/2024

DATE



SIGNATURE

CASE NUMBER: SS64/2022

In the matter between:

THE STATE

and

MTHETHWA SIPHO

ACCUSED

SENTENCE

DOSIO J:

Introduction

- [1] The accused has been found guilty of the following counts:
Count one, a charge of murder read with the provisions of s51(2) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997').

Count two a charge of possession of an unlicensed firearm, to wit a 9mm parabellum, a contravention of s3 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000').

Count three, possession of unlawful ammunition to wit 9mm Parabellum calibre ammunition, a contravention of s90 of Act 60 of 2000.

Count nine a charge of murder, in terms of s51(1) of Act 105 of 1997.

Count ten, a charge of attempted murder.

Count eleven, a charge of unlawful possession of a firearm, a contravention of s3 of Act 60 of 2000.

Count twelve, a charge of unlawful possession of ammunition, a contravention of s90 of Act 60 of 2000.

- [2] For purposes of sentence, this Court has taken into consideration the personal circumstances of the accused, the seriousness of the offences 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 that:
- (a) He is 42 years old. When the first murder was committed in September 2020 he was 38 years old.
 - (b) He has a previous conviction of robbery committed in 2013 for which he was given seven years direct imprisonment.
 - (c) When he committed the first murder in September 2020, he was working as an uber driver.
 - (d) When the second murder was committed in March 2021 he was no longer working as an uber driver. He however earned R6000 from renting properties.
 - (e) He is not married but has eight children. Five children are above the age of sixteen years and the remaining three are below sixteen years old.
 - (f) Prior to his arrest he was living with his six children and supporting them.
- [4] In respect to the charges of possession of an unlicensed firearm on counts two and count eleven and the charges of unlawful possession of ammunition in respect to counts three and twelve it was argued that this is a duplication of charges and the accused should not be punished twice.

The seriousness of the offences

- [5] The deceased on count one was killed in a fit of road rage. He was not a threat to the accused as the deceased exited his car with his hands held up. Notwithstanding the passive stance of the deceased, the accused brutally killed him. This was a cold-blooded and an unnecessary killing. The accused left the scene and never returned that day or the next morning to see whether he could help the deceased. He also never reported this incident to the police. It is wholly unacceptable for a person like the accused to kill a harmless drunk deceased, especially as the deceased had not even collided with the car that the accused was driving. A jail sentence in these circumstances is unavoidable as it is clear from the actions of the accused that he is extremely aggressive and is ready to kill anyone that upsets him. The accused has a previous conviction of robbery which shows that he has a propensity to violence. The seven year's imprisonment which was imposed for the crime of robbery had no impact to rehabilitate the accused.
- [6] In the matter of *S v Eadie*¹ the Supreme Court of Appeal stated that:
 '...The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law.'²
- [7] The deceased on count nine was dancing when the accused shot him. Due to some frustration experienced by the accused, who was unable to move his car from this car wash, he decided to wield his firearm while at the car wash which was full of patrons and he threatened to shoot people if they did not move their cars. The accused then fired a shot. The accused acted recklessly and in the process two people sustained injuries and one died. It was not a spur of the moment decision to kill the deceased. He had time to plan how he was going to get out of the car wash and the only way to do this was to shoot the people who were causing the congestion. As a result, he foresaw the possibility that he may kill someone if he fired a shot. It is of little moment that the intention on count nine took the form of *dolus eventualis*.
- [8] Premeditation involves a thought process that contemplates a certain outcome whilst the perpetrator has the means to accomplish the act. Premeditation is not an element

¹ *S v Eadie* (196/2001) [2002] ZASCA 24 (27 March 2002),

² *Ibid* para 70

of murder. Premeditation and intention must not be confused. Premeditation is concerned with an accused's moral blame worthiness and is an aggravating factor when an appropriate sentence is concerned.³

[9] In the matter of *S v Dube*⁴ the Court held that:

‘...If a perpetrator carries through with his plan to cause another person bodily harm which ultimately results in that persons death where the death was foreseen by the perpetrator, premediated murder is established.’⁵

[10] In the matter of *Kekana v The State*,⁶ the Supreme Court of Appeal held that:

‘it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.’⁷

[11] The accused has shown no remorse in respect to the two murders and the one count of attempted murder. During the address by the accused's counsel it was stated that the accused still believes he is innocent. In the matter of *S v Makhudu*,⁸ the Supreme Court of Appeal stated that:

‘the behavior of an accused during trial maybe indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering sentence.’⁹

[12] 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. The State called Phillipine Lethoko who is the sister of the deceased on count nine. She was extremely emotional during her testimony and it is clear that the experience of losing her younger brother was very traumatic for her.

[13] Phillipine Lethoko (‘Ms Lethoko’) stated that her brother was 29 years old when he was shot. He had a five-year old child at the time and he used to DJ in different locations, including the car wash where he was killed. The deceased supported his little girl. This

³ Shelley Walker et al (2022), *Criminal Law in South Africa*, fourth edition, Oxford University Press Southern Africa para 19.3.1

⁴ *S v Dube* 2023 (1) SACR 513

⁵ Ibid para 20

⁶ *Kekana v The State* [2014] ZASCA 158 (1 October 2014)

⁷ Ibid para 13

⁸ *S v Makhudu* 2003 (1) SACR 500 SCA

⁹ Ibid para 7

witness has now taken over the role of caring for this child as the mother of this child is still studying. The death of the deceased has had a major impact on the deceased's daughter and also on the children of Ms Lethoko, as her children had a close report with the deceased. The death of the deceased has also had an impact on her other brother who cannot come to terms with the death of the deceased. Ms Lethoko stated that the deceased had dreams like any person and one of his aspirations was to help young men who were jobless to obtain a driver's license so that they could work effectively as uber drivers or couriers. The deceased's intention to open a driving school would have made a major difference in their community.

- [14] The crime of attempted murder in respect to count ten is equally serious in that the accused fired a shot that struck Sabelo Myeni on his face.

Interests of the community

- [15] 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.
- [16] In *S v Msimanga and Another*,¹⁰ the Appellate Division, as it then was, 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.
- [17] 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. S51(2) of Act 105 of 1997 dictates that if an accused, who is a first offender of murder

¹⁰ *S v Msimanga and Another* 2005 (1) SACR 377 (A)

has been convicted of an offence referred to in part 2 of schedule 2, he shall be sentenced to fifteen years' imprisonment.

- [18] 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.
- [19] The accused did not testify in mitigation of sentence. His legal representative placed on record the following substantial and compelling circumstances in respect to count nine which is the charge of murder, namely:
- (a) The bullet that struck the deceased on count nine was not intended for the deceased and the deceased was unfortunately at the wrong place at the wrong time. It appears that from the statement of Sabelo Myeni there was an altercation between him and the accused. From the address of the defence, the bullet was intended for Sabelo Myeni. The shot was aimed at Sabelo Myeni which passed through Sabelo Myeni and hit the deceased on count nine. It was argued that because the intention on count nine is *dolus eventualis* and not *dolus directus* that this is a substantial and compelling reason not to impose a sentence of life imprisonment on count nine. It was argued this was not a premeditated murder.
 - (b) It was further argued on behalf of the accused that because he is the primary caregiver that a term of imprisonment should be the last resort.
- [20] It was further argued that there are compelling and substantial circumstances not to impose fifteen years imprisonment on count one.
- [21] In the matter of *S v Malgas*,¹¹ 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.'¹²

¹¹ *S v Malgas* 2001 (1) SACR 469 SCA

¹² *Ibid* para i

- [22] The accused had an opportunity to plead guilty at the inception of the trial, yet he maintained his innocence. The aspects referred to in paragraph [19] *supra* are not substantial and compelling circumstances.
- [23] 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 acted with sheer brutality when he killed the deceased on count one and nine. Violence against innocent victims is a serious concern in this country.
- [24] 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.
- [25] In the matter of *S v Matyityi*,¹³ 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 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.'¹⁴
- [26] The accused was initially arrested on 27 November 2020 after he committed the crimes on counts four to eight. He was granted bail in January 2021. After counts nine to twelve were committed he was once again arrested on 12 March 2021 and given bail. Whilst on bail the matter was transferred from the lower Courts to the High Court and he was warned to appear in the High Court on 12 August 2022. The accused failed to appear on 12 August 2022 in the High Court and accordingly a warrant of arrest was issued for the accused. He was arrested on 22 November 2023 and has been in custody for seven months. It is clear the accused absconded for a year prior to his re-

¹³ *S v Matyityi* 2011 (1) SACR 40 SCA

¹⁴ *Ibid* para 24

arrest. It is further clear that after he was released on bail for the crimes committed on count one to eight, he continued unabated to terrorise the community and once again killed another victim on 7 March 2021. It is clear that the accused is a danger to the community and must be removed. It was evident during the course of this trial that witnesses were afraid to testify against him.

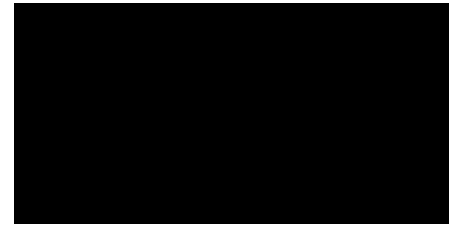
- [27] In the case of *DPP v Gcwala*,¹⁵ the Supreme Court of Appeal held that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the 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.
- [28] This Court finds the sentence of life imprisonment on count nine is a just sentence in the circumstances of this case, as well as a sentence of fifteen year's imprisonment on count one. There are no substantial and compelling circumstances to depart from the minimum prescribed sentences on count one or count nine.
- [29] This Court also finds that counts two and eleven, pertaining to the possession of unlicensed firearm as well as counts three and twelve, pertaining to unlawful possession of ammunition are not duplication of charges as counts one to three was a separate incident from counts nine to twelve. Almost six months transpired between these two incidents. In addition, there was no evidence that the same firearms were used when the deceased on count one was killed as compared to when the deceased on count nine was killed.
- [30] In the premises the following sentences are imposed, namely:
 In respect to count one the accused is sentenced to fifteen years' imprisonment.
 In respect to count two the accused is sentence to ten years' imprisonment.
 In respect to count three the accused is sentenced to five years' imprisonment.
 In respect to count nine the accused is sentenced to life imprisonment.
 In respect to count ten the accused is sentenced to ten years' imprisonment.

¹⁵ *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014)

In respect to count eleven the accused is sentenced to ten years' imprisonment.

In respect to count twelve the accused is sentenced to five years' imprisonment.

- [31] Due to the fact that the accused is sentenced to life imprisonment on count nine, the remaining sentences on count one, two, three, ten, eleven and twelve will run concurrently with the sentence of life imprisonment imposed on count nine.
- [32] In terms of section 103(1)(g) 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: 22 May 2024

Judgment handed down: 23 May 2024

Appearances:

On behalf of the State: Adv. V.E Mbaduli

On behalf of the Accused: Adv. I Mthembu