REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: CC30/2020

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

[redacted]

04-09-2024 **PD. PHAHLANE**
DATE **SIGNATURE**

In the matter between:

THE STATE

And

JABULANI TSOTETSI **ACCUSED**

JUDGMENT

PHAHLANE, J

[1] On 20 May 2021 when the proceedings commenced, the court was informed that the accused wanted to enter into a Plea Sentence Agreement and requested two days to prepare. He however changed his mind when the court resumed and opted to plead not

guilty to all the counts and gave no plea explanation, thereby exercising his right to remain silent. Throughout the proceedings, the accused was legally represented by Advocate Kgagara. He was charged with six (6) counts namely:

Count 1: Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") in that on or about 6 August 2015, and at or near Orange Farm train station, in the district of Vereeniging, the accused did unlawfully and intentionally kill NORMAN NWASOMBANA MUHLARI an adult male person.

Count 2: Robbery with aggravating circumstances read with the provisions of section 51(2) of the CLAA in that on or about 6 August 2015, and at or near Orange Farm train station, in the district of Vereeniging, the accused did unlawfully and intentionally assault NORMAN NWASOMBANA MUHLARI and/or KHATHUTSHE LEORNARD MABILA and did then and with force, take the following items from them to wit: a wallet, bank card, R600 cash, 9mm pistol, two magazine, 30 rounds of ammunition, their property or property in their lawful possession, aggravating circumstances being that NORMAN NWASOMBANA MUHLARI was killed and KHATHUTSHE LEORNARD MABILA was assaulted.

Count 3: Robbery with aggravating circumstances read with the provisions of section 51(2) of the CLAA in that on or about 6 August 2015, and at or near Orange Farm train station, in the district of Vereeniging, the accused did unlawfully and intentionally assault MOTSAMAI EDBUT MAKGAJANE and/or MVUME MJILANA and did then and with force, take the following items from them to wit: R 28 686.00 their property or property in their lawful possession, aggravating circumstances being that a grinder and explosives were used to gain access to the money.

Count 4: Robbery with aggravating circumstances read with the provisions of section 51(2) of the CLAA in that on or about 6 August 2015, and at or near Orange Farm train station, in the district of Vereeniging, the accused did unlawfully and intentionally assault MOTSAMAI EDBUT MAKGAJANE and/or MVUME MJILANA and did then and with force, take the following items from them to wit: a Nokia cellular telephone, cash, a ZTE cellular telephone, keys, a

9mm firearm with serial number R14605 and ammunition, their property or property in their lawful possession, aggravating circumstances being that MOTSAMAI EDBUT MAKGAJANE and/or MVUME MJILANA were held at gunpoint and tied up.

Count 5: Contravention of section 3 read with sections 1, 103, 117, 120(1)(a), 121 read with Schedule 4 and section 151 of Act 60 of 2000 and further read with section 250 of Act 51 of 1977 (possession of a semi-automatic firearm)

Count 6: Contravention of section 90 read with sections 1, 103, 117, 120(1)(a), 121 read with Schedule 4 and section 151 of Act 60 of 2000 and further read with section 250 of Act 51 of 1977 (possession of ammunition)

[2] The accused made formal admissions in terms of section 220 of the Criminal Procedure Act 77 of 1977 ("the CPA") which includes the photographs of the body of the deceased; the post-mortem report compiled by Dr Philippus Johannes Schutte, in which he recorded the cause of death as: "**GUNSHOT WOUNDS**"; the photographs of the safe which appears to have been bombed – with debris and bank notes all around it; the photograph of the accused admitted as exhibit E, in which he is depicted wearing an army-green jacket and a red sweater or jacket on the inside with a hoodie – standing next to a person holding a rifle and wearing a black balaclava.

[3] **Mr Sabata Isaac Mphuti** testified that he met the accused in 2015 when they were playing a game of dice at the station in Eyethu Mall, extension 3, and the accused was looking for a place to stay. He approached his twin friends Thabo and Thabang from extension 10 in Orange Farm and arranged with them to accommodate the accused. According to him, the accused stayed with the twins up until the day his photograph was published on the Daily Sun newspaper of Monday, the 10th of August 2014. He said he never saw the accused after his photo was published on the newspaper.

3.1 He said he also saw the police at the twins' home when they went to collect the accused's red jacket. He identified the red jacket as the one that is depicted on the photo admitted into evidence as exhibit E and stated that after the accused was arrested, he saw him again on 19 May 2015 in court, and he never saw him

again. He explained that the accused's furniture was collected the same week, over the weekend by his wife.

[4] He testified under cross-examination that the accused was already known to him for five years prior to him coming to look for accommodation.

[5] **Mr Thabo Gift Tladi** also took the stand and testified that he knew the accused through Sabata, the previous State witness. He confirmed that Sabata approached him and informed him that the accused was looking for a place to rent, and he agreed to rent out a room to the accused in one of the outside rooms at his home. He testified that he last saw the accused driving an X5 BMW silver or white in colour, one morning around August 2015. He said the police came to his home looking for Jabulani, and they did not find him. The police then opened the shack of the accused and conducted a searched, and also showed him the photo of the accused where the accused was staring at the camera. He identified the accused on exhibit E and stated that exhibit E was the photo that was shown to him by the police.

5.1 He testified that the police took the clothes of the accused which he was wearing as he appears on exhibit E. He explained that the accused owns the red jacket on exhibit E because he has seen him many times wearing it, together with the red takkies the accused is wearing on the picture because the accused used to wash them and hang them to dry on several occasions.

5.2 He explained that the accused was in the company of other people when he arrived driving the X5 BMW, and they were arguing and making noise.

5.3 The witness said he was taken by the police to the police station and was requested to tell them what he saw when the accused came driving the BMW.

[6] Under **cross-examination**, it was put to him that the accused deny owning a red jacket and that he never drove the BMW, but that he was driving a 4x4 bakkie belonging to his employer. The witness refuted that and was adamant that the accused owned the red jacket.

6.1 It was further put to him that the accused denies that he is the person depicted on exhibit E, and he refuted that stated that he knows the accused very well and has seen him always wearing the read sneakers and red jacket on exhibit E.

[7] I interpose to state that after cross-examination of this witness, the accused complained of having a painful ear and requested to go to the doctor. The next day on 21 May 2021, the accused indicated that he was still experiencing pain in his ear and could not proceed, and said he needed to be taken to the hospital. The investigating officer took him to the correctional facility where he was housed so that he could be taken to a physician, and he was thereafter referred to OR Tambo Memorial hospital.

7.1 Several postponements were sought by the defence, with the accused indicating that he is not in a position to proceed because he could not hear properly. Finally on 12 July 2023 an audiologist, Ms Tarryn Moodley appeared before the court after being requested by the court to come and explain why it was taking so long for the accused to be provided with a hearing aid because the accused had on one occasion indicated that the doctors had recommended that he be provided with a hearing aid.

7.2 Ms Moodley took the witness stand testified that she first saw and consulted with the accused on 19 August 2021 when he was referred by the ENT specialist, Dr Muanza. She was requested to do a full audiology test on the accused, and the result of the test were that the accused had a mild to moderate hearing problem, meaning that he has a mixed hearing on the left ear and has a problem of hearing when a person speaking to him is far from him.

7.3 She explained that the accused suffers from a moderate hearing loss and stated that on the 16th of May 2022 when she performed another test on the accused, his hearing was moderate on the right and the left ear was severe. She further explained that for the accused to hear properly, one will have to speak louder, and that the accused needed a hearing aid.

7.4 According to her, the accused received a hearing aid on 7 July 2022 and was booked for a test on 10 October 2022 to see if he could hear properly using the hearing aid. She testified that the accused was able to hear with normal limits

after the device was fitted and was booked for another session for 7 July 2023, but that the hearing aid had to taken to the company that manufactures hearing aids for a further test to be done on the device so that the accused can be able to hear like a person with normal hearing.

[8] I want to place on record that the court engaged directly with the accused on every appearance, just to see if the accused was able to hear with or without the use of hearing aids. On several occasions when his matter came before the court, the accused was reluctant to proceed but the court observed that the accused could hear properly even when spoken to softly from a distance. When the court made the accused aware of its observations when it communicated with him – that he (the accused) was able to hear and respond to questions even when the court is not raising its voice, the accused still insisted that he did not want to proceed because his hearing aid needed to be tested and serviced.

[9] On 31 May 2024 the accused informed the court that he wants to change his plea from not guilty to guilty in respect of all counts and placed the following facts on record:

9.1 In respect of the count 1 of murder, he stated that he admits that on the 6th of August 2015, he was with Sipho, Ndlovu, Mabuza and Motsamai, and Jomo, and other four males and they discussed and agreed to rob the Orange Farm Train Station. The accused was armed with a pistol and upon arrival there, they split into groups. He went upstairs with his group, and they found two security officers, and they tied them with cable ties. He stated that the deceased, Norman Nwasombana Muhlari, was shot by the group that remained downstairs. He admitted that by associating himself with the group, he is responsible for the death of the deceased even if he did not directly pull the trigger to shoot him because he foresaw the possibility that the firearm may be used to shoot someone in case of any resistance.

9.2 In respect of counts 2, 3 and 4 of robbery with aggravating circumstances, he admitted that he unlawfully and intentionally assaulted and robbed all the

complainants in these counts of their properties and explained that the complainants in count 4 were tied up and pointed with firearms. Accordingly, all the elements of these offences were admitted and he further stated that he admits that he did not have the right to take the properties of the complainants and that at the time of the commission of these offences, he knew that what he was doing was wrong and punishable by law. In essence, the admission made in respect of these counts confirmed the allegations of the State as they appear in the individual counts.

9.3 In respect of counts 5 and 6, the admission is made in respect of the allegations as they appear in these counts and all the elements of the offences are admitted. He admitted that after his arrest, he freely and voluntarily made a confession and stated that he received a share of R7000 after the robbery. He further stated that he is sorry for what he has done and regrets his actions and apologises to the parents and family of the deceased.

9.4 The defence indicated that the guilty plea should further be admitted in terms of section 220 of the CPA.

[10] It is worth noting that the deceased in this matter was a member of the South African Police Services. He is depicted on photos 27 and 28 inside the SAPS marked vehicle wearing his uniform, and according to the summary of substantial facts noted on the indictment in terms of section 144(3)(a) of the CPA, the deceased and the complainant in count 2 were on patrol when they stopped at the train station to check with the security guards there if everything was in order, but they could not find the guards.

10.1 Upon their return to the police van, they were attacked. The deceased was shot dead and the complainant in count 2 was assaulted and tied up. Their service pistols and other personal items were robbed from them.

[11] It is noted on the post-mortem report that the external appearance of the body and limbs reveals that the deceased had five wounds – the first one was on the left cheek, the second one was over the posterior aspect of the skull, that is in the region of the

upper part of the neck and somewhat below the base of the skull at the back. The third one was right hand and included the right wrist.

11.1 Multiple fractures of the bony tissue in this area were present. It is noted that wounds one, two and three were caused by a passing projectile. Wound four is in the area of the volar part of the left wrist and was also caused by a passing projectile. Wound five is found in the distal area of the right forearm.

11.2 With regards to the skull, the post-mortem identifies three skull wounds. The first wound created a groove in the base of the skull on the left side. Skull wound two was on the posterior part of the skull and showed external funnelling and looked like an exit wound. Skull wound three was a larger wound on the posterior cranial fossa on the left side. Several fractures were noted.

[12] The offences which the accused have been convicted for are very serious in nature. Our country has been witnessing an increasing wave of violence where innocent and defenceless victims continue to fall prey to these types of offences. Worst in this case, the deceased was a police officer who was killed in the line of duty. Day in and day out, our communities are terrorized by violent criminal activities committed by people such as the accused, and where members of the police service who took an oath to serve and protect try to do exactly that, they are being attacked by criminals who simply do not care about the law or being law abiding citizens, and who do not care and respect other people's basic human rights, such as the right to life.

[13] It is now a reality in our country that violent robberies and murders are the order of the day where criminals arm themselves with weapons and are ready to kill because human life has no value to them. The right to life, which should never be compromised in any way, is guaranteed and protected by the constitution as an unqualified right because human life cannot be intentionally terminated. The value of human dignity lies at the heart of the requirement that a sentence must be proportionate to the offence[1].

[1] S v Madikane 2011 (2) SACR 11 (ECG).

[14] Accordingly, society and communities must be protected from these violent crimes, and against the greed resulting in people's lives not being respected. On the same token, law abiding citizens must be protected against this lawlessness and extreme disrespect for the law.

[15] It is therefore the duty of the courts to protect the society from the scourge of these violent crimes and to send a clear message that this behaviour of the accused is unacceptable. The SCA in ***S v Msimanga and Another***,[2] held that violence in any form is no longer tolerated, and our courts, by imposing heavier sentences, must send out a message to 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.

[16] Our courts have long recognized that - because of the seriousness of the 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***[3] 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.

[17] In an effort to curb the wave of violent crimes which threatens to destroy our society, Parliament saw it fit to step in and address these problems, hence the legislature enacted section 51 of the CLAA[4] with the intent to prescribe a variety of mandatory

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

[3] 1997 (1) SACR 515 (SCA). *See also:* S v Swart 2004 (2) SACR 370 (SCA); R v Karg 1961 (1) SA 231 (A).

[4] The relevant provisions of the Minimum Sentences Act in respect of the murder convictions is Section 51 (1) which provides that:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for Life."

Part 1 of Schedule 2 to the Minimum Sentences Act provides, in the relevant part, as follows:

"Murder, when –

(a) …

(b) …

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) …

(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977)."

minimum sentences to be imposed by the courts in respect of a wide range of serious and violent crimes, and the relevant sections being section 51(1) and section 51(2) which have been explained by the court to the accused at the commencement of the trial.

[18] In respect of the murder count, it carries a mandatory sentence of life imprisonment, not only because the murder was committed in the process of committing the offence of robbery, but also because a police officer has been killed. In respect of the counts of robbery with aggravating circumstances which carries the prescribed sentence of not less than 15 years imprisonment for a first offender, and 20 years imprisonment for a second offender, the accused before this court has been convicted on three counts of robbery with aggravating circumstances.

[19] There can be no doubt that the action taken by the legislature to fix prescribed terms of imprisonment for offences such as murder and robbery is clearly an indication that these offences are prevalent and problematic, and the society needs to be protected from people committing these types of offences.

[20] To avoid these sentences, the accused must satisfy the court that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the prescribed minimum sentences - because the court is enjoined with the powers in terms of section 51(3)(a) of the Act, to deviate from imposing the prescribed minimum sentence.

[21] It is appropriate to refer to the guidelines on sentencing as was aptly articulated by the court in ***S v Thonga***[5] that "during the sentencing phase, the trial court is called upon to exercise its penal discretion judicially after careful and objectively balanced consideration of all relevant material and that punishment should reflect the degree of moral blameworthiness of the accused".

[5] 1993 (1) SACR 365 (V) at 370 (c)-(f).

[22] 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 as stated by the Appellate Division in the case of ***S v Rabie***[6]. In considering an appropriate sentence to be imposed on the accused, I must in the exercise of my sentencing discretion have due regard to the "triad" factors pertaining to sentence namely: – the nature and seriousness of the crimes committed by the accused, including the gravity and extent thereof, the personal circumstances of the accused, and the interests of society[7].

[23] The court in ***S v Zinn*** recognised that the seriousness of the offences and the circumstances under which they were committed, as well as the victims of crimes are also relevant factors in respect of the last triad, where the interest and protection of society's needs should have a deterrent effect on the would-be criminals. It is therefore imperative that these factors should not be over or under emphasized. Nonetheless, the court has a duty, especially where the sentences are prescribed by legislation, to impose such sentences. Consequently, the punishment [itself] should clearly reflect a balanced process of careful and objective consideration of all the relevant facts, the mitigating and aggravating factors surrounding the accused.

[24] The general principles governing the imposition of a sentence in terms of the Act as articulated by the Supreme Court of Appeal in **S v Malgas**[8] cannot be ignored. This relates to the fact that "a court that is required to impose a sentence in terms of the Minimum Sentences Act is not free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation". This principle was reaffirmed by the Supreme Court of Appeal in ***S v Matyityi***[9]***.***

[6] 1975 (4) SA 855 (A).
[7] See: S v Zinn 1969 (2) SA 537 (A)
[8] 2001 (1) SACR 469 (SCA)
[9] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

[25] The State submitted extensive heads of argument and referred me to quite a number of authorities which deal with the legal principles. It was argued on behalf of the State that the court should not lose sight of the fact that the deceased was robbed of his service pistol and that he was killed by a firearm which the accused did not have a licence to possess. The State submitted that the accused is a danger to society because not only did the consequences of his actions have an impact on the wife of the deceased who was pregnant when the deceased was killed, but that the incident also had a severe impact on the colleague of the deceased that accompanied him during the shooting, and other colleagues who worked with him.

[26] Mr Kgagara submitted on behalf of the accused that personal circumstances of the accused should be taken cumulatively as constituting substantial and compelling circumstances which should persuade the court to deviate from imposing the prescribed sentences. The personal circumstances of the accused placed on record, which also appear on his pre-sentence report prepared on his behalf are as follows:

26.1 He was born on the 13th of March 1975, making him 49 years of age.

26.2 He was raised by his mother as single parent with the help from maternal grandparents. His father was unknown to him. The probation officer noted in his report that the accused informed him that although he did not know his father, he did not lack a father figure since his grandfather played a fatherly role, guided him even during his adolescent years. He noted that the accused received proper parental supervision and had a good support structure because his uncle who is a pastor also had a hand in his upbringing.

26.3 Regarding his educational background, he went as far as Grade 11 and could not proceed further with schooling because his grandfather who was taking care of his educational needs lost his job, and he struggled to sustain his educational needs. This resulted in him dropping out of school and focusing on securing employment. Consequently, he became self-employed and did plumbing and construction, and was a sub-contractor for a building construction company. He earned between R3500-R6800 monthly and spend his salary on groceries, clothes and entertainment. He was unemployed at the time of his arrest.

26.4 He has a 27-year-old daughter who is currently staying at a student residence at Tshwane University of Technology in Pretoria. The accused also has a 21-year-old child who also attends a tertiary institution.

26.5 The probation officer noted that the accused reported to him that over the years, he committed crime with his friends, and this became his means of generating an income.

26.6 He has one previous conviction for possession of stolen property, for the year 1993 and was sentence to get six lashes. But he reported to the probation officer that he was given a suspended sentence.

[27] The accused's previous conviction is more than 10 years old, and he will therefore be regarded as a first offender.

[28] After a careful consideration and evaluation of all the circumstances of this case, and having regard to the purposes of punishment and the seriousness of the crime committed by the accused, the personal circumstances of the accused which his counsel has submitted that they be considered as substantial and compelling, the "triad" factors pertaining to sentence as pronounced in ***S v Zinn,*** the only thing in favour of the accused is that he is a first offender. There is no doubt in my mind that the only appropriate punishment for the accused is a sentence prescribed by the legislature. I say this being mindful of the warning given by ***Malgas*** that prescribed sentences are not to be departed from lightly or for flimsy reasons.

[29] I am alive to the fact that the version that was put to Mr Tladi was that the accused denies that he is the person depicted on exhibit E, and further denied the clothes that he was wearing on that photograph.

[30] Although the accused has decided to change his plea, what is so surprising is that his counsel still denied that the person on exhibit E is the accused. Furthermore, his counsel stated that the accused initially wanted to plead guilty but due to his hearing problems, he was not able to do so. One wonders what his hearing problem had to do with being

open and honest and taking the court into his confidence, because clearly, there is no nexus between the two.

[31] Having considered the submission made by both parties, I agree with the State that the accused is deserving of the imposition of the prescribe minimum sentences. The State indicated that the deceased was robbed of his service pistol and was killed by a firearm which the accused did not have a licence to possess. One of the aspects which this court engaged the defence counsel on when it was denied that the accused is not the person depicted on the photograph, was the issues of the rifle depicted on the photograph. This confirms the State's submission that the accused is a danger to society, which I agree with.

[32] I have already indicated that in considering an appropriate sentence to be meted on the accused, I must evaluate and consider the totality of the evidence before me, and weigh the mitigating factors with the aggravating factors, and decide whether substantial and compelling circumstances exist[10]. In the process of doing that, I should also consider the time spent by the accused in custody awaiting finalisation of his case.

[33] It is common cause that the accused spent 3 years in custody 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 SCA in ***S v Livanje***[11] considered the role played by the period that a person spends in detention while awaiting finalisation of the case. The court reiterated what it held in ***S v Radebe***[12] namely that: 'the test is not whether on its own that period of detention constitutes a substantial and compelling

[10] S v Sikhipha 2006 (2) SACR 439 (SCA) at para 16.
[11] 2020 (2) SACR 451 (SCA).
[12] 2013 (2) SACR 165 (SCA) at para 14.

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. (underlining added for emphasis)

[34] Consequently, the question is 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.

34.1 This decision was not taken lightly, having regard to the comments I made about having direct interaction with the accused as a means of determining whether the accused was in a position to hear properly, and trying to establish whether the matter can be proceeded with when it was very clear that the accused was able to hear properly – but he insisted on waiting for a longer period of time.

34.2 The delay can therefore not be imputed on the State.

[35] With regards to the aspect of remorse, it is trite that if the accused shows genuine remorse, punishment will be accommodating, especially when the accused has taken steps to translate his remorse into action. It is worth noting that remorse should fully be investigated before a court comes to a conclusion whether an accused person is remorseful – because true remorse is an important factor to be considered in the imposition of a sentence[13] as it indicates that the accused has realised that a wrong was done and has to that extent, been rehabilitated.

[36] The court in ***Matyityi*** *supra stated that: "In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the*

[13] S v Brand 1998 (1) SACR 296 (C) at 299i-j.

contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those actions". (emphasis added)

[37] The accused noted in his statement that he is sorry about what he has done and that the incident is haunting him day and night because someone has lost his life. Furthermore, he begs for forgiveness and mercy for his wrong actions. Having regard to the above principle, I have no idea what motivated the accused to commit these offences and kill the deceased. It is not clear what brought this change of heart and why he killed the deceased in such a cruel manner.

[38] As indicated above, his counsel still denied that the person on **exhibit E** is the accused while his face is not even covered. What counsel has said does not reconcile with the statement of a person who says he is sorry. It must be placed on record that throughout the proceedings, advocate Kgagara has been consulting with the accused in court and asking for an indulgence to approach the accused to take instructions, and I believe that he could not have made such an argument if it was not his instructions.

[39] In light of the above, I am of the view that the accused is not truly remorseful. It is on record that the court was informed at the commencement of the proceedings that the accused wanted to enter into a plea agreement with the State but decided to change his mind – and now the court is informed that the accused was prevented by his hearing problem from pleading guilty. This reasoning in my view does not make sense, but it remains his explanation which in my view does not hold water.

[40] Accordingly, I agree with the State that the court should approach the aspect of remorse with caution and should not merely rely on the word of the accused that he is remorseful. I therefore align myself with the above authorities which find that the

expression of remorse will only be validly taken into consideration if the accused takes the court into his confidence.

[41] The probation officer recommended that the court should consider imposing imprisonment in terms of the provisions of section 276(1)(b) of the CPA. 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.

[42] 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.

42.1 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 each count of robbery.

[43] Having regard to the above authorities, this court is further reminded of the warning given in the case of ***S v Lister***[14] where the court held that: "*To focus on the well-being of the accused at the expense of all other aims of sentencing such as the interest of*

[14] 1993 SACR 228 (A)

society is to distort the process and to produce in all likelihood a warped sentence". On the other hand, the majority of the SCA in ***S v Ro and Another***[15] 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".*

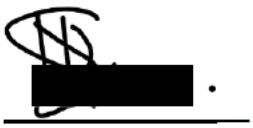
[44] Consequently, I cannot find any justification why this court should depart from imposing the prescribed sentences.

[45] Having considered the cumulative circumstances of this case, the submissions made by both parties, and applying the above principles as they relate to sentence, I agree with all the authorities cited above. This court is bound by the doctrine of s*tare decisis* and by statute, and it follows that the accused must be sentenced as prescribed by the legislature.

[46] In the circumstance, the following Order is made:

1. **Count 1:** Murder read with the provisions of section 51(1) of the CLAA, the accused is sentenced to Life Imprisonment.
2. **Counts 2, 3, and 4**: Robbery with aggravating circumstance read with the provisions of section 51(2) of the CLAA, the accused is sentenced to 15 years' imprisonment on each count.
3. **Count 5**: Unlawful possession three (3) semi-automatic firearms, read with Schedule 4 and section 151 of Act 60 of 2000, the accused is sentenced to 15 years imprisonment.
4. **Count 6**: Unlawful possession ammunition, the accused is sentenced to 3 years imprisonment.
5. In terms of section 280(2) of the CPA, it is ordered that the sentence in counts 5 and 6 should run concurrently with the sentence in count 1.
    - In the circumstance, the accused is sentenced to serve life imprisonment and 45 years imprisonment.
6. In terms of section 103(1) of Act 60 of 2000, the accused is declared unfit to possess a firearm.

[15] 2010 (2) SACR 248 (SCA)



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

APPEARANCES

For the State	: Adv. L. More & Adv. GJC Maritz
Instructed by	: Director of Public Prosecutions, Pretoria
For Accused 1	: Adv. Kgagara
Instructed by	: Legal Aid South Africa
Heard	: 20, 21 May 2021 12 July 2023 31 May; 22 July & 4 Sep 2024.
Judgment Delivered	: 4 September 2024