



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: CC14/2021P

In the matter between:

THE STATE

and

SENZO JEFFREY MAGWANYANA

ACCUSED

Coram: Mossop J

Heard: 23, 24, 25, 26, 30, 31 October 2023, 1, 2, 3 November 2023

Delivered: 3 November 2023

JUDGMENT ON SENTENCE

Mossop J:

[1] The sad events that we have learned of as the facts of this trial have been disclosed makes it plain that two human lives have needlessly been wasted. The obvious needless waste of a life is the lost life of the deceased. His was killed for money that ultimately you could not use because it became stained with ink. The second life that is to be wasted is yours. Whatever personal potential that you had is

to be squandered by your incarceration for these very serious offences. A tragedy has become a double tragedy.

[2] The State indicated at the commencement of the trial that it sought the imposition of certain minimum sentences upon you. You stated that you understood this. The minimum sentences are prescribed by the provisions of the Criminal Law Amendment Act 105 of 1997 (the Act) and the schedules attached thereto. In respect of murder, the minimum sentence prescribed is life imprisonment where the death of the victim was occasioned by a group of persons acting in the execution of a common purpose. In respect of robbery with aggravating circumstances, the minimum sentence prescribed is imprisonment for 15 years for a first offender. In respect of attempted murder, the sentence to be imposed is 5 years' imprisonment.

[3] While the State continues to ask for the imposition of the minimum sentences upon you, I indicate to you that I am not compelled to impose those minimum sentences. I am entitled to impose a lesser, shorter sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of such a lesser sentence.

[4] You have submitted through Mr Tengwa the details of your life and he has submitted that those facts constitute proof of substantial and compelling circumstances that entitle this court to avoid imposing the prescribed minimum sentences.

[5] What are substantial and compelling circumstances? The Act does not define what they are. This is left to the courts to determine. A leading case on this issue that is often referred to, indeed, it was referred to today when submissions were made by Mr Tengwa on sentence, is the matter of *S v Malgas*.¹ It is necessary to quote from that judgment at some length. The court stated, with regard to the words 'substantial and compelling' that:

'Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin

¹ *S v Malgas* 2001 (2) SA 1222 (SCA).

sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets “substantial” and “compelling” cannot be interpreted as excluding *even from consideration* any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative *impact* of those circumstances must be such as to *justify* a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that.’²

[6] The court in *Malgas* went on to state that courts are required to approach the imposition of sentences conscious of the fact that the Legislature has ordained the particular prescribed period of imprisonment should be the sentence that is ordinarily imposed. In the absence of any other persuasive, weighty factors that may properly be considered, the minimum sentence should therefore be imposed.

[7] From *Malgas*, I therefore deduce that your personal circumstances may be taken into account when determining whether the minimum sentences should be imposed or not and that they may constitute substantial and compelling circumstances that may allow you to avoid those prescribed minimum sentences.

[8] Before considering what was said on your behalf regarding your personal circumstances, it is important, in my view, when considering the appropriateness of the sentence to be imposed upon you, not to start with the mind-set that the minimum sentence that is prescribed is also a just sentence. All the circumstances of the case must be identified, considered and evaluated and then it should be considered whether the sentence is disproportionate to the crime, the offence and the legitimate needs of the community. That will require the court to consider what a

² Ibid, para 9.

just sentence would be in all the circumstances of the case. If a just sentence falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence.³

[9] I have listened carefully to what Mr Tengwa has submitted regarding your personal circumstances. You are 42 years young, unmarried, but a father of seven children ranging in age from 23 years to 11 years. You have a fiancée with whom you have three children and you support her and all your children. This you previously did with an income of R4 000 per month earned from your employment, ironically, as a security guard. Having lost that employment, you claim to earn an income from selling traditional herbs from which activity you earn R3 000 per month.

[10] The biggest factor that counts in your favour is that you are a first time criminal offender. It is, however, unfortunate for you that you commenced your criminal career with the most serious criminal offence that you could commit.

[11] Mr Tengwa very correctly acknowledged the seriousness of what you have been convicted of when he addressed me in mitigation. You would have heard him call upon me to display some mercy towards you when sentencing you. The dictionary definition of mercy is:

‘compassion or forbearance shown especially to an offender or to one subject to one's power.’⁴

In my view, mercy should have a place, and be evident, in every sentence imposed by a court. I point out, however, that it is easier for a court to be merciful where wrongdoing has been admitted. It is less easy to be merciful where this has not occurred. You have admitted no wrongdoing. You are entitled to adopt that position. You are an intelligent man and you will then realise that the room for mercy in the light of the position that you have adopted is very constrained. I shall, nonetheless, strive to blend an element of mercy into the sentences that I am required to impose upon you.

³ S v GK 2013 (2) SACR 505 (WCC) para 14.

⁴ Merriam-Webster Online Dictionary: <https://www.merriam-webster.com/dictionary/mercy>.

[12] But even as I strive to be merciful, I would be failing in my duty if I did not acknowledge that society is repulsed by the rampant crime in our country. There is simply too much unnecessary, violent crime in our society. What you did is a prime example of a senseless, violent crime, a fact rightly acknowledged by Mr Tengwa. As he stated, there was simply no reason to kill the deceased, yet you did so swiftly, unfeelingly and without any compunction. You executed him as if he was undeserving of living further. Human life is no longer viewed as being sacrosanct. You must hold that view judging by your actions. Human life is routinely taken by those who seek to avoid the consequences of their unlawful conduct. You did exactly that. Those who act in this fashion very often evade detection and arrest. You did not. When wrongdoers are actually apprehended, the community needs the reassurance of appropriate sentences being imposed upon those who will not obey the law.

[13] Having heard of your personal circumstances, I regret that there is nothing to be found in them that constitutes substantial and compelling circumstances that would merit the avoidance of the minimum sentences relied upon by the State. In my view, the minimum sentences prescribed by the Act, and called for by the State, would be just sentences in the particular circumstances of this matter. For you cold bloodedly executed the deceased from behind by discharging a bullet into his head. He posed no threat to you and as Ms Sokhela pointed out in her address to me on sentence, the deceased had already relinquished his grip on the tribus, which was now under the gang's control.

[14] You have not impressed me as a man nor as a member of the human race. While you personally seek mercy, you were not prepared to show any to the deceased.

[15] Ms Sokhela indicated in her address that you had displayed no remorse. She is correct. Because of the basis of your false defence it is not possible for me to find that you are remorseful for your conduct. Remorse is a hopeful sign that there is a

redeemable quality in the person that exhibits it. While you may now perhaps regret your conduct, as Ponnan JA stated in *S v Matyityi*⁵ there is:

‘... a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. 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 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; and whether he or she does indeed have a true appreciation of the consequences of those actions.’⁶ (Footnotes omitted)

[16] I assume, without knowing definitely, that what motivated you and the others with whom you ganged up, was greed. Your goal was to take the money but you were prepared to kill to achieve that goal. Disgustingly, and to your everlasting shame, you were prepared to even kill school children if that meant you could escape with the money. I wonder how you would feel if someone shot one of your children while committing a criminal act? In the circumstances, I cannot find that you are remorseful or that you have acknowledged the error of your ways.

[17] In sentencing you, I must be mindful of the fact that multiple sentences must shortly be imposed upon you and I must insure that that the cumulative burden of those sentences should not operate unfairly upon you.

[18] Having considered all the relevant factors, including the representations made to me by Mr Tengwa on your behalf, the nature of the offenses that you committed and the demands of society as a whole, I am satisfied that the following are appropriate sentences:

⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA).

⁶ *Ibid*, para 13.

1. Count 1
Robbery with aggravating circumstances:
15 years' imprisonment;
 2. Count 2
Murder:
Life imprisonment;
 3. Count 3
Attempted murder:
5 years' imprisonment;
 4. Count 4
Attempted murder:
5 years' imprisonment;
 5. Count 5
Attempted murder:
5 years' imprisonment.
 6. The sentences imposed on counts 1, 3, 4 and 5 will run concurrently with the sentence imposed on count 2 in terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977.
 7. No order is made in terms of the provisions of section 103(1) of the Firearms Control Act, 60 of 2000.
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APPEARANCES

Counsel for the State	:	Ms Z Sokhela
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Counsel for accused	:	Mr M Tengwa
Instructed by	:	Legal Aid Pietermaritzburg
Dates of trial	:	23, 24, 25, 26, 30, 31 October 2023, 1, 2, 3 November 2023
Date of judgment	:	3 November 2023