IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, NORTH EASTERN CIRCUIT

Case no: **CC49/2024P**

In the matter between:

THE STATE

and

PHAKAMANI DUNCAN NGCOBO **ACCUSED**

Coram: Mossop J
Heard: 16 and 17 September 2024
Delivered: 10 October 2024

ORDER

The following sentence is imposed:

1. Counts 1 and 2

These counts are taken as one for the purpose of sentence and a sentence of 15 years' imprisonment is imposed.

2. Count 3

A sentence of 25 years' imprisonment is imposed.

3. In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of

1977, it is directed that the sentence imposed on counts 1 and 2 shall run concurrently
with the sentence imposed on count 3.

4. No determination is made in terms of section 103(1) of the Firearms Control Act 60 of 2000.

JUDGMENT

MOSSOP J:

[1] This judgment relates to the sentence to be imposed upon you, Mr Ngcobo.

[2] I intend commencing on a positive note insofar as you are concerned. There is much to be said about the approach that you have taken with regard to the charges of housebreaking, robbery with aggravating circumstances and the murder of Mr Rajendra Chetty (the deceased) that have been put to you. You have unhesitatingly pleaded guilty to those three counts. They are serious counts that ordinarily attract heavy custodial sentences. It must have taken some courage on your part to accept that from today you are to be denied your liberty for a considerable period of time.

[3] I was advised that you intended to plead guilty by your counsel, Mr Tengwa, when a pre-trial conference was held on 1 October 2024. You have not wavered in your intent and yesterday you, indeed, pleaded guilty as you said you would. In mitigation, your counsel indicated further that you had been arrested on 18 December 2023 and the very next day you had made a confession in exactly the same terms as the plea that you tendered yesterday. It seems therefore that it was always your intent to accept responsibility for what can only be described as your reprehensible conduct.

[4] I was asked by your counsel to accept that this is a true indication of remorse on your behalf. Ms Sokhela, who appears for the State, very fairly yesterday indicated that she was prepared to accept that to be the case. In her submissions to

me she referenced the matter of *S v Matyityi*,[1] where Ponnan JA had the following to say on the issue of remorse:

'There is, moreover, 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.' (Footnotes omitted).

[5] A guilty plea is not always an indication of remorse. A guilty plea in the face of an open and shut case is, at best, a neutral factor.[2] That, however, does not appear to be the case in this instance. I say so for the reasoning that follows. There were no eyewitnesses to what occurred within the confines of the deceased's home because he lived alone. Neighbours, responding to the deceased's screams, apparently observed two men fleeing from the home into the night but could not identify them. The State would have had great difficulty in prosecuting anyone for the crime. Your undoing, ironically, was the only thing that you took from the deceased: his cellular telephone, which you later sold for R350. The person who purchased it from you gave it to his girlfriend. She apparently used it with the deceased's WhatsApp application still active on it. The stolen telephone was then traced through that application and that ultimately led back to you.

[6] That does not appear to me be an open and shut case. That this must be so is demonstrated by the fact that your associate who allegedly committed this crime with

[1] *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13.
[2] *S v Barnard* 2004 (1) SACR 191 (SCA) at 197.

you, and who used to work for the deceased, was also arrested but refused to say anything and was, accordingly, freed from police custody because there was no evidence linking him to the crime. You, on the other hand, upon your arrest confessed your guilt almost immediately. Perhaps that was a sign of your conscience at work. If it was, it should be acknowledged by this court. You have also offered to assist the State in the event of it pursuing a case against your associate. On a personal level, you have indicated that you would like to apologise to the deceased's family for your conduct. That is a noble gesture, but I am not sure that it will be possible given your circumstances.

[7] Considering your decision to plead guilty and the words that are used by Ponnan JA in the extract from *Matyityi* to which I just referred, I am accordingly inclined to accept that your plea and your general conduct since your arrest is a sign of true contrition on your part. In pleading guilty, I do not lose sight of the fact that you have saved the court time and have not required the State to spend precious resources on establishing your guilt. All that I have just said thus far redounds to your credit.

[8] Before moving on to other considerations, I shift my gaze to your personal circumstances. You are 34 years of age and grew up in the Pietermaritzburg area. Both your parents are now deceased and you have a brother and a sister. You are single but have three children, who range in age from 14 years to 18 months. All your children are born of different mothers and reside with their respective mothers. At the time of your arrest, you were not working but did piece work from time to time as and when it became available.

[9] A consideration of your background undeniably indicates that you do not come from a privileged background. Your life has not been an easy one and you have, unfortunately, succumbed to the temptation of crime. I have no doubt that your criminal conduct would have been a grave embarrassment and disappointment to your parents had they still been alive. Your criminal conduct has, unfortunately, brought great shame both on you and on your family.

[10] Your criminal record is most distressing. In fact, it is disgraceful. You have a propensity for housebreaking: since 2011, you have been convicted of it on no less than five occasions. You have also been convicted of theft on 2 occasions. Notwithstanding this, the longest sentence of direct imprisonment that you have received is 18 months.

[11] Mr Tengwa, your counsel, correctly in my view, submitted that there is nothing really substantial or compelling arising out of your personal circumstances. The relevance of this is, as you know because it was explained to you by your counsel and by the court yesterday, that count two and count three have prescribed minimum sentences that must be imposed in the absence of substantial and compelling circumstances justifying a lesser sentence.

[12] I, however, advise you that I am not compelled to impose the minimum sentence prescribed. I can impose a lesser sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. In *S v Malgas*,[3] referred to by Ms Sokhela yesterday in her address to the court on sentence, the court found that it is incorrect to hold the view that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of being seldom encountered or rarely encountered. The court in that matter observed that there is no reason to conclude that the legislature intended a court to exclude from consideration, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. However, the court in *Malgas* went on to state that the specified minimum sentences are not to be departed from lightly and for flimsy reasons which cannot withstand scrutiny.

[13] I must turn now to the facts of the matter. They, unfortunately, do not speak to your credit. The deceased was 72 years old. His home was broken into by you and your associate in the early hours of the morning when he was asleep and he met an untimely and savage death. He was stabbed in his chest and his back a total of five times by both you and your associate and suffered a collapsed lung and a fracture to his skull leading to a subarachnoid haemorrhage. Those injuries caused his death. You and your associate caused those injuries. The deceased did not succumb

[3] *S v Malgas* 2001 (2) SA 1222 (SCA).

meekly to his death: he tried to protect himself and there were defensive wounds observed by the forensic pathologist at his post mortem on his hands. Both you and your associate armed yourselves with knives before proceeding to the deceased's home. You were clearly prepared to, and did, use those weapons to subdue the deceased and rob him and then to kill him.

[14] The deceased's children, Kevin Chetty (Kevin) and Anneleen Pillay (Anneleen), have deposed to victim impact statements. They do not make for easy reading. They are both adults with families of their own but they have both been traumatised severely by what you did. Kevin lived in the same road as his late father. He indicates that he feels angry towards you because he does not understand why his father had to be killed. Only you can provide the answer to that and despite your frankness in tendering your plea, you have not gone that far and explained why the deceased had to be killed over something as trivial as a cellular telephone. Anneleen Pillay has explained the loss that she now feels arising out of your senseless conduct. Her father's death has meant his absence from family events and has deprived him of the ability to watch his grandchildren grow up. Unlike Kevin, she states that she does not feel angry towards you. Her reasoning is that if she shows anger, that would mean that she feels something for you whereas she does not feel anything for you at all.

[15] The society in which you live is entitled to have its views considered when it comes to the question of the sentence to be imposed upon you. If a sentence does not reflect the seriousness of the offence, the courts are brought into disrepute. People expect serious crime to be dealt with seriously by the courts and to result in serious sentences. Ours is a very violent society. Young men like yourself do not think twice about resorting to criminal conduct that very often ends with a violent act. It appears that taking a life for R175, as you did, being a half share of the R350 for which you sold the deceased's cellular telephone, is apparently acceptable to you. The message must go out that it is not acceptable. It has never been acceptable and it never will be acceptable to kill someone for his possessions. Your conduct, in taking that most valuable thing, a human life, must be condemned by a suitably severe sentence.

[16] I often remark in imposing sentence that a murder is a double tragedy. The first tragedy is the death of the murdered person. The second tragedy is the fact that the murderer, in committing the murder, being caught and tried and sentenced, has, ultimately, wasted his own life. You will now spend a very long period of time behind bars. Whatever hopes or aspirations that you may have had will never be realised. You consciously decided to commit the crime and assumed the risk of what might follow. You will now spend the greater part of your life as an outcast, separated from society. And all of that for R175. You will have a long time to think about that.

[17] I have carefully considered all the representations made on your behalf yesterday by Mr Tengwa. I am prepared to accept that your guilty plea is a substantial and compelling reason to depart from the minimum sentence prescribed for murder. In sentencing you I am also conscious of the fact that you have been convicted of three very serious offences and I must ensure that the sentence that I impose upon you is not cumulatively unbearable and unjustified.

[18] I accordingly consider the following to be a just sentence in all the circumstances of this matter:

1. Counts 1 and 2

These counts are taken as one for the purpose of sentence and you are sentenced to 15 years' imprisonment.

2. Count 3

You are sentenced to 25 years' imprisonment.

3. In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is directed that the sentence imposed on counts 1 and 2 shall run concurrently with the sentence imposed on count 3.

You will thus serve an effective 25 years' imprisonment.

4. No determination is made in terms of section 103(1) of the Firearms Control Act 60 of 2000. That means you may not lawfully possess a firearm.

Do you understand? I wish you good luck.

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MOSSOP J

APPEARANCES

Counsel for the state	:	Ms Z Sokhela
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Counsel for the accused	:	Mr Mr M Tengwa
Instructed by	:	Legal Aid South Africa Pietermaritzburg