

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case number: **K/S 1/06**
Date delivered: **13/11/2006**

In the matter between:

THE STATE

and

**MAARMAN, J
THWENEYAGAE, D
Tsame, G**

Accused 1
Accused 2
Accused 3

SENTENCE

MOKGOHLOA AJ:

1. Accused 1, Mr John Maarman, has been found guilty of housebreaking with intent to rob and robbery with aggravating circumstances in count 1; murder in count 2; and theft in count 3.

Accused 2, Mr Tshweneyagae, has been found guilty of housebreaking with the intent to rob and robbery with aggravating circumstances in count 1; murder in count 2; and theft in count 3.

Accused 3, Mr Tsame, has been found guilty of receiving stolen property emanating from the robbery of the items by accused 1 and 2.

What I have to do is to determine an appropriate sentence for all

three of you.

2. The basic consideration in imposing sentence have been developed by the Courts over a long period. These are deterrent, preventive, reformatory and retributive.

21 By deterrent the aim is to discourage the specific offender or would be offenders from committing similar crimes.

22 Preventive is to protect the public from further criminal conduct by the accused.

23 Reformatory is to rehabilitate the offender where possible by educational or other correctional treatment in the most effective way.

24 Retributive is to impose a sentence which reflects the seriousness of the offence in order to promote the respect for the law and proper punishment for the accused.

3. The triad enunciated in **S v Zinn 1969(2) SA 537 (A) at 540 G** remains instructive to this Court. This consist of the crime, the offender and the interest of the society.

4. A Court should strike a judicious counterbalance between

these elements in order to ensure that one element is not unduly accentuated at the expense of, and to the exclusion of other elements.

5. To achieve this counterbalance a Court must evaluate and balance evenly the nature and the circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.
6. The murder committed by accused 1 and 2 was insensitive and cruel. The deceased was evidently, as Dr Lourens testified, attacked and assaulted, using a blunt instrument, like an iron bar or brick. The deceased's body was tied up, probably to make it impossible for him to try to ward-off blows. For instance, Dr Lourens noted, inter alia, the following on her post mortem report:

"4. External appearance of body and condition of limbs

4.1 The body had been tied up:

- (a) White/black nylon rope once around the lower legs with a double knot.*
 - (b) Brown sock once around the lower legs.*
 - (c) Cream sock once around the forearms.*
 - (d) Brown sock just around the left wrist.*
 - (e) Cream sock around the head and through the mouth.*
- These ligature left deep indentation in the body. The face and arms underneath the ligatures revealed bruises and vital reaction, but the indentation underneath the sock of the legs left no soft tissue vital reaction.*

4.2 Bruising of the distal and dorsal left forearm: 110 x 90mm.

- 4.3 *Bruise over the superior aspect of the right shoulder: 70 x 40mm.*
- 4.4 *Bruises and superficial open wounds just to the anterior of the right ear, caused by the sock tied through the mouth.*
- 4.5 *Two open wounds extending from the right ear and onto the scalp tissue behind the right ear. The two open wounds joined in a V-shape over the right ear. The total lengths of these two wounds measured 60mm each, with the scalp wounds that measured 35mm and 45m respectively. The more superior wound (45mm) had well defined edges, an abrasion ring and no tissue bridges. No foreign material was present. There was some hair loss. The more inferior wound (35mm) had well defined edges, an abrasion ring, hair loss and tissue bridges.”*

- 7. To ensure that the deceased would not survive the attack or that he dies a slow but certain death, a cream sock was tied around his head and through his mouth. The deceased would not have been able to remove or untie this sock because his hands were tied together and his feet also tied together to restrict his mobility. Dr Lourens stated further that according to her the cause of death of the deceased is:

“... the person died because of the head injury and blows to the head, more than one blow to the head. I think a very important contributing to the fact of the death of the deceased one must not overlook the fact that the sock was tied through the mouth of the person. Because of the sock could have also impaired the breathing effort of the person and he probably could not breath properly. He already got a head injury that is going to interfere with his breathing. Now there is another obstruction in his mouth and he cannot breath properly.”

- 8. Sec. 51(1) of the Criminal Procedure Act 105 of 1997 (the Act) provides that: if a High Court has convicted an accused

person or persons amongst other offences, of murder where the death of the victim was caused by the accused in committing or attempting to commit or after committing robbery with aggravating circumstances; or the murder was committed by a person or group of persons in acting in the execution of furtherance of a common purpose or conspiracy, he/she should be sentenced to life imprisonment: Provided the Court is satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

9. In **S v Malgas 2001(1) SACR 469 (SCA) 482 C to E** the Supreme Court of Appeal expressed itself as follows:

“All factors (with a few exceptions) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

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.”

10. These offences are very serious and that is why there is a legislation which prescribes the minimum sentences. The court must promote respect for the law. The interest and

protection of the community against the accuseds or would be offenders must be taken into account. Failure to do so would result in chaotic society where there is no respect of the law and vigilantism being the order of the day. Farm-killings are rife and prevalent in the Northern Cape Province and the whole of South Africa. Statistics when an offence is of such prevalence the courts are obliged to impose sentences that will not only defer the accused person appearing before them but also would be farm killers. The society expects the courts to take into account the interests of the victims of farm-killings in imposing appropriate sentences but in the context of the interests and rights of ordinary citizens of this country.

11. PERSONAL CIRCUMSTANCES

Mr Rasethunsa, on behalf of accused 1 and 2 submitted that the following ought to be taken into account in mitigation of sentence in respect of accused 1 and 2.

Accused 1:

- 1) That he was born on 3 June 1974 that makes him 32 years old;
- 2) That he is not married and have two children;
- 3) That he has no proper education, never attended school;

- 4) That he is self employed selling veggies;
- 5) That he has no pending case against him.

Accused 2

- 1) That he was born on 25 December 1983 that makes him 22 years old and he is still reasonably youthful;
- 2) That the accused is not married and have no children;
- 3) That he attended school up to Standard 3.
- 4) He is employed as a ...

Despite his best endeavours, Mr Rasethunsa was, nevertheless, unable to argue that the above factors constituted substantial and compelling circumstances. I cannot blame him because there are none.

12. The State on the other hand submitted that there are aggravating circumstances i.e.

- 1) The deceased was an old man 75 years old.
- 2) Considerable violence used.
- 3) Previous convictions.

13. The aggravating features in this case by far outweigh the mitigating factors. I am not satisfied that the mitigating factors, taken together, constitute substantial and compelling circumstances. I am also not satisfied that a sentence of life

imprisonment would be inappropriate to this heinous murder so that an injustice would be done by imposing such a sentence.

14. In the premises I have no option but to impose the ultimate sentence, on accused 1 and 2, that the law and the constitution allows being life imprisonment.
15. On the first count of housebreaking with intent to rob and robbery with aggravating circumstances – both accused 1 and 2 are not first offenders. They have relatively previous convictions. They were given a chance to rehabilitate but failed.
16. Accused 1 and 2 have also been found guilty of theft of a motor vehicle. The value of the said motor vehicle a Mitshubishi Colt bakkie is estimated at R120 000.00 – R100 000.00. It is a fairly new bakkie.
17. As far as accused 3 is concerned, he has been convicted of receiving stolen property knowing to be stolen. The exact value of the property was not mentioned but it appeared from the exhibits that they are of high value e.g. sofas, warmer, AMC pots. This is a serious offence and I believe in that the courts have to *“cut the hand that receives there will be no hand to steal”*. People who receive stolen goods encourage in a way others to steal.

18. Accused's 3 personal circumstances are favourable. He is 48 years old, married for 15 years with four children all attending school. Accused 3 attended school until Standard 6. He is a sole breadwinner operating a taxi with an income of ± R5 000.00 per month. He was in custody for 3 months until he was released on bail. Accused 3 is a first offender. Ms Segone, for accused 3 has suggested that a wholly suspended sentence alternatively an imprisonment sentence coupled with an option of a fine would be appropriate. In my view a sentence of
19. In respect of all three accused: I have had due regard to the purpose and object of punishment. I also had regard to the interest of society as represented by the State. I have also considered all the mitigating and aggravating circumstances emanating from the record and the oral arguments addressed to me by counsel for the defence and the State.
20. I regard the following sentences to be appropriate:

FE Mokgohloa
ACTING JUDGE
NORHTERN CAPE DIVISION

<u>For the State:</u> Public Prosecutions	Adv Cloete	Instructed by: Director of
<u>For Accused 1&2:</u>	Mr Rasethuntsa	Instructed by:
<u>For Accused 3:</u> Centre	Ms Segone	Instructed by: Justice