

SOUTH AFRICA / JUDGMENT

S v Beja (CC18/21) [2024] ZAWCHC 102 (18 April 2024)

[2024] ZAWCHC 102

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

CC18/21

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC18/21

In the matter between

THE STATE

V

GCINITHEMBA BEJA

ACCUSED 1

FUNDILE MASETI

ACCUSED 2

JUDGMENT

delivered 18 April 2024

THULARE J

- [1] The accused were convicted of seven counts of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) (as amended) (the CLAA), three counts of attempted murder read with the provisions of section 51(2) of the CLAA, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. Section 51(1) of CLAA prescribes life imprisonment for the murder premeditated or planned, unless the court finds substantial and compelling circumstances to deviate from the prescribed sentence. Section 51(2)(c) prescribes, for attempted murder

as envisaged, in respect of a first offender, to imprisonment for a period not less than 5 years unless the court finds substantial and compelling circumstances to deviate from the prescribed sentence. In terms of section 3 read with 90 and 121 of the Firearms Control Act, 2000 (Act No. 60 of 2000), read with schedule 4, an accused convicted of unlawful possession of firearm and ammunition may be sentenced to a fine or maximum period of imprisonment of at least 15 years per count.

- [2] The issue is an appropriate sentence in respect of each count for each of the accused.
- [3] Accused 1 is the last born child and has 5 siblings, one of whom is deceased. His parents were married and raised their children together in a stable family. The accused did not in early childhood until early adulthood present any behavioural negativity or violent personality to his family. The accused himself did not report any negativity or trauma relating to his upbringing. He is 33 years and was 30 years at the time of the commission of the offence. He was unmarried but had two sons, twins aged 10 years and a 3 year old daughter. The accused met his daughter for the first time at the request of the court when

the matter was postponed for sentence, through the intervention of the probation officer during the consultation and preparation of the pre-sentence report. He spent an hour with the child. Never seeing his daughter before was primarily because of prison prescripts as regards visits by infants influenced by measures to protect young children against covid-19 and its effects. The daughter was born during the covid-19 lockdown, when the accused was already in custody. The twins and the daughter had different mothers. The sons lived with the accused's retired parents in Lady Frere in the Eastern Cape whilst the daughter lived with her mother in Cape Town. The accused's father was, before retirement, the sole breadwinner for the family and had the support of the accused's elder siblings when they started working. The parents now depend on older persons' grants and the twins' child support grants. The accused daughter is supported by its mother solely after the accused was detained. She did not qualify for child support grant. The accused's relationship with his family was stable. His girlfriend described him to the probation officer as a non-violent person with a lovely and caring personality.

- [4] The accused family occupied a six-room house in Khayelitsha site B, Y section, and the accused lived in the backroom. He completed his foundation phase education and dropped out of school in grade 11. In 2016 he worked at Pick n' Pay as a packer. From 2017 until his arrest in 2020 he worked in the township as a stock taker at Ngquzi tavern. From his income he supported his children and assisted his parents where necessary. He was a soccer player and later became a soccer coach in his community. He assisted with house chores at home. He was affiliated to the Zion church as a Christian and was a part-time attendee because of work commitments. He was a social drinker and used alcohol occasionally and did not use any substances. He was physically, psychologically and emotionally stable. On one of the two prison visits by the probation officer the accused reported body pains which he attributed to the random search conducted by prison authorities the previous day, and was advised to seek medical attention at the institutional medical facility. The accused had one previous conviction of unlawful possession of a firearm and ammunition and served a term

of imprisonment between 2013 and 2015. He did not acknowledge responsibility for the offences that he was now convicted of. He had been in detention since his arrest on 8 March 2020 which was 4 years.

- [5] Mr Simphiwe Victor Giyo, a probation officer in the Department of Social Development at Metro East Region in the Western Cape, stationed at Khayelitsha, who provided a report at the request of accused 1, concluded his analysis on his pre-sentence report by stating the following:

“With the accused in custody at Pollsmoor Correctional Service ever since his arrest during March 2020, there is no extra income to support or taking care of his children. Hence it can be said that the family’s hope is on the court’s mercy during the sentencing, as they hope for less sentence that will see him reuniting with his children in a shorter timeframe.”

Irrespective of whether the accused does or does not accept responsibility, he needs to be held accountable for his actions. The complainant/victims of crime and the community expect to see the law playing its role in terms of community safety and as part of crime reduction strategies. Therefore, justice has to be served to ensure the safety and the economic growth of our country. In so doing the court has to take in cognizance of the years the accused spent in prison. The responsibilities he left behind and the age of the accused and his children.”

Mr Giyo amongst others considered the sentencing options and cannot be faulted for his conclusion that the most appropriate sentence he recommended was direct imprisonment.

- [6] Accused 2 took the witness stand to inform the court that he stood by his innocence and did not take any responsibility for the offence, and in protest to his conviction and imminent sentence, was not willing to make any contribution in mitigation of sentence. Against the background of this position, and the responsibility of Adv. Paries to advance the case of and to protect and advance the interests of his client, I can only record my appreciation of the calm, calculated and firm manner in which Adv. Paries navigated what must count as one of the most difficult instructions and trial he was involved in. When regard is had that it was in this matter where during the trial, accused 1 lost his legal representative, Adv. Gladile, who was shot and killed, Adv. Paries brought truth to some writing whose author I could not recall, which said: “I can solve any problem, but to solve some, I must have time for and have to cry first.” In his evidence on the merits, accused 2 had indicated that he was married and had a son. He lived in his own property in Khayelitsha and ran a chicken business. Accused 2 had been in custody since 17 May 2021 which was nearly 3 years.
- [7] The City of Cape Town is one of the areas in the Republic, which is in the eye of a storm of extortion. The failed expectations, high rate of unemployment and lack of opportunities for young people resulted in many young people, especially Blacks, getting poorer, in the midst of the cost of living that is rising. The poverty, for the greedy and moral ‘factory faults’ of society, has created a fertile environment for crime. Greed has for them made poverty and crime blood cousins. It is not for a judge to debate whether the historical education and settlement patterns with larger black residential areas than whites in towns and cities across

the country, and the preparation of a Black child to be minded to expect the small white community to provide employment opportunities is to blame, or whether the paradigm shift necessary to inculcate the attitude of grabbing the devil of entrepreneurship by its tail with a “wafa wafa” spirit and as they say in the hoods of our capital city, “chancer bari mhlambe uzophumelela” mindset and adrenalin will liberate the Black majority financially and economically. The observation that I can make, from the facts of the case before me, is that in the black settlement areas of Cape Town, greedy criminals solicit money from business people. If you refused to pay or cannot afford, they threaten to make your life a living hell, with the result that you could not continue doing business. They would rob, or even kill you. Extortion and harassment were alive and kicking. The criminals deem themselves entitled to the share of any income, not just profits. Unless they meet the authority of the State face to face, they remain unstoppable. The extortion and harassment became an unwelcome influence, but had an economic effect in alleviating poverty for those practicing it. It did not just become standard practice, but seems to have become a lucrative business.

- [8] The attack on Q166, Khayelitsha, which found the convictions against the accused, was a consequence of a fall-out in the battle for extortion turf, which caused bad blood between the accused and their erstwhile friend, Ntera. The accused together with others ambushed a now deceased co-extortionist, Ntera at his birthday party attended by patrons which included Ntera’s friends, visitors and relatives. In a scene reminiscent of the Wild Wild West television series, the accused together with others made a grand entrance, carrying big and small guns, and shot randomly at attendees. Ntera himself had been shot earlier elsewhere just before the accused’s arrival at Ntera’s home. The victims at the party were innocent attendees who were not involved in gangsterism or extortion also called “protection fee”. Ntera’s 6 year old daughter at the time, was not only shot at, but also kicked by one of the shooters who had entered the house. The attack was intended to send a message to anyone who crossed the path of the Gupta-gang, that it was not only the betrayer who was placed in danger, but anyone who associated with such crosser. If it was not so, the accused could have clearly retaliated and ambushed Ntera without involving innocent people. As I mentioned in the judgment on the merits, the attack was brazen and meant to enforce an iron grip to the community. The accused ruled the Khayelitsha community through the use of a bullet and ran a parallel authority to that of the State. They made sure that the community lived in fear. After the shooting, accused 2 came back not only to be an onlooker, but he observed who of the community members was talking to the police and in fact jumped the tape barricade to where one community member was talking to the police to monitor what was being said to the police. Not only was Mr X intimidated by the accused. There were members of the police who he knew as close to the Guptas, who asked him why he was at the police station and also told him that he liked being at the police station. Mr X was hounded even when he was in police protection. He had to be re-routed when the destination to a safe place became known to the Gupta gang, of which the accused were members. The Guptas worked with some police officers and had an established network in their rule by the bullet through gangsterism, forceful demand for ‘protection fees’ and extortion.

[9] The murders of rival gangs, random civilians and children is a daily reality in the settlements especially of blacks in the City of Cape Town. This is a pandemic that is alarming and has engulfed the city. The pandemic results in the prevalence of murders, attempted murders and unlawful possession of firearms and ammunition. In this matter, Nokwanele, Ntera's sister, testified as a victim of crime. The physical harm suffered by her and Ntera's child was not only limited to their bodily harm. Nokwanele had to immediately after the shooting go into induced labour as there was a threat to her unborn child as it was during an advanced stage of her gestation period. Amongst others the unborn child no longer made movements that a pregnant mother would feel to instill the peace that the child was still alive. Ntera's 6 year old daughter was shot at and injured, and was also kicked with booted feet by an adult male. After the shooting, the Makhetha family had to do the ritual cleansing for which the family had to spend money to "wash the blood of the deceased and injured" from their household. As if

that was not enough, they had to move from Q166 and go and rent property. This was as a result of the psychological harm done to the family. Nokwanele and Ntera's daughter could no longer live in their home because they had reflections of what happened to them in that house, and relived the trauma daily. This was also the social and economic effect of the crime on them, which was likely to also sustain for sometime into the future. The surviving members of the Makhetha family are being blamed by other families who lost their loved ones, as being the ones responsible for the ambush at the party. The wrong done extends beyond Nokwanele and Ntera's daughter and has tainted the whole family name. The sins of Ntera and the accused are now visited upon the innocent members of the Makhetha family.

[10] For the sentences on murder and attempted murder, my starting point was not a clean slate upon which I was free to inscribe whatever sentence I thought appropriate. For the murder counts it was imprisonment for life, and for the attempted murder, imprisonment for not less than 5 years [S v Matyityi 2011 (1) SACR 40 at para 18]. In that paragraph 18 the SCA also referred to paragraphs 8 and 9 of S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220 where it was said:

"[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based - than if it is not'. Moreover, those circumstances had to be substantial and compelling. 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 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. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration."

[11] Both accused had no remorse. They had no pain of conscience for the plight of the deceased, the injured or the fear which gripped the community of Khayelitsha and beyond. They had no appreciation of the extent of their error. They demonstrated no action which manifested feelings of sorrow and regret for having done wrong. The viciousness of the deeds of the accused resulted in heinous offences. The accused took more than one life in a very callous manner, to instill fear so that they

become unstoppable, to support their greed. The circumstances surrounding the multiple killing of innocent party goers simply to

send a message to a competing gangster, who used to be their friend and partner in crime that they will not tolerate any betrayal and disturbance of their territory for extortion is alarming. Whilst extortion has become fashionable, and a few members of the SAPS in Khayelitsha have become partners in that criminal enterprise, the conviction and sentence in this matter gives

hope that with the help of community members like Mr X, the industry of the Anti-Gang Unit members and other members of the SAPS who are not moved by corruption, and other role prayers like fearless members of the National Prosecuting Authority, South Africa is on its path to win the battle. The clarion call remains, the cowards must move to the back, and let the brave lead.

[12] Accused 1 grew up in a stable home and was raised by both parents. According to him he was a star academic performer in basic education. I am inclined to accept this as throughout the trial, accused 1 demonstrated above average intelligence in his engagement with the issues and the instructions he gave to his legal representatives, initially Adv. Gladile and later Adv. Paries. It takes an intelligent person, who has accepted the possibility of long term imprisonment, to seek a probation officer's report not as part of the collection of the portfolio of evidence for the mitigation of sentence, but simply calculated to pierce the regulatory framework at prison through judicial thrust, so as to enable him to see his infant child. This is what accused 1 told, including to Mr Giyo the probation officer. Accused 1 dropped out of school at grade 11. It is unfortunate that the probation officer did not obtain the portfolio of evidence from the schools which accused 1 attended, to help determine what manner of support, if any, was given to the accused by both the Department of Education and where necessary working with the Department of Social Development. As things stand, it is difficult to determine whether there was a systemic failure by Educators and Social Workers, or whether it was the influence of the social circumstances of the community of Khayelitsha, or whether it was a deliberate decision of accused 1 to drop out of school. As I told him, he owed himself, his family, his community and his country including the world, the benefits of his industry and intellect, which was wasted in criminal activities. His intelligence and mental capacity, in my view, added to his blameworthiness. Accused 1 was not primary caregiver of his children. The twins were care for by his parents and daughter by its mother.

[13] Accused 2, throughout the trial, lacked affection and warmth. It is as if he had no feelings. Even after conviction, he had no feeling of sympathy towards other people. Unlike accused 1, accused 2 can be described as someone who showed no understanding for other people's sufferings. Even when explained what the moment of mitigation entailed, he had no sympathy, interest or sensitivity even to his own fate. He was simply cold-hearted throughout the proceedings. Accused 2 chose not to participate substantively in mitigation of sentence, except to take the witness stand and under oath to tell the court that he would not participate at that stage of proceedings as he was innocent. That was his right. In *S v Dzukuda and Others*; *S v Tshilo* [2000] ZACC 16; 2000 (2) SACR 443 (CC) at para 40 it was said:

"The accused's right under s 35(3)(h) of the Constitution 'to remain silent, and not to testify during the proceedings' applies to the sentencing stage as well, including the E proceedings here in question."

However, this was not without consequences. In *S v Jaipal* [2005] ZACC 1; 2005 (1) SACR 215 (CC) at para 29 it was said:

“[29] The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.”

The accused's election to exercise his right to silence in consideration of an appropriate sentence, may lead to a conclusion

that there was nothing he could say that could persuade a court to find substantial and compelling circumstances to deviate from the prescribed sentence [Matyityi at para 21].

[14] The violence displayed by the accused was simply gratuitous, unnecessary and served to increase the blameworthiness of the accused and his companions. I have been told nothing, from what had been said individually and cumulatively in favour of both accused respectively, that shifted the scales when measured against the total weight of the gravity of the offences, their prevalence and the legislature's quest for severe and standardized responses by the courts. In my view the prescribed sentences represented public interest in a just and proportionally balanced manner [Matyityi para 22]. The sentences in respect of the unlawful possession of a firearm and unlawful possession of ammunition may be steep, but under the circumstances of this case, not unduly harsh [Witbooi v S (A416/2015) [2015] ZAWCHC 185 (8 December 2015) at para 17]. At para 23 in Matyityi the court said predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order. It is appropriate to also repeat para 24 where it was said:

“[24] In this case the respondent and his cohorts conducted themselves with a flagrant disregard for the sanctity of human life or individual physical integrity.”

There is no doubt that society expects of the criminal justice system, the last word of which comes from the courts, to demonstrate satisfaction of the desire for protection from gratuitous criminality executed with boldness and without shame and with confidence and an untouchable illusion. It is the courts that should take criminals back to reality by imposition of sentences that are proportionate to the criminals, the crime and the interests of society blended with a measure of mercy. For these reasons each of the accused, the leading members of Gupta-gang, is sentenced as follows:

1. Count 1: the murder of Thembelani Sihlali, each of the accused is sentenced to life imprisonment.
2. Count 2: the murder of Akhona Cuba, each of the accused is sentenced to life imprisonment.
3. Count 3: the murder of Lisa Kalpens, each of the accused is sentenced to life imprisonment.
4. Count 4: the murder of Bongani Lonert Stiwa, each of the accused is sentenced to life imprisonment.

5. Count 5: the murder of Tabita Mgidlana, each of the accused is sentenced to life imprisonment.
6. Count 6: the murder of Monwabisi Nolusu, each of the accused is sentenced to life imprisonment.
7. Count 7: the murder of Ntandazo “Ntera” Makhetha, each of the accused is sentenced to life imprisonment.
8. Count 8: Attempted murder of Sipho Mtshikwe, each accused is sentenced to 5 years imprisonment.
9. Count 9: Attempted murder of Minentle Simanga, each accused is sentenced to 5 years imprisonment.
10. Count 10: Attempted murder of Abongile Mbi, each accused is sentenced to 5 years imprisonment.
11. Count 11: unlawful possession of a firearm, each accused is sentenced to 15 years imprisonment.
12. Count 12: unlawful possession of ammunition, each accused is sentenced to 15 years imprisonment.

The sentences on count 8 to 12 shall run concurrently with the sentences imposed on count 1 to 7.

Both accused are declared unfit to possess a firearm.

DM THULARE

JUDGE OF THE HIGH COURT

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