

SOUTH AFRICA / JUDGMENT

S v Billa (20/2022) [2022] ZAECKMKHC 19 (12 May 2022) [2022] ZAECKMKHC 19

COURT

Eastern Cape High Court, Makhanda

BEFORE

A Govindjee

CASE / FILE NUMBER

20/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Not Reportable

Case no: 20/2022

In the matter between:

THE STATE

and

GERMAN BILLA

Accused

SENTENCE

Govindjee J Background

- [1] Mr Billa pleaded guilty to charges of murder, robbery (with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 1977[1] ('the Act')) and unlawfully entering and remaining in the Republic of South Africa in contravention of s 49(1)(a) of the Immigration Act, 2002.[2] His plea was accepted by the prosecutor and, in terms of s 112 of the Act, he was convicted on all counts on the basis of a signed statement setting out various admitted facts.

- [2] Mr Billa is a 28-year-old Mozambican adult. He was contacted by Nelson Shelauli ('Shelauli'), a former school friend, during May 2021. Shelauli met with him in Nelspruit and told him about a house in East London containing a safe loaded with cash. After initially refusing, Mr Billa agreed to accompany him in the hope of becoming wealthy. He knew then that this was money to which he had no claim.
- [3] Shelauli shared with Mr Billa WhatsApp voice notes with his contact and friend in East London ('Nico') indicating plans to obtain the money from the house. Shelauli advised Mr Billa that the house was unoccupied. Upon arrival in East London, Shelauli took Mr Billa to meet Nico, who took them to a large house indicated as the target. They visited the house during the day and at night.
- [4] After two days, they returned to the house at approximately 19h00. Shelauli was armed with a black firearm. Nico was sent to see if a room occupied by the owner's son was vacant. He communicated with Shelauli using WhatsApp, advising that the room was unoccupied but that there was a cell phone and laptop visible.
- [5] Upon entering that room, Mr Billa was surprised and discomforted to find the son inside. He foresaw the possibility of resistance from the occupiers, including the possibility of shooting taking place. The son was tied up with shoe laces and taken to an upstairs room. The home owner heard this and asked what was happening. Mr Billa was nervous as he observed that the owner was carrying a firearm. He then saw Shelauli firing two shots at the owner, who fell down, his firearm dropping to the floor.
- [6] All the family members were tied up using shoelaces, other than a baby girl and the injured owner. Mr Billa was still nervous and shaking. He observed Shelauli and Nico taking the lady of the house and the elder son to the room containing a safe, while he remained in the dining room with the other members of the household. When Shelauli realised that Mr Billa was nervous, he assaulted him with an open hand. After some time, the other two returned with a school bag and laptop bag. The three left the house with the bags and three bicycles and returned to Nico's house. When the bags were emptied, he observed laptops, cell phones, the owner's firearm and other things.
- [7] A few days later, Mr Billa received his share: he was given a black cell phone to use, and Shelauli informed him that he had wasted his money by bringing him to East London. Mr Billa's statement indicated that he had panicked when he realised that there were people in the house. This was not part of the plan but he had not done anything to extricate himself from the situation. He eventually returned to Nelspruit.
- [8] Mr Billa stated that: 'I knew at the time of being involved with Nelson and Nico in the commission of the crime that it was unlawful and is punishable by law, but I nevertheless continued with my actions and associated myself with their actions by assisting them when we went to commit robbery and the deceased got shot in the process. I associated myself with the actions of my co-perpetrators as I also did nothing to save the deceased and his family.' When approached by the police two months later, during July 2021, he immediately

admitted to the crimes and explained what had occurred. He became aware that the home owner had succumbed to his injuries on the day of the incident. He offered an apology to the court and the family of the deceased as part of his statement, indicating that he felt remorse for what had transpired.

- [9] Mr Billa also indicated that he had not obtained the necessary papers to be able to remain in South Africa from the Department of Home Affairs. After being found guilty, the state proved a prior conviction in this respect, for which he had been fined R1500.

Aggravation and mitigation

- [10] Dr Solomon Zondi testified that he was the Chief Medical Officer at Forensic Pathology Services in Woodbrook, East London. He had conducted a post-mortem examination on the body of J[....]1 J[....]2 ('the deceased') on 17 May

2021. The uncontested chief post-mortem findings, supported by a photo album and diagrams accepted into evidence, were the following:

- A projectile had entered the deceased's left lateral chest wall, had perforated the left dome of the diaphragm, descending into the colon and left kidney and exiting on the left posterior lumbar region.
- A second projectile had entered the left thigh, medially, traversing the thigh muscles, from left to right in an upward direction, exiting on the left medial aspect of the buttock.
- The cause of death was the abdominal injuries caused to the left kidney, which had been injured as a result of the gunshot wound to the left chest wall.
- The deceased, who had seemingly been a person of good health, barring high blood pressure, was likely to have suffered a slow and painful death. This was caused by the gunshot at close range, which had permeated the colon and the kidney, resulting in multiple organ failure and the deceased's lungs being congested with blood.

- [11] Mrs J[....]3, the wife of the deceased, also testified. They had been married for 23 years and had two children, aged 22 and eight. The elder child was studying at the University of Cape Town. The younger, who had been adopted at the age of four months, is schooling at a private school in Makhanda. Funds had been provided by the deceased to enable the children's education. The deceased had played a crucial role in their upbringing, communicating with them better than their mother could. For example, he would unhesitatingly leave his work in Bhisho and travel to Makhanda

whenever his children needed him. They meant the world to him. He knew their friends and the parents of their friends by name. It was the deceased who had raised and bottle-fed the younger child, who had been present at the time of the incident.

- [12] The deceased had been a police officer holding the rank of Director and stationed in Bhisho, prior to his retirement. He had been the head of the family and also filled the role of father to the witness's other children prior to his passing. The child aged eight had been adopted and knew no other father. The deceased was also considered as a father figure and leader by various community members, particularly for households where a father figure was absent. In some instances, the children supported had obtained tertiary qualifications. A children's bicycle race, the Eastern Cape Cycling Tour, had also been initiated by the deceased, to provide opportunities to children. He had been a freedom fighter and a veteran of Umkhonto we Sizwe. He was a patriot who would frequently feed community members who were struggling financially. He was also an active member of the Anglican Church working with the youth. He played a role as a unifier of families and as a mediator. He was a commissioner of the South African Defence Force at the time of his passing, working even in retirement to protect the rights of the country's soldiers.
- [13] The witness and another family member had been taken to the main bedroom containing the safe. The perpetrators were disappointed to find that there was no money there. They then assaulted the witness. The person holding the fire-arm attempted to fire at the witness but it mis-fired. The magazine in the firearm was removed and reinserted, and another attempt was made to shoot the witness. She was pleading with them, saying that they could accompany her while she withdrew money. Instead, they ransacked the wardrobe, throwing many items on the floor. The witness was subsequently gagged with a rope and dragged to the en suite bathroom and made to lie down, facing the toilet, her hands and feet tied with chargers and cords. The witness asked her attacker if she was to be raped. He was busy pulling down her trousers and panty to her knees, told her that he was not going to rape her but would shoot her in the genitals instead. When he attempted to do so, the firearm again misfired. The witness prayed for her life. Her attacker left and then returned, made a hand gesture towards her and then left.
- [14] Once she had managed to untie herself, the witness ran to her husband's body and saw that he was still. One of the other inhabitants had been tied up so tightly that he had lost circulation. The witness then called the police. She confirmed that various items had been taken from the inhabitants and placed in a bag taken from the bedroom.
- [15] The robbery and murder had resulted in the witness being suspected by certain community members of some involvement. Her relationship with her in-laws had also been negatively affected. Her own family-life had been severely disrupted. The deceased's passing had left an irreparable void. Their farm had also suffered and people were now trespassing regularly. Employees had left and animals had died. A security company had since been contracted. The witness had been deeply hurt and required treatment for depression, including in-patient treatment for 14 days and anti- depressant medication. While the medication had helped, there was now some dependence on this. Her work, as a chief financial officer, had been severely affected and she suffered from loss of memory. Her performance at work had declined. Her youngest child had observed what had happened and was also traumatised.

She had started bed-wetting and required therapy.

Analysis

[16] Murder when committed by a group of persons acting in common purpose is listed in Part I of Schedule 2 of the Criminal Law Amendment Act, 1997 ('the Minimum Sentences Act').[3] Murder when the death of the victim was caused by the accused in committing or attempting to commit or after having committed robbery with aggravating circumstances, as defined in s 1 of the Act, is also listed in this part. The consequence is that the crime attracts a minimum sentence of life imprisonment unless the court finds substantial and compelling circumstances to deviate from this.

[17] Courts are expected to temper the punishments they impose with a modicum of mercy in order to attempt to achieve a balanced, even-handed

outcome.[4] The triad of factors to be considered consists of the crime, the offender and the interests of society and these factors must be applied to consider whether substantial and compelling circumstances exist to deviate from the prescribed minimum sentence.[5] A court must exercise a reasoned discretion in determining an appropriate sentence.

[18] The approach to be applied in imposing a sentence when the Minimum Sentences Act applies has been set out by Nugent JA in *S v Vilakazi*: [6]

'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the

circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional

Court made it clear that what is meant by the "offence" in the context ... "consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender". If a court is indeed satisfied that a lesser sentence is called for in the particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence.'

[19] As noted by Mr Mtsila, for the state, it must be borne in mind that personal aversion to life imprisonment or doubts as to the efficacy

of the policy implicit in the Minimum Sentences Act cannot be elevated to 'substantial and compelling' factors. The

prescribed minimum sentences must be imposed unless there are 'truly convincing reasons' for departure.[7] These are sentences to be imposed 'ordinarily and in the absence of weighty justification'.[8] 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.[9]

[20] The personal circumstances of Mr Billa were presented to the court by Ms Mthini. He is 28 years of age and worked in Nelspruit as a hairstylist earning R2500 per month prior to his arrest. His parents and elder sister have passed away and he occasionally sends money to a younger sister in Mozambique. He is father to two young children and unmarried.

[21] Mr Billa is a first offender in respect of his convictions for murder and robbery with aggravated circumstances. He pleaded guilty and, since he was approached by police in Nelspruit, has been forthright about his involvement in these crimes. He was not the main instigator of the crimes, had himself been unarmed and had played a less active role in the commission of the crimes than his co-perpetrators. It was submitted that he had shown genuine remorse for his actions. He had been motivated by greed and influenced by peer-pressure to participate in a criminal activity. Counsel submitted that Mr Billa was not a danger to society and would testify against his co-perpetrators if they were apprehended. There was a possibility of rehabilitation and the effect of a sentence of life imprisonment would be disproportionate to his crimes. Mr Billa has been in custody awaiting trial for approximately ten months.

[22] The aggravating features of the crimes are well-illustrated by the testimony of Mrs J[...].3. Attacked in the sanctity of her home in the evening, her husband murdered, her child traumatised, the community suspicious, her life, and that of the family members who depended upon the deceased, will never be the same. There can be no doubt that society is appalled by serious crimes of this nature and expects commensurate punishments to be imposed.

[23] In determining whether substantial and compelling circumstances exist for deviating from the prescribed minimum sentence for murder, it is useful to consider the plea of guilty and Mr Billa's remorse. It has been held that a guilty plea in these circumstances is 'of little moment' once an accused person is caught, but that it 'counts for something that he did not unduly burden the state with the need to prove the charges' and had, furthermore, expressed remorse.[10] It is a question of fact whether this remorse is genuine or not, requiring consideration of an accused's conduct after the

offence and during a trial.[11] The reality is that Mr Billa did not confess out of his own volition but spoke openly about his involvement once he was confronted by the police, suggesting a case of 'regret' rather than 'remorse'. He also failed to testify in mitigation of sentence, leaving it to his representative to explain his position.[12] Still, his offer to testify against the co-perpetrators, his explanation of events, plea of guilty and tendered apology cannot be ignored.[13]

[24] Added to this is his less active role in the commission of the murder and the events subsequent thereto. Mr Billa's statement regarding his involvement, including that he was assaulted by Shelauli, must be accepted. Mrs J[....] herself recalled such an occurrence. In this regard, it may be noted that *S v Erskine* is one of the cases where a court has drawn a distinction between the various roles played by offenders in the execution of a common

purpose.[14] In that matter, an effective term of 30 years' imprisonment was considered to be unduly harsh on a first offender who had played a less active role in kidnapping the complainant and in circumstances where there was no proof that he had himself assaulted

her.[15]

[25] Cumulatively considering that Mr Billa is a first offender, his less active role in the commission of the murder and the events subsequent thereto, and his plea of guilty and subsequent conduct, I am of the view that substantial and compelling circumstances exist so that a minimum life sentence for murder should not be imposed. These are not light or flimsy considerations. Life imprisonment as an outcome would be unjust in the circumstances, and destroy any prospect of rehabilitation, warranting a departure. Suffice to say that, upon consideration of the crime, the criminal and the interests of society, I have no similar misgivings in respect of imposing the prescribed minimum sentence for the conviction in respect of robbery with aggravating circumstances. Plasket J held as follows in *S v Arends and Others*: [16]

'The offence of robbery with aggravating circumstances is also ... all too prevalent, causing grave harm to the physical, psychological and economic interests of victims of this form of predatory conduct. All too often, the offence is committed at the same time as rape ... and murder. Society's interest in the effective punishment of this offence by the courts is obvious.'

[26] As to the appropriate sentence for the murder conviction, various remarks are apposite. Although deterrence is one of the important

purposes of punishment, the reasons for not 'sacrificing an accused person on its altar' have been expressed in a range of decisions. The issue of prevalence of crimes also requires careful consideration. It has been explained that sentencing courts cannot keep on imposing more and more severe sentences simply because the particular crime is prevalent or on the increase.[17] The purpose of sentencing is not to satisfy or meet public opinion but to serve and promote the public interest.[18] A court should not too easily be swayed by the argument that society demands a severe sentence, it being its function to ensure that a convicted offender is treated fairly. This includes the treatment meted out during the sentencing process, when the court exercises its discretion upon a consideration of all the applicable factors. Decided cases, while being a useful guideline, cannot straightjacket a court into a particular position.

- [27] Having said that, Mr Billa willingly participated in a planned robbery, travelling from Nelspruit to East London for that purpose. He knew that Shelauli was armed en route to the scene of the crime, foresaw the possibility of violence and shooting once he realised that the target house was occupied and nonetheless proceeded regardless. The subsequent events, particularly the murder for which Mr Billa has been convicted, have shattered the life of Mrs J[....]3 and the family she holds dear.
- [28] Moreover, the deceased's community has lost one of its stalwarts and pillars needlessly. In considering the appropriate sentence to be imposed, these consequences, and society's disgust at the brazen violation of human life and property that has become commonplace, far outweigh Mr Billa's right to freedom and the various mitigating factors already listed. A lengthy period of imprisonment is certainly warranted. Bearing in mind the time already spent in custody, I consider a sentence of 22 years imprisonment to be appropriate for the murder conviction.
- [29] As already indicated, there is no basis to depart from the prescribed minimum sentence in respect of the conviction for robbery with aggravating circumstances. Considering the circumstances of that offence and the resultant murder, it is appropriate for this sentence to run concurrently with the sentence for count one.
- [30] Finally, Mr Billa has also been convicted for the second time for a statutory offence. Section 49(1)(a) of the Immigration Act, 2002, provides that anyone who enters or remains in, or departs from the country in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years. While non-citizens enjoy a range of rights in South Africa, they are expected to comply with the country's laws, particularly when they have already received a non-custodial sentence for a previous infraction. A period of imprisonment of six months is considered to be appropriate in this regard.

Order

[31] The accused is sentenced as follows:

1. Count 1: Murder (Mr J[....]1 J[....]2): 22 years' imprisonment;
2. Count 2: Robbery (with aggravating circumstances): 15 years' imprisonment;
3. Count 3: Unlawfully entering and remaining in the Republic of South Africa in contravention of s 49(1)(a) of the Immigration Act, 2002: 6 months' imprisonment.

It is directed that the sentences imposed in respect of count 2 shall be served concurrently with the sentence imposed in respect of count 1, giving an effective sentence of 22 years' and 6 months.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:09 May 2022

Delivered:12 May 2022

Appearances:

Counsel for the State: Adv S. Mtsila

Director of Public Prosecutions Makhanda

046 602 3000

Attorney for Accused: Ms N. Mthini

Legal Aid of South Africa East London

043 704 4700

[1] Act 51 of 1977.

[2] Act 13 of 2002.

[3] Act 105 of 1997. See *S v N* 2000

(1) SACR 209 (W), confirming that the prescribed minimum sentence is applicable to a person convicted of murder with common purpose

[4] See *S v Khulu* 1975

(2) SA 518 (N) at 521-522.

[5] *Malgas v S* 2001

(1) SACR 469 (SCA) ('Malgas'); *Radebe v The State* [2019] ZAGPPHC 406 para

12. On the functions of sentencing, see *S v Van Loggenberg* 2012 (1) SACR 462 (GSJ) and *S v Tsotetsi* 2019 (2) SACR 594 (WCC) para 29.

[5] *Malgas v S* 2001

(1) SACR 469 (SCA) ('Malgas'); *Radebe v The State* [2019] ZAGPPHC 406 para

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2019 (2) SACR 594 (WCC) para 29.

[6] *S v Vilakazi* 2009

(1) SACR 552 (SCA) ('Vilakazi') para 15.

[7] *Malgas supra* fn 5 para 23.

[8] *Vilakazi supra* fn 6 para 16.

- [9] Ibid para 14
- [10] S v Mathe 2014
- (2) SACR 298 (KZD) para 27. Also see S v Matshiba 2012
- (1) SACR 577 (ECG) para 17 and S v Britz 2016 JDR 0980 (SCA) para 10.
- [11] Director of Public Prosecutions, Grahamstown v Peli 2018
- (2) SACR 1 (SCA) para 10.
- [12] See S v PZ (unreported, WCC case no A283/2019, 8 November 2019 para 3.
- [13] See S v Gouws (unreported, GP case no A224/2016, 13 December 2016) para 37.
- [14] S v Erskine 2008
- (1) SACR 468 (C).
- [15] Also see S v Matoewa 2009
- (2) SACR 303 (ECG).
- [16] S v Arends and Others [2010] ZAECGHC 11 para 19.
- [17] S v Qamata 1997
- (1) SACR 479 (E) at 482c-d. Cf S v Ndou 2019
- (2) SACR 243 (SCA) para 23
- [18] S v Mhlakaza and Another 1997
- (1) SACR 515 (SCA) at 518e-f. Also see S v Jimenez 2003
- (1) SACR 507 (SCA) and S v Van de Venter 2011
- (1) SACR 238 (SCA) para 15. In S v O 2003
- (2) SACR 147 (C) it was held that the court should be constantly vigilant against taking the easy way out by simply joining the ranks of the mob and imposing sentence for which a crowd in a street may be screaming, without it properly consulting its own common judgment and experience. Of course this does not mean that the court can simply ignore the wishes and expectations of the community.
- [18] S v Mhlakaza and Another 1997
- (1) SACR 515 (SCA) at 518e-f. Also see S v Jimenez 2003
- (1) SACR 507 (SCA) and S v Van de Venter 2011
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