

SOUTH AFRICA / JUDGMENT

S v Funaphi and Others (Sentence) (353/2022) [2024] ZAECKMKHC 28 (29 February 2024) [2024] ZAECKMKHC 28

COURT

Eastern Cape High Court, Makhandla

BEFORE

Govindjee

CASE / FILE NUMBER

353/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: 40/2023

In the matter between:

THE STATE

and

YAMKELANI FUNAPHI

Accused 1

THEMBELANI MAZIBUKO

Accused 2

ANDILE LUCKY DYANI

Accused 3

SENTENCE

Govindjee J

- [1] The accused were convicted on charges of murder, robbery with aggravating circumstances and attempting to defeat the ends of justice, acting in the execution of a common purpose. Accused no. 1 and no. 3 were also convicted of the crime of housebreaking with the intent to commit theft.
- [2] In terms of s 51(1) of the Criminal Law Amendment Act, 1997,[1] read with Parts I and II of Schedule 2, prescribed sentences apply in respect of two of the counts. They are 15 years imprisonment in respect of the convictions for robbery with aggravating circumstances and life imprisonment in respect of the murder convictions because the murder was committed during a robbery and was also committed by the accused in the execution or furtherance of a common purpose.
- [3] Section 276 of the Criminal Procedure Act, 1977[2] provides for the sentences which courts can impose. A sentencing court's discretion must be exercised judicially and properly, and courts are enjoined to temper the punishment with a measure of mercy.[3] The sentencing court must attempt to achieve a balance in its sentence, and not approach its task in a spirit of anger, but in one of equity. Hastiness, the striving after severity and misplaced pity are out of place, as are so-called exemplary sentences designed to use the crime to set an example for others in society.[4] Still, more serious cases clearly require severity, with a certain moderation of generosity where appropriate, for the appropriate balance to be struck. The object of sentencing is not to satisfy public opinion, but to serve the public interest.[5]
- [4] In the final analysis, the well-known triad of factors to be considered consists of 'the crime, the offender and the interests of society',[6] and these factors must be applied, in accordance with *S v Malgas*,[7] to consider whether substantial and compelling circumstances exist to deviate from any prescribed minimum sentence.[8] In *S v Matyityi*,[9] Ponnann JA held that Parliament:

'...has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts...and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order'.

Nature of the crime and surrounding circumstances

- [5] In convicting the accused I found that the accused broke into the deceased's property with the intention to commit theft. The evidence reveals that the deceased came across the accused and a fight ensued, accused 2 and 3 joining the fray and assisting accused 1 in assaulting the deceased. They struck him with fists and beat him in a manner that caused his head to repeatedly strike a table, wooden chairs and a wall. It is also accepted that one or more of the accused poured hot liquid onto the deceased, causing severe burns covering

approximately 15 percent of his body. In addition, superficial linear wounds on top of the deceased's

head were caused by a sharp object, seemingly in an attempt to stab the deceased.

- [6] At some stage the accused stopped their attack. They tied up the deceased and proceeded with the robbery. When examined by a doctor soon thereafter, and despite his serious injuries, which caused confusion and disorientation, the deceased was partially able to conduct a normal conversation. Sadly, he succumbed to his injuries approximately a month later. This was part of the evidence that resulted in the murder conviction based on *dolus eventualis*.

The accused's circumstances and interests

- [7] Accused no. 1 is 24 years of age. He dropped out of school in grade ten, is unmarried with one young child, who stays with his mother. He performed special jobs for the deceased on occasion, earning limited income for this work.
- [8] Accused no. 2 is 40 years of age. He also dropped out of school in grade ten. He is unmarried and his son, aged 14, lives with the child's mother. He performed construction work earning R1800 per month prior to his arrest.
- [9] Accused no. 3 is 29 years of age. He completed schooling and was employed as a general worker, earning approximately R1500 per month, prior to his arrest. He too is unmarried with a daughter, aged eight, who lives with his parents in Cape Town.
- [10] The accused have been in custody for the past ten months. All conveyed, through their counsel, that they were remorseful and apologised for their conduct. All may be treated as first offenders for purposes of sentencing. Mr Geldenhuys submitted that this, coupled with their pleas of guilty and general co-operation since their arrest, demonstrated the possibility of rehabilitation and eventual reintegration into society. He impressed that this was a housebreaking that went wrong, as opposed to a premeditated murder, and that the convictions had been based upon *dolus eventualis*. A further factor to consider was that it was probable that the accused were, at least to some extent, under the influence of liquor

and / or drugs at the time, thereby lowering their inhibitions.

The interests of society

- [11] The deceased's son, Mr Davidson, testified about the devastating impact of his passing on the family, staff and broader community. The deceased was a fit and healthy man and his murder had deprived his wife and family of his companionship. Mr Davidson explained his close relationship with his father, and it is evident that his presence will be sorely missed.

- [12] The deceased had served as a mentor for emerging farmers. This group were now stripped of the benefit of his knowledge and would suffer financially as a result. He also supported neighbouring farmers by paying to use their spare land for grazing, and by repairing their tractors. Those landowners would now lose that income and support. In addition, his employees were now redundant, and, in most cases, their services had already been terminated.
- [13] Finally, Mr Davidson testified about the brutal reality of farm-related murders and robberies in the Eastern Cape, with particular emphasis on the prevalence of these crimes in Elliot, Maclear and Ugie. The court takes judicial notice of the extent of the problem and the complexities surrounding its pervasiveness in South Africa. A recent qualitative postgraduate study in forensic science provides insight. Gathering data through an extensive literature review of published reports, news articles, books, journals, government records and through collaboration with other researchers working in the area, the researcher concludes that farm attacks in South Africa present a unique crime problem unlike any other crime problem in the world. According to this study, in 2019 there were a total of 552 farm attacks and 57 related murders in the country, often well-planned and accompanied by extreme violence and torture. The study is not the first to propose that farm crimes should be addressed as a 'priority crime problem' by the executive arm of government, as opposed to being treated as part of a broader malaise.[10]
- [14] In recognition of the prevalence and seriousness of the offences of robbery with aggravating circumstances and murder, the legislature has included hefty, prescribed sentences in the Criminal Law Amendment Act. This is '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'.
- [15] Mr Nohiya, counsel for the State, argued that there were no substantial and compelling circumstances present and that a sentence of life

imprisonment should follow given the seriousness of the offences. I have also noted that s 30(4) of the Older Persons Act, 2006,[11] provides that if a court, after having convicted a person of any crime or offence, finds that the convicted person has abused an older person in the commission of such crime or offence, such finding must be regarded as an aggravating circumstance for sentencing purposes.

Analysis

- [16] Sentencing courts are obliged to consider the 'sentencing triad' to arrive at a just outcome. [12] Punishment must be proportional to the criminal and the crime and be fair to society. As indicated, it should not be imposed out of a spirit of anger or retribution and should also, where circumstances permit, be blended with a measure of mercy.[13]

[17] While all considerations should be carefully weighed, prescribed minimum sentences are not to be departed from lightly and for flimsy

reasons.[14] Several cases have provided non-binding guidance to courts as to when it would be appropriate to make a finding confirming that the 'composite yardstick' (substantial and compelling circumstances) has been met.[15] It must also be appreciated that life imprisonment is the heaviest sentence that a person can legally be obliged to serve.[16] The court must consider the traditional mitigating and aggravating factors cumulatively and as part of determining whether the minimum prescribed sentence is so disproportionate to the sentence that would be appropriate, to the extent that an injustice would be done by imposing that sentence.[17]

[18] If, after considering all the factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or, put differently, that the prescribed sentence would be disproportionate to the crime, the

criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to impose a lesser sentence than the prescribed minimum.[18] As Rogers J put it in *S v GK*: [19]

'I thus must not approach the present appeal with a mind that a life sentence is a priori a just punishment ... Instead, I must

examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence, but have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs

of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case ... If the just sentence, approached in this manner, falls materially below the prescribed sentence, there will be substantial and compelling circumstances to depart from the prescribed sentence. As was held in *Malgas*, substantial and compelling circumstances are not confined to circumstances where the prescribed sentence would, in relation to the sentence the court would have imposed, be 'disturbingly' inappropriate or 'induce a sense of shock'. In other words, a discrepancy falling short of the latter test ... may justify a finding that substantial and compelling circumstances exist to depart from the sentence prescribed by the Act.'

[19] Aversion to imprisoning an offender, even for a first offence, is not, on its own, a factor intended to qualify as a 'substantial and compelling' circumstance warranting deviation from the prescribed minimum sentence.[20] Farm robberies and murders are a scourge, an aggravating feature being the perpetration of violence in the sanctity of a person's

home, and the violation of a litany of constitutional rights, including life, human dignity, bodily integrity and privacy.

[20] Balanced against these features of the offence are the personal circumstances of the accused and other aspects of the nature of the offence, which I have carefully considered. In particular, the accused are treated as first offenders for purposes of sentencing in this matter. They cooperated with the authorities and tendered a guilty plea, although no expression of remorse was forthcoming.[21] As noted in *S v Mendile*,[22] this is indicative of an acceptance of some responsibility for the accuseds' actions.

[21] That the intention behind the murder was *dolus eventualis* is immaterial to the applicability of s 51(1) of the Criminal Law Amendment Act, 1997, so that the prescribed minimum sentence of life imprisonment is to be imposed unless there are substantial and compelling circumstances in terms of s 51(3) of that Act.[23] There is, however, appellate authority for *dolus eventualis* to be mitigating, because of reduced moral blameworthiness, in appropriate circumstances.[24] In the present circumstances, bearing in mind the accepted features of the assault, including the extent and nature of the injuries

sustained by the deceased, this is a neutral factor. Considering the lack of evidence on the point, the impact of drugs and alcohol is also largely neutral.[25]

[22] Mr Nohiya referred me to the judgment of this court in *S v Petse*,[26] arguing that the facts were analogous and that this court should follow the decision of Plasket J to impose life imprisonment. The judgment indeed constitutes a useful application of the proper approach to sentencing when faced with a broadly similar factual

matrix, and I am grateful for the reference. It is, however, important to emphasise the distinguishing features of that case which, in my view, resulted in the ultimate sanction being imposed. Briefly, the accused had broken into the deceased's home with

the intention of robbing him. He was assaulted on the head with a hammer and at least one other blunt object. Photographs showed 'in shocking and graphic detail the severity of the assault', including 16 incised wounds and broken front teeth, as well as compressed wounds on the skull corresponding with four depressed fractures, inflicted with the hammer. The court concluded that the accused 'participated actively in a vicious, sustained and severe assault on the deceased with a hammer and one other object at least'. In aggravation, the housebreaking and robbery were planned the previous night. On the day in question, the accused set off having prepared themselves, one of the accused armed with the hammer, a dangerous weapon, another wearing a balaclava. The house was kept under observation and a plan made to ambush and assault the deceased to force him to reveal the whereabouts of the keys to a safe. The assault which followed was brutal and sustained. It was also carried out with a weapon brought for the purpose. The learned judge concluded as follows:

'Given the barbarity of the murder of the deceased in particular, and the planned and brazen robbery that they committed, the prescribed

sentences are, I believe, proportional and appropriate.'

- [23] The court is alive to the dangers associated with seeking to compare one case with another to arrive at a just sentence. The purpose of detailing the disturbing features of Petse is certainly not to provide an illustration of a more grotesque set of circumstances to downplay the present offences or their impact. Rather, and having been referred to the case specifically, it is to highlight the singular dimensions of those facts to demonstrate the distinguishing features of the present circumstances, as part of the necessary enquiry.
- [24] In the final analysis, the fact that the accused are first offenders must be emphasised. The court has found the intention behind the housebreaking to be theft and there was no evidence of any plan to hurt or kill the deceased. The injuries inflicted upon the deceased have been described and considered, along with the available evidence as to the state in which the accused left the deceased when they stopped their assault. Although there has been no true demonstration of remorse, the plea of guilty and cooperation with the authorities cannot be ignored, providing an additional basis supportive of some prospect of eventual rehabilitation. As part of the enquiry, the irreplaceable loss caused by the conduct of the accused has been factored, along with the negative impact on the deceased's family, employees, and community. Assessed cumulatively, the various considerations are such as to convince me that imposition of sentences of life imprisonment would be disproportionate to the crime, the criminals and the interests of society and be unjust.[27] I therefore conclude that substantial and compelling circumstances are present to justify a departure from the prescribed minimum

sentence and note the reasons for this conclusion on the record.

- [25] Given the facts of the matter, it is, however, clear that a lengthy period of imprisonment is warranted, as accepted by both counsel who appeared in the matter. I need not reiterate the various dimensions of the offence, which has been perpetrated on an older person in what should have been a safe space, and its multi-layered impact, to justify this. These realities far outweigh the various mitigating factors when considering an appropriate period of direct imprisonment. I have considered the sentencing triad, including the months already spent in custody, and the legislative provisions already described in concluding that a period of imprisonment of 23 years is warranted for the crime of murder in respect of each of the accused. Various other sentences are imposed in respect of the other offences committed, to run concurrently with this sentence so that the cumulative impact remains proportionate.

Order

- [26] The following sentences are imposed:

1. Accused no. 1 is sentenced to:
 - a) 23 years imprisonment for murder (count 3);
 - b) 15 years imprisonment for robbery with aggravating circumstances (count 2);
 - c) 4 years imprisonment for attempting to defeat the ends of justice (count 4);

d) 4 years imprisonment for housebreaking with intent to commit theft (count 1).

The sentences in respect of counts 1, 2 and 4 are to run concurrently with the sentence imposed in respect of count 3.

2. Accused no. 2 is sentenced to:

The sentences in respect of counts 2 and 4 are to run concurrently with the sentence imposed in respect of count 3.

3. Accused no. 3 is sentenced to:

4. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused are all unfit to possess a firearm, the Registrar of Firearms to be notified accordingly.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 28 February 2024

Delivered: 29 February 2024

Appearances:

For the State:

Adv A Nohiya

Director of Public Prosecutions

Makhanda

046 602 3000

For the Accused:

Adv D Geldenhuys

Legal Aid South Africa

046 622 9350

:

[1] Act 105 of 1997.

[2] Act 51 of 1977 ('the CPA').

[3] S v Rabie 1975

(4) SA 855 (A) at 862G–H.

- [4] See *S v Khulu* 1975 (2) SA 518 (N) 521–522.
- [5] *S v Mhlakhaza and Another*
- [1997] 2 All SA 185 (A) at 189. Also see *S v M* (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC).
- [6] *S v Zinn*
- [1969] 3 All SA 57 (A) at 540G–H.
- [7] *S v Malgas* 2001
- (1) SACR 469 (SCA).
- [8] See *Radebe v The State*
- [2019] ZAGPPHC 406 para 12.
- [9] *S v Matyityi* 2011
- (1) SACR 40 (SCA) para 23. Also see *S v Malgas* above n 7, in respect of the prescribed period of imprisonment in the Minimum Sentences Act ordinarily being imposed for the commission of the listed crimes in the specified circumstances, in the absence of weighty justification, as quoted in *Otto v S* [2017] ZASCA 114 at para 21.
- [10] *J Strydom Farm attacks in South Africa: An international comparison of farm crimes* (2022) (Master of Science in Forensic Science thesis) (University of Central Oklahoma) at 6 – 7.
- [11] Act 13 of 2006. ‘Abuse’ includes physical abuse, which is defined to mean any act or threat of physical violence towards an older person, defined to include men over the age of 65.
- [12] *S v Zinn* above n 6 at 540G–H. On the functions to be served by sentence, see *S v Matyaleni*
- [2021] ZAECGHC para 13. In this context, these factors must be applied to consider whether substantial and compelling circumstances exist to deviate from a prescribed minimum sentence: *S v Malgas* above n 7 para 18.
- [13] *S v Rabie* above n 3 at 862G–H.
- [14] *S v PB* 2011
- (1) SACR 448 (SCA) para 21; *S v Matyityi* above n 9 para 23.
- [15] See, for example, *D v S* [2016] ZASCA 123 para 11.
- [16] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).
- [17] See *Dyanty v S* [2010] ZAECGHC 120; 2011 (1) SACR 540 (ECG) para 14.
- [18] *S v GK* 2013

(2) SACR 505 (WCC) para 9.

[19] Ibid para 14.

[20] The Director of Public Prosecutions, Grahamstown v T M 2020 JDR 0652 (SCA) (“TM”) para 11.

[21] It has been held that while it may be argued that every human being is capable of change and transformation if offered opportunity and resources, the prospect of rehabilitation pales in the absence of an expression of contrition and commitment to ‘the path of rectitude’: Dyantyi v S above n 17 para 26.

[22] S v Mendile 2016 JDR 2010 (ECG) para 11.

[23] Director of Public Prosecutions, Mpumalanga Division v Mofokeng 2023

(1) SACR 670 (ML) para 12.

[24] S v Rapitsi 1987

(4) SA 351 (A) at 358F. Cf S v B 1994 (2) SACR 237 (E) at 251e–g; S v Oosthuizen 1991 (2) SACR 298 (A) at 302c–d.

[25] S v Prins 1990

(1) SACR 426 (A) at 430g–h.

[26] S v Petse 2018 JDR 1948 (ECG).

[27] See, in general, S v Sekonyela 2020 JDR 1614 (ECM).

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