

SOUTH AFRICA / JUDGMENT

S v Gcuwa and Others (CC15/2019) [2022] ZAECQBHC 28 (7 September 2022) [2022] ZAECQBHC 28

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Gqamana

CASE / FILE NUMBER

CC15/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, GQEBERHA)

Case

no.: CC15/2019

In

the matter between:

THE
STATE
And
SONWABO
GCUWA
Accused 1
LUSANDA
LUDZIYA
Accused 2
NONTUTHUZELO
MAJOLA
Accused 3
SIMTHEMBILE
QHONGOSHANI
Accused 4

JUDGMENT

ON SENTENCE

GQAMANA J

[1] Accused 1, 2 and 4 have been found guilty of serious offences, namely, robbery with aggravating circumstances, 2 counts of attempted murder, murder, unlawful possession of firearms and unlawful possession of ammunition, accused 4 was not convicted of the last two counts. Accused 3 was only found guilty of robbery with aggravating circumstances. Briefly the robbery occurred on 2 May 2018, at Sasol Garage, Cape Road, here in Gqeberha. Three armed men (i.e. accused 1 and 2 and an unknown man) stormed in at the shop at Sasol Garage and robbed money which was in the carnisters that were carried by Mr

Saba, an employee of Fidelity Guard Services and an ex-colleague of accused 3. In the course of such robbery, Saba was disarmed and his firearm was handed over to accused 1 by one of the robbers. In addition to the three men, there were also other two robbers that were strategically deployed outside the shop as it was evident from the video footage. While the whole robbery was in action, accused 3 was inside the Fidelity Guard van which was parked next to the shop entrance. The robbery was well executed mainly because of the information disclosed by accused 3. Due to quick response of the police, especially Captain Dirk, the accused's actions were thwarted. Chase ensued between the getaway taxi and the police leading up to Chase Drive and Ditchling Street and the arrest of accused 1 and the death of the deceased on count 4.

[2] It is now time for the court to consider and impose appropriate sentences. Sentencing involves a very high degree of responsibility which must be carried out with calmness and composure. In striving to impose a sentence that is fair to the accused, I must keep in mind the well-known triad as set out in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H that, the punishment should fit the crime, the offender and the interests of society. Further there should be a measure of mercy. I must also consider the main objectives of punishment which are deterrence, reformation or rehabilitation and retribution. Sentencing is not an easy judicial task to perform.

[3] It is appropriate to refer to the guidelines on sentencing as was aptly articulated by Du Toit AJ in *S v Thonga*, 1993 (1) SACR 365 (V) at 370 (c)-(f), that:

“During the sentencing phase the trial court is then called upon to exercise its penal discretion judicially and only after careful and objectively balanced consideration of all relevant material... In my view the punishment must firstly be reasonable, i.e. it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all the relevant facts, mitigating and aggravating. The sentence should, thirdly, reflect consistency, as far as humanly possible, with previous sentences imposed on

similar offenders committing similar offences, lest society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account.”

[4] In casu, I should be mindful and alive to the fact that some of the offences that the accused are convicted of, attract the minimum sentences envisaged in s 51 (1) and (2)(a) of the Criminal Law Amendment Act, 105 of 1997, as amended (“Act 105 of 1997”).

[5] It was emphasised in *S v Rabie* 1975 (4) SA 855 (A) at 866, by Corbett JA, (then) that:

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.”

[6] For the reasons set out in paragraph 4 above, my point of departure should be that, the statutory prescribed minimum sentences of life and 15 years’ imprisonment in terms of the provisions of section 51(1) and (2)(a) of the Act 105 of 1997 should be imposed unless, I find that there are substantial and compelling circumstances justifying a deviation.

[7] In the well celebrated case of *S v Malgas* 2001 (1) SACR 469 (SCA) the approach that should be followed under the circumstances is eloquently set out therein as:

“.....[the court] 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.

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, mitigating as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.”

[8] In *S v Matyityi* 2011 (1) SACR 40 (SCA) at para [23], Ponnann JA, emphasised that, the courts are obliged to impose the prescribed sentences unless there are truly convincing reasons for departing

from them. The courts are not free to subvert the will of the Legislature by resort to vague and ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Against the above legal principles, I now consider the personal circumstances each of the accused persons before me.

[9] In so doing I shall consider first accused 1’s personal circumstances. He was born on 22 September 1982, and therefore he was 36 years of age at the time of the commission of the offence. His highest standard of education is grade 1 which he never even completed. He left school and secured an employment in Cape Town. He is a divorcee with two children, ages 16 years and two months at the time of his arrest. One of his children resides in Bloemfontein with her maternal relative and the other child is looked after by the accused’s mother. He has been in custody for four years awaiting trial. He has no previous convictions and such he is a first offender. He co-operated with the police investigation although he maintains his innocence and denies any involvement in the robbery.

[10] I now turn on to deal with accused 2. He was 33 years of age at the time. He is the eldest child in a family of 6 children. He was born in Mqanduli and was raised by both his parents in a stable family environment. He studied his high school levels up to grade 11 here in Gqeberha. He left school because he suffered from epileptic seizures. From the pre-sentence report, his transit to Gqeberha was an attempt to avert and remove him from his criminal hobby which manifested at a young age while still residing in Mqanduli. Unfortunately his parents’ conscious strategy did not achieve the desired purpose, in that, on 26 November 2008, accused 2 committed a housebreaking with intent to steal and theft and was convicted and sentenced of same to 12 months imprisonment. When he committed the aforementioned housebreaking, he was 23 years of age. He is unmarried and has two children from different mothers. Before his arrest, he had casual jobs as a taxi conductor and was also operating a car wash

business as an aid to better his income. On the information from the pre-sentence report, from 2011–2016 he worked as a security

guard for different companies. Healthwise, it was placed on record that he is HIV positive and receives treatment thereof. Recently he was diagnosed with high blood pressure. He has been in custody awaiting trial for a period of 4 years. His father died in 2022 while the accused was in custody consequently he was unable to attend his funeral and to bid him farewell and that has traumatised him. He maintains his innocence and has showed no remorse.

[11] Moving over to accused 3, she was born on 26 August 1984, and therefore she was 34 years of age at the time. She is unmarried and has no children of her own. She completed her grade 12 high school formal education. Thereafter she studied various courses to empower herself for better job opportunities. She was gainfully employed as a Driver at Fidelity Security at the time of her arrest. She was responsible of supporting her family financially before her arrest. She has since lost her employment. She has been in custody for four years awaiting trial. She acknowledges and takes full responsibility of her role in the robbery incident relevant herein. She has no previous convictions. She is a candidate for rehabilitation. During her period of incarceration she lost her sister and her stepmother. She too could not attend their funerals and bid them farewell because she was incarcerated.

[12] Turning to accused 4, he was born on 1 June 1985, and therefore he was 33 years of age at the time of the commission of the offences. He was still a youth. His highest level of education is grade 2. He left school in order to be a shepherd to his father's cattle. He was born and grew up in a poor and rural environment. He was married and sired 5 children. He has no previous conviction. He was employed as a taxi conductor and as an aid to his income, he also did odd jobs,

like selling livestock, vegetables and wood to maintain his family. He was the breadwinner of his family. He has been in custody for four years awaiting trial. He was described as a good father and husband in the pre-sentence report. Since his incarceration his family struggles to make ends meet.

[13] All counsel for the accused appreciated that most of the offences that the accused are convicted of, attract the prescribed minimum sentences e.g. life imprisonment for count 4 and 15 years' imprisonment for counts 1 and 5, unless there are substantial and compelling circumstances justifying a deviation. With that in mind, they advanced similar submissions that, the following factors considered cumulatively are substantial and compelling circumstances which would justify a deviation, namely; the ages of the accused, the fact that the accused were first offenders, save for accused 2, the pretrial detention period of 4 years, the great prospects of rehabilitation of the accused, the fact that nobody was assaulted during the actual robbery at Sasol Garage and their personal circumstances. It was further argued by Ms Coertsen for accused 1 that his co-operation with the police investigation is also an additional factor that counts in his favour. For that proposition reliance was placed in the judgment by Mthiyane JA in *Vermeulen v S* [2004] 3 All SA 190 (SCA). I will consider all the above factors in the context of this case, together with all the other factors including the interests of society and the aggravating factors.

- [14] For accused 2 it was further argued by Mr Bodlo that in addition to the factors mentioned in paragraph 13 above, his medical condition, i.e. he is HIV positive, suffers from epileptic fits and high blood pressure are also factors to be considered although he is not a first offender.
- [15] On behalf of accused 3, Mr Ngqeza argued that in addition to the factors mentioned in paragraph 13 above, her role in the commission of the robbery was minimal. She was not physically involved in the actual robbery but merely provided information which enabled her co-accused to bring the plan to fruition. Parallel to that, she has acknowledged and takes full responsibility of her actions as indicated in the pre-sentence report. She has been in custody for four years awaiting trial and she is a first offender. She was gainfully employed before her arrest. She succumbed the pressured from accused 1 but, with hindsight she should have stood firm and reported the matter instead of disclosing the information. She lost her employment as a result of her actions and she has learned her lesson. No benefit was received by her from the spoils of the robbery. Accused 3 was only convicted of robbery unlike her co-accused.
- [16] For accused 4, emphasis was placed on his age, his lack of sophistication, the minimal role he played, that he is a first offender, was married and was a breadwinner of his family despite his access to minimal financial resources, he is a candidate for rehabilitation and the time of his pretrial detention. Further Ms Cubungu argued that because of his minimal role, there must be disparity of sentence between him and accused 1 and 2. The extent of her submission was that accused 4 was at a wrong place at a wrong time. For the reasons set out in paragraph 24 below I don't share the latter's sentiments, that he was at a wrong place at a wrong time.
- [17] Mr Draaiman, for the State, placed more emphasis on the seriousness of the offences committed by the accused and that such offences are prevalent within the area of jurisdiction of this court. In addition, he argued that the robbery was well planned and executed and accused 3 played a pivotal role therein because she provided crucial information to her co-accused which enabled them to execute the robbery smoothly. The cellphone records showed that the area where the robbery occurred was visited by some of the accused on 26 April
2018. On the day of the robbery, shortly before it took place, accused 3 gave accused 1 a heads up that they were coming ("Siyeza"). Unfortunately for the accused, the quick and excellent response by the police thwarted their action.
- [18] Mr Draaiman further argued that the sentence of life imprisonment for murder should be imposed on accused 1 and 2 but not for accused 4. Besides the seriousness of the offence of murder, he submitted that the actions of the accused placed innocent road users' life in danger. During the exchange of fire between the police and the accused right from Impala Street to the corner of Chase Drive and

Ditchling Street, innocent members of the public could have been injured. Indeed Mr Kamkam was injured by a stray bullet at the secondary scene. Robbery of the cash in transit service providers is very prevalent. He however, conceded that the deceased was one of the robbers and that the latter also fired shots at the police. Consequently he lost his life when he was fatally shot by the police who were defending themselves. Therefore the deceased and the accused must have foreseen resistance hence they were armed.

- [19] In summary his submissions were that, there are no substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentences in respect of accused 1 and 2. However for accused 3 and 4, he aligned himself with the submissions advanced by their respective counsel and that, the period of 4 years in custody awaiting trial and the role they played in the actual robbery was minimal. Furthermore he had no qualms for the sentences to run concurrently. He stressed the point that the interests of society demands that the sentences to be imposed should serve as a deterrence.
- [20] In *S v Skenjana* 1985 (3) SA 51 (A), Nicholas JA, said: "So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length."
- [21] The length of punishment must be proportionate to the offence committed by the accused. I shall now consider all the factors mentioned above in the context of this case, together with all the other factors including the aggravating factors and the interests of society. And for obvious reasons I intend to deal with the murder count first because is the most serious one of them all and also attracts the most harsh sentence in terms of the prescribed minimum sentence legislation. In the event I find that there are substantial and compelling circumstances, that would be extended to the other counts as well, namely, count 1 and 5.
- [22] The deceased in count 4 was one of the robbers. He was a participant in the planning and execution of the robbery. Not only that he travelled together with accused 1, 2 and 4 and unknown men including the driver of the getaway taxi from Mqanduli to Gqeberha. Crucially he actively participated in the shooting of the police. In defence for their life, the police fatally shot and killed him. At the secondary scene a 9mm semi-automatic pistol was recovered from him. Accused 1, 2 and 4 were convicted of his murder on the basis of common purpose and the principles set out in *S v Nhlapo* 1981
- (2) SA 744 (A) and *S v Molimi* [2006] ZASCA 43; 2006 (2) SACR 8 (SCA). No doubt murder is a serious offence which usually calls for severe punishment. Circumstances however vary. In casu, the deceased knew the risk associated with his actions. He was not coerced to be party to the robbery. He was not an innocent member of the public.
- [23] However, if one has regard to the accused personal circumstances together with their ages, that they are first offenders, except accused 2, the pretrial detention period of 4 years and the prospects of their rehabilitation in prison, those factors are in my view substantial and compelling circumstances justifying a lesser sentence, than the prescribed minimum sentences. A life imprisonment would be too harsh a sentence and it would not serve the

interests of society in the context of this case. Further life sentence would be disproportionate to the crime, the offenders and the needs of society. (See *S v Dodo* [2001] ZACC 16; 2001 (5) BCLR 423 (CC) and *S v Malgas* (supra). However the accused cannot escape a long term of imprisonment.

- [24] Reverting to accused 4, I agree with Ms Cubungu that there must be a disparity on sentence between him and accused 1 and 2, because of the minimul role that the former played. As indicated in paragraph 16 above, he was not at a wrong place and at a wrong time. Totally not. Accused 4 was part of the planning of the robbery with his co-accused and other unknown persons including the driver of the getaway taxi. He was present in the taxi when the robbery occurred and during the shoot out with the police. Even after the robbery and the shooting with the police, evidence placed him in the same vicinity here in Gqeberha with accused 2. And again the State's evidence placed him with accused 2 in the vicinity of King William's Town the same evening of the robbery. Furthermore on his own version, he travelled back on the same getaway taxi with the same driver from East London back to his home town in Mqanduli. He never reported the robbery to the police. Even during the pleading stage of the proceedings herein, he never admitted to have been in the taxi during the robbery. That version only surfaced when he was identified by one of the State witnesses from the video footage of Colchester BP garage.
- [25] With regard to accused 1 and 2, although the latter has a previous conviction of housebreaking which was committed in 2008, but both of them played a dominant role in the commission of the robbery. They were both inside the shop at Sasol Garage, armed to the teeth. Accused 2 instructed the people that were inside the shop to lie down and threatened to shoot Ms Louw, then owner of the Sasol Garage. When Saba was disarmed of his firearm, it was handed over to accused 1. Accused 1 and 2 together with the third unknown man ran together to the getaway taxi while one of them was carrying the cash carnister which was robbed from Saba. In a cowboy style, accused 1 stood by the taxi's sliding door while it was opened in motion and unashamedly fired shots at the police when the latter were chasing it. Accused 1 was the first person to jumped out of the taxi at the corner of Bell Road and Grysbok Street and branished his firearm. Near the corner of Chase Drive and Ditchling Street, accused 1 alighted from the getaway taxi and pointed his firearm to Captain Dirk and the latter fired shots at him. Accused 1 ran and hide himself on the nearby reeds where he was eventually arrested by the police. On a bigger scale of things, both accused 1 and 2 played an almost equal degree of complicity, although accused 2 has a previous conviction, but that on its own would not warrant a disparity on the sentence to be imposed.
- [26] Reverting to accused 3, she was only convicted of robbery with aggravating circumstances. Her role in the matter was to provide information to her co-accused and that brought their plan to fruition. But she was not physically involved in the actual robbery. Her assistance smoothen the execution of the robbery. However, as found in the main judgment, she was unaware that her co-accused would be armed. Her personal circumstances are set out in

detail in paragraph 11 above, similar with other accused, her age, the period of pretrial detention, the fact that she was first offender, her acknowledgement and appreciation of her actions and the consequences thereof and her prospects of rehabilitation are in my view substantial and compelling substances that warrant a deviation from the 15 years' imprisonment prescribed in section 51(2)(a). Further she did not benefit from the spoils of the robbery. Hopefully while in prison she will benefit from programmes that could enhance her life skills and not to succumb to pressure easily.

[26] In the circumstances the sentence that I intend to impose is the following:

(a) For accused 1 and 2 in respect of:

1. Count 1 – 12 years' imprisonment.
2. Counts 2 and 3 – 6 years' imprisonment for each count.
3. Count 4 – 20 years' imprisonment.
4. Count 5 – 12 years' imprisonment.
5. Count 6 – 3 years' imprisonment.
6. The sentence imposed on counts 1, 2, 3, 5 and 6 shall run concurrently with the sentence on count 4.

(b) For accused 3, on count 1– 10 years' imprisonment.

(c) For accused 4 in respect of:

1. Count 1 – 12 years' imprisonment.
2. Count 2 and 3 – 6 years' imprisonment for each count.
3. Count 4 – 15 years' imprisonment.
4. The sentence imposed on counts 1, 2, and 3 shall run concurrently with the sentence on count 4.

N GQAMANA

APPEARANCES:

For the State

: Adv M M Driman

For Accused 1

: Adv D Coertsen

For Accused 2

: Mr Bodlo

For Accused 3

: Mr Z Ngqeza

For Accused 4

: Adv S Cubungu

Dates heard

: 6, 19 May 2022; 27 June 2022; 25, 29 July 2022; 18, 19 August 2022

Date judgment delivered : 7 September 2022

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