

SOUTH AFRICA / JUDGMENT

S v Lutshetu and Others (Sentence) (81/2020) [2025] ZAWCHC 211 (21 May 2025) [2025] ZAWCHC 211

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

81/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

Case No: 81/2020

In the matter between

THE STATE

AND

NDUMISO LUTSHETU

ASHWIN KENNEDY

BONGANI MVAMVEKI

MALIBONGWE WITBOOI

Date of

Hearing:

02 October 2023

Date of Judgment on

the merits: 13

March 2025

Date of Judgment on

sentence:

21 May 2025

JUDGMENT

THULARE J

SENTENCE

Each of the accused is sentenced as follows:

On count 1, the murder of Jan Nieuwenhuys, life imprisonment.

On count 2, the murder of Simthembile Nyangiwe, life imprisonment.

On count 3, robbery with aggravating circumstances involving Nieuwenhuys pistol, 15 years imprisonment.

On count 4, robbery with aggravating circumstances involving Nyangiwe's pistol, 15 years imprisonment.

On count 5, unlawful possession of firearms, 15 years imprisonment

On count 6, unlawful possession of ammunition, 15 years imprisonment.

All four accused are declared unfit to possess a firearm.

The sentences in counts 3, 4, 5 and 6 shall run concurrently with the sentence in count 1 and 2.

- [1] The accused were convicted of two counts of murder of two law enforcement officers, Jan Nieuwenhuys and Simthembile Nyangiwe; two counts of robbery with aggravating circumstances where the two law enforcement officers had their service pistols taken by force, one count of unlawful possession of firearms and one count of unlawful possession of ammunition. The two counts of murder (count 1 and 2) and the two counts of robbery with aggravating circumstances (count 3 and 4) are serious offences where the discretionary minimum sentences are applicable as envisaged in section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). For each of the murder charges, the discretionary prescribed minimum sentence is life imprisonment as envisaged in section 51(1) of the CLAA. For the robbery with aggravating circumstances for a first offender, the discretionary prescribed minimum sentence is 15 years imprisonment for each count as envisaged in section 51(2) of the CLAA. For the unlawful possession of a firearm (count 5), the discretionary sentence is 15 years imprisonment and for the unlawful possession of ammunition (count 6) the discretionary sentence is also 15 years imprisonment as envisaged in schedule 4 to the Firearms Control Act 60 of 2000 (the FCA).
- [2] The sentences in counts 1, 2, 3 and 4 are peremptory [section 51(1) and 51(2)(a) of the CLAA respectively] unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, and it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence [section 51(3) of the CLAA]. The seriousness of

the offense, the accused's individual circumstances, and the interests of society must all be considered when determining the appropriate sentence. These considerations must be weighed up as, with and against any potential significant and compelling circumstances that call for a departure from the prescribed sentence. The considerations have become well-established as the Zinn triad [S v Zinn 1969(2) SA 537 (A) at 540G]. The personal circumstance of the offender includes their status, character, failures and achievements, conduct in life, competencies and personality, and everything that may have had an influence on the commission of the offence including all other factors in their favour that may mitigate the sentence or against them that may aggravate the sentence. The nature and seriousness of the offence committed includes a consideration of the proportionality between the offence and the sentence [S v Vilakazi 2009 (1) SACR 552 (SCA) at para18. The punishment must fit the severity of the crime committed and care should be taken that excessive sentences are

not imposed for minor offences and that serious crimes receive appropriate sentences, which may be severe and harsh as required by our constitutional values and ethos [S v Dyantyi 2011 (1) SACR 540 (ECG) at para 21]. The discretionary minimum sentence regime as well as the appropriate weight to the offence committed also ensures

a level of uniformity in sentencing [S v Bodibe (CC 14/2021)

[2021] ZAGPPHC 715].

[3] The approach to the interests of the community as a factor in sentencing was set out in R v. Karg 1961 (1) SA 231 (A) at 236 A-B] where it was said:

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

In 1961 the Appellate Division saw persons injured by the crime as part of the community and considered victims as a constituent part of the interests of the community. The emerging thinking in the Supreme Court of Appeal since 2023 is that the interests of the victim of the offence is the fourth element distinct from the Zinn triad [Maila v S (429/2022) ZASCA 3 (23 January 2023) para 52 footnote 26]. In this Division, the view was expressed as follows in CW v S (Appeal) (A301/2024) [2025] ZAWCHC 198 (13 May 2025):

"Is it not time to replace the triad with a quartet of factors: the crime, the criminal, the community and the consequences for the victim, both directly and indirectly? As an aide-memoire, the four c's are those that a court must consider and apply in unison without emphasising one over the other."

[4] All four accused were drop-outs of basic education. Having observed the accused throughout the trial, including listening to them, it is not wrong to conclude that all four were children who struggled with and in traditional educational settings. It seems to me that all four accused were children who faced various learning barriers that hindered their

educational progress. Counsel for the accused argued for the court to consider the absence of a proper account from the State, not in the sense of the prosecuting authority, but in the sense of the Republic of South Africa, on how it treated school foundation phase learners who faced learning barriers. Counsel for the accused cannot be faulted for urging the court to call out the failure of the state to provide an explanation of its response to barriers that hinder educational progress especially of young people who end up as perpetrators of serious violent and often fatal crimes. There is merit in the observations of counsel that most accused persons found guilty of serious violent crimes, especially gang-related violent crimes in the Cape Flats, are foundation phase school drop-outs. Most, if not all, including the accused before me, have not passed grade seven. Courts are left in the dark as to the educational profile, interventions if any and the response thereto by the education system. The time is tik-toking towards the need for educators, principals and if needs be accounting officers within the Department of Basic Education to come and account for their mitigating interventions, if any, including on cognitive, emotional, social and environmental factors that hindered the educational progress of their learners who ended up as easy targets for recruitment by street gangs. What happened to all four of the accused in this matter, where they were simply kept in foundation phase and some until the age of 17, that was accused 1, 2 and 4, and in respect of accused 3 until he was 23 years old and then off-loaded to the streets, without any educational or vocational support, cannot be allowed to continue unabated.

[5] The Minister of Basic Education may be too young to know, but even apartheid basic education issued its learners with the “Certificate

of Perseverance” and off-loaded them to schools of trade and did vocational training, and not to aimlessly wander the streets with no vocational training explored as an alternative and in extreme cases attention given to children’s processing disorders. In the context of children with learning barriers at foundation phase the accused were victims of a cold and non-responsive foundation

phase education system, which simply tolerated their difficulties with learning until they dropped out of the system. Courts cannot and should not condone a “good riddance by omission’ when it comes to human beings. No one belongs in the ‘human waste disposal bin’ in a progressive society. As it turns out, that ‘human waste disposal bin’ bred anti-social behaviour and has made the Cape Flats the most dangerous place to raise children, especially boy-children, in the Republic. As the accused have shown in this matter, boy-children thrown into a ‘human waste disposal bin’ by being off-loaded from a non-responsive basic education, without any intervention, to the street gangs, have now become not only a danger to society, but actually are bold enough to challenge the authority of the state to such an extent that in broad daylight, they were brazen to disarm the state’s armed forces by killing law enforcement officers to secure firearms to use in their criminal activities. The Republic’s armed forces were no match to children with learning barriers who were left unattended into adulthood.

- [6] Being a victim of educational failure is not taken lightly by this court, nonetheless, it does not justify the inability to

differentiate right from wrong or good from bad. Those are basic teachings from good parents, educators, blood relations and the

community and its structures. People frequently do their hardest to blend in and feel like the people around them rather than thinking

for themselves. However, this is more typically about spreading pre-existing beliefs than it is about thinking. One alone is aware of one's desires and what is best for one. People will take advantage of one and force one to work toward their objectives rather than one's objectives if one does not think for one's self. Additionally, one must be able to think independently to separate the good from the bad because there is a lot of false information out there.

- [7] Accused 1, Lutshetu, was 30 years old. He maintained that he was not guilty. He was a first-time offender. He asked to be released to be able to provide for his child whose primary caregiver was the mother of the accused. The accused was unmarried, not employed and he was not providing for the child financially before arrest, except for now and then giving what he could from odd-jobs. Accused 2, Kennedy, was 32 years old. He maintained that he was not guilty. He claimed in court that he was a victim of the nation's inadequate educational system, arguing that his educational failure was primarily due to his preference for and proficiency with manual labour rather than a lack of interest in learning. As a result, he terminated his education because he struggled with the normal school and preferred to work with his hands which he was good at. He was not a candidate to complete matriculation. He was a first offender. Kennedy stated that he wanted to provide for and see his children through high school. He had never been the primary care giver of the children and used his meagre earnings from part time odd jobs to help his child.

- [8] Accused 3, Mvamveki, has an unrelated previous conviction which he admitted. His counsel submitted that he too fell victim to the education system which led to him terminating his education before time and falling prone to the world of crime. He only went up to grade 7 and dropped out of school when he was about 23 years old as he struggled in academic classes. He was the father of one child. He did odd jobs as a plumber, which he was good at. He was unmarried. Accused 4, Witbooi, was 42 years of age. He was approximately 36 years old at the time of the commission of the offences. He has been in custody ever since his arrest, 4 September 2019, which is a period of a little over five years. He is not married but is a father to two minor children by different mothers. The children are in the care and custody of their respective mothers. Before his arrest, he was self-employed and provided maintenance for his children. He dropped out of school in grade 6 when he was 17 years old. He was unmarried but had a steady girlfriend prior to his arrest.

- [9] For their part counsel for accused, also urged this court to find substantial and compelling reasons justifying a departure from the mandatory minimum sentences. Being of the view that the time that they had already spent in prison, while awaiting trial, should be counted

towards their sentence. If for instance they are sentenced to 20 years, then the 5 years that they were awaiting sentence should be subtracted from their sentence making it 15 years. This approach of the court reducing a sentence as seen in *S v Brophy and Another* 2007 (2) SACR 56 (W) paras 16-19 where the court reduced the minimum sentences on the basis that the time spent in custody while awaiting trial was a substantial and compelling circumstance, was rejected in *Radebe and Another v S* [2013] ZASCA 31; 2013

- (2) SACR 165 (SCA) paras 13-14 which criticized the application of any formula. Rather, the time spent in custody awaiting trial is one of the factors to consider when determining whether there is justification for a sentence that is less than the prescribed minimum sentence. Each case should be evaluated according to its own merits. There is no set rule regarding the weight that should be given to pre-sentencing incarceration when it comes to finite sentences. It is but one of the factors to take into consideration when determining the existence of substantial and compelling circumstances [Radebe para 13 to 14]. Similarly, the Court in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and Others* [2014] ZASCA 44; 2014 (2) SACR 337 (SCA) paras 26-30 determined that the trial court misunderstood in using the formulas and raised the sentences. The Court in *Ncgobo v S* [2018] ZASCA 6; 2018 (1) SACR 479 (SCA) para 7 confirmed that the time spent in prison prior to conviction and sentencing is not, by itself, a major and compelling reason when it came to a life imprisonment. It only serves as a determining factor in whether the sentence is unfair and disproportionate. It was decided that a life sentence would not be wildly unfair because the two years in custody would have little effect on them.
- [10] This court views the offenses committed with extreme seriousness. Without exception, none of them qualify as small offenses. Shane and accused 1 were the masterminds behind the crimes. They went to accused 4 to borrow unlicensed firearms which it appears they knew accused 4 kept. They explained to accused 4 that they wanted to rob the two law enforcement officers. Shane and accused 1 knew the area well, as well as the law enforcement officers who did duty at the construction site. This is the logical explanation of their knowledge that Nieuwenhuys and Nyangiwe were new to the area and new as law enforcement officers. Accused 2 was at the time in accused 4's shack. Shane, accused 1 and 4 went into accused 4's shack ostensibly to collect the firearms. Shane, accused 1, 2, and 4 planned the robbery. Accused 2 left with Shane and accused 1 at the same time from accused 4's shack. This offence was planned and it matters not that the evidence could not precisely establish when accused 3 joined the plan, suffice to say that he was part of the execution of the plan. The accused decided to shoot to kill the two law enforcement officers. If the plan was to simply get the firearms, the loss of two lives was unnecessary. One must contextualise the developments to understand the message from the street gang. It is public knowledge that the City of Cape Town (the City), a local government, struggled with attacks of those who worked on the construction sites where the City was active with projects. The scene of the shooting of the law enforcement officers was such a construction site.

[11] The law enforcement officers were dispatched there specifically to guard the construction site and to protect the workers on site. In situations like that, a lapse of judgment and alertness can have fatal consequences. Sitting in a stationary marked vehicle, under the circumstances, became a fatal choice for the new officers. Careful consideration must have been taken by the accused, so much so that they knew the officials were ‘new’ and susceptible to such dangerous choices. The time chosen for the attack was also an educated consideration. It was as the two law enforcement officers just returned from lunch. The message from the street gang to the City was simply that even with your deployment of law enforcement officers, you can’t stop us for we will kill and rob your guards in broad daylight. It seems to me that the crime was intended to intimidate the City into submission to the gangs’ dictates.

[12] In *S v Vilakazi Nugent JA* stated the following at para 58:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided.”

The accused committed heinous offences and they showed no remorse for their actions. No person should have the ability or power to extra-judicially take another’s life. The law enforcement officers are there to protect the community including the property of the State.

[13] The nature of the work of the armed forces in the Republic carries with it high levels of exposure to potentially traumatic experiences. Recently, especially in policing, it carried with it the risk of being mercilessly killed by armed criminal gangs. The experience of colleagues being intentionally killed or seriously injured must have traumatic consequences among police officers, especially those who must attend to the scene of such crimes or personally knew the deceased officer or those who should bury their friends. The frequency and severity of these life traumatic exposure in the life of a member of the forces and the impact of the duty-related death and serious injury require concomitant responses, including by the courts in sentencing. This is moreso where the courts must deal with individuals who show no moral conflict, shame or guilt associated with the taking of someone’s life and lives are lost primarily at the hands of persons who elected to be social maladjustments. In the case before me, the victims of crime go beyond the blood and affinity relations of the deceased. The City of Cape Town as a local government, the communities served by the City and its law enforcement officers, the colleagues of the deceased, and all members of the armed forces especially those involved in policing, are also victims. It is crucial that the courts continue to be firm in their message that crimes like this will not be accepted and will instead result in harsh penalties under appropriate circumstances. That’s the case here. It is justified to remove the accused from society for a significant amount of time. The failures of the foundation phase education system to respond to children with learning barriers as well as the time already spent awaiting trial,

over and above the quartet of factors notwithstanding, I find no substantial and compelling reasons to deviate from the discretionary prescribed minimum sentences. I exercised my discretion in favour of imposing the minimum sentences prescribed. For these reasons the sentences were imposed.

Appearances

Counsels for the State: Adv. C Gerster

Counsel for Accused 1 Mr T Mgengwana

Counsel for Accused 2 Adv. J Camphor

Counsel for Accused 3 A Lange

Counsel for Accused 4 C.M Verster

DM THULARE

JUDGE OF THE HIGH COURT

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