

SOUTH AFRICA / JUDGMENT

S v Makasi and Another (Sentence) (CC14/2024) [2024] ZAECQBHC 77 (19 December 2024) [2024] ZAECQBHC 77

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Noncembu

CASE / FILE NUMBER

CC14/2024

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GQEBERHA

Case number: CC14/2024

In the matter between: -

THE STATE

And

BONGANI MAKASI

Accused 1

THUKELA MAYATHULA

Accused 3

JUDGMENT – SENTENCE

Noncembu J

- [1] Accused 1 has been convicted of one count of robbery with aggravating circumstances, whilst accused 3 has been convicted of 4 counts of robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition, kidnapping, attempted murder and murder. The prescribed minimum sentence of 15 years is applicable in respect of the robbery and unlawful possession of a firearm offences, in that a firearm was used, and grievous bodily harm was inflicted during the commission of the robbery offences, and the firearm that was possessed by accused 3 was a semi-automatic. In

respect of the murder charge the applicable minimum sentences is life imprisonment as the deceased was killed during the commission of a robbery.

[2] I now deal with the sentencing of the accused for these crimes.

[3] The salient facts of the matter, which are dealt with extensively in the main judgment, can be summarized as follows. On the night of 29 May 2023, the accused, more specifically, accused 3, with one Siya who turned state witness after his conviction for his role, went on a rampage around Central in Gqeberha where they were robbing anyone who

was in their way, and shooting people.

[4] The evidence tendered was that an Atlas security guard had stopped to intervene as accused 1 and 3 together with Siya, were busy robbing an unknown coloured male of his cellphone. The said coloured male ran to the security guard for assistance, when accused 3 and Siya attacked the security guard, with Siya grabbing his firearm whilst accused 3 was busy hitting him with a firearm on the head until he lost consciousness. Accused 1 in the process was busy helping himself to the security guard's belongings in his vehicle, whilst also encouraging accused 3 to hit the security guard on the head. The gruesome scene with horrid screams from the security guard as he was crying for help, was captured on video with a cellphone by a witness who saw the incident from a building nearby, which video later became viral.

[5] After robbing the security guard the three separated as accused 1 went his own way whilst accused 3 and Siya continued with their night of terror. They proceeded towards a student accommodation in Belmont Terrace where they accosted a group of female students who were coming out of the building at gunpoint. They took the students back inside where they confined them, together with other students who were inside the residence, under the staircase against their wishes,

and robbed them of their cellphones, laptops and money. One of the students was severely assaulted with a firearm by accused 3 and had to be taken to hospital where she received some stitches.

[6] From the student residence they proceeded to an old, abandoned building known as the ANC building where accused 3 shot one Abongile Makwethu on the leg because he viewed him as being disrespectful, and also robbed him of his cellphone. They then proceeded to a tavern (Madeira Tavern) where accused 3 randomly shot one African male who was talking on the phone, after which the two robbed him of his cellphone and cigarettes. The said male died as a result of complications following the gunshot wound to the left thigh perforating the left femoral blood vessels, which led to him bleeding to his death. As if nothing had happened, the two then sold the items robbed from their victims and shared the proceeds from their spoils.

- [7] The imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused. That measure is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn* 1969 (2) SA 537 (A), at 540G-H described as a 'triad consisting of the crime, the offender and the interests of society'. Coupled with this balancing act, a court must also take into account the purpose of sentencing which is four-fold, retribution, prevention, deterrence and rehabilitation.
- [8] A sentencing court does not always have an untrammelled discretion to determine sentence – a clean slate on which to work. In certain cases – as indicated in paragraph 1 above – a prescribed minimum sentence is provided for by the Criminal Law Amendment Act 105 of 1997. I deal with this later in the judgment.
- [9] First I deal with the Zinn triad where I start with the personal circumstances of the accused. Accused 1 is 34 years old, single with two minor children who are 16 and 6 years old respectively. His children currently reside with their aunt, and although he is not their primary care giver, he did support them financially when he was employed. Before his arrest he worked as a car wash earning approximately R2000 per month. His highest level of education is grade 8. He has three previous convictions, two of housebreaking with intent to rob and one of robbery. He has been in custody awaiting trial for 1 and a half years in this matter.
- [10] Accused 3 is 28 years old, single with no children. He lost both his parents at the age of 18 and was looked after by his maternal grandmother. His highest level of education is grade 5. He left home at the age of 18 and has been living on the streets in Central since then, where he used to work as a taxi fare collector. He has 1 previous conviction of robbery and has been in custody on this matter since his arrest on 22 June 2023.
- [11] The seriousness of the offences committed by the accused persons are beyond question. The robberies involved the infliction of grievous bodily harm where the victims were either severely assaulted with a firearm to the extent of requiring hospitalization or hospital treatment (including sutures), or they were shot with a firearm. It is clear that accused 3 was on a rampage, going around terrorizing people and robbing whoever came his way on the night in question. The video footage depicting the Atlas security screaming for help leaves one with chills down the spine. It can only be ascribed to a miracle that he was able to survive the ordeal to be able to tell his tale.
- [12] A similar misfortune befell the students who were minding their own business not being aware of the danger that was lurking. One of the students was severely assaulted for no apparent reason. The deceased in respect of count 12 was also killed for no apparent reason. There is nothing to indicate that he would have offered any resistance had the accused simply demanded his phone. Instead, he was never even given the opportunity. Why he had to die for a cellphone and a mere packet of cigarettes is a mystery to me. The right to life is

one of the sacrosanct rights entrenched in our Bill of Rights. Not only was his right to life violated by the accused, specifically accused 3 in this instance, his right to privacy and dignity were also violated in a most gruesome way.

[13] No doubt society views these offences in a very serious light. For one to find themselves in a situation where they are not able to walk freely in their own community, or feel safe in the sanctity of their home, as was the case with Abongile who was shot whilst lying on his own bed, says a lot about the community we live in. In these circumstances courts have a duty to ensure that members of the community feel safe and protected. This they can do by ensuring that offences of this nature are dealt with in a manner that displays its serious displeasure and a clear message that such conduct will not be

tolerated in our communities. This is no doubt one case where the court has to satisfy society's need for retribution in

sentencing the offenders for their crimes, for anything less might lead to them resorting to self-help.

[14] I now turn to consider whether or not substantial and compelling circumstances justifying a deviation from the prescribed sentences are applicable in the present matter.

[15] The approach of the courts to sentence when the Criminal Law Amendment Act applies is now well developed. It has been emphasised in *S v Malgas* 2001 (1) SACR 469 (SCA), at paragraph 8, that when sentencing for crimes specified in the Act, a court is 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 ...'. Even though the Act has placed emphasis on 'the objective gravity of the type of crime and the public's need for effective sanctions against it' discretion to deviate from the prescribed sentence was granted to courts 'in recognition of the easily foreseeable injustices which would result from obliging them to pass the specified sentences come what may'.

[16] As indicated above, a court may deviate from the sentences prescribed by the Act if 'substantial and compelling circumstances' are present. In *Malgas*, at paragraph 9, it was held that it is impermissible to deviate from the prescribed sentence 'lightly and for flimsy reasons which could not withstand scrutiny' but, this apart, all factors relevant to determining sentence remain relevant when the Act applies and a sentencing court must look to the 'ultimate cumulative impact' of all of these factors in order to determine whether a departure from the prescribed sentence is justified.

[17] In *Malgas*, at paragraph 22, the court held that when a court is convinced that the imposition of the prescribed sentence would be unjust or 'disproportionate to the crime, the criminal and the legitimate needs of society' that in itself constitutes substantial and compelling circumstances. (See also *S v Fatyi* 2001 (1) SACR 485 (SCA), at paragraph 5).

[18] The effect of *Malgas* was examined by Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA). At paragraph 14 he observed that it is ‘only by approaching sentencing under the Act in the manner that was laid down by this court in *S v Malgas* ... that incongruous and disproportionate sentences are capable of being avoided’ and that by ‘avoiding sentences that are disproportionate a court necessarily safe-guards against the risk ... that sentences will be imposed in some cases that are so disproportionate as to be unconstitutional’.

[19] Nugent JA set out how a court is to approach the imposition of sentence when the Act applies, stating, at paragraph 15:

‘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.’

[20] Although there can be no question that accused 1 was an active participant in the robbery of the Atlas security guard, the evidence presented shows that the role he played was quite limited compared to that of his co-perpetrators. His culpability or moral blameworthiness, therefore, cannot be placed at the same level as that of Siya and accused 3, although he was cheering them on in the assault of the Atlas security guard. This is more so given the evidence before this court that not only was accused 3 the main protagonist on the night in question, but also that anyone who dared disobey him faced his wrath.

[21] Further fortifying this view is the fact that after the robbery of the Atlas security, he went his own way and there is no evidence before this court that he actually shared in the spoils of the robberies with accused 3 and Siya. I therefore find these factors to constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. Nevertheless, as indicated earlier, I am mindful of the fact that he was an active participant in the robbery, and therefore, even in deviation, a lengthy term of imprisonment is still warranted.

[22] With regards to the period that the accused spent in detention whilst awaiting trial, the SCA made it clear in *S v Radebe*[1] that this cannot, on its own constitute ‘substantial and compelling circumstances’ justifying a departure from the

minimum sentence prescribed. Lewis JA, stated that ‘the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed’.

[23] With regards to accused 3, regrettably, his position is on a totally different footing to that of accused 1. The evidence presented in court demonstrates that not only was he the master mind in the commission of the offences on the night in question; but that he was, like his name, the man of Action; ordering everyone around and making sure that anyone who did not follow his instructions to the ‘t’ faced his wrath. This was evinced in the evidence of Abongile who was

shot merely because he did not do what he had instructed him to do. The same fate befell Siya who was assaulted when he resisted

following his instructions.

[24] Further support in this regard was found from the evidence of the students who not only confirmed that Siya, who clearly was not very keen on robbing them, was taking instructions from accused 3, and that anyone who did not do as told by accused 3 was either threatened with a firearm, or severely assaulted. Two of the students were assaulted by accused 3, one of them severely so, simply because they did not toe his line.

[25] There is, in my view, nothing peculiar in the personal circumstances of accused 3 which can be said to constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentences. The brazen manner in which he committed the offences on the day in question, starting from the assault on the security guard, up to the deceased who was just shot for no apparent reason, all go to show the brutality with which he carried himself on the night in question. He went about terrorizing the entire Central area on the night in question, and anyone who came his way became his victim. Given the brazen manner in which he committed these offences, his wanton disregard for human life, and just his lack of humanity (ubuntu), are all aggravating circumstances which lead me to the ineluctable conclusion that the prescribed minimum sentences are not disproportionate to the offences he committed.

[26] The community of Central, which comprises of a student community who reside in the area, need to feel protected and to be able to move around without being terrorized by the likes of him. Whilst I take into account that he had difficulties earlier on in his life, having lost both his parents at the age of 18, it is noteworthy that even then, he had already attained the age of majority when his parents demised, and therefore was no longer a child. Furthermore, on his own version, he was not left destitute as he had his grandmother, like many South Africans who are raised by their grandparents, to look after, but he chose to go and live on the streets of Central.

- [27] I find it quite worrisome that he seems to have no sense of remorse or even an acknowledgment of the seriousness of the offences he committed. In fact, he was very bold and daring in even telling the court about his life of crime selling drugs, etc, as if with no care of the implications whatsoever. The impact that the crimes he committed in this matter was clearly demonstrated in the evidence of the witnesses who testified in this court, one of whom was so traumatized that she could not even attend to an identification parade, and had to leave his room because of the trauma of the experience.
- [28] The victim impact statements presented also paint a very bleak picture of children who have been left without a father and who have to grow up without the love and support of their father. Their mother now has to fend by herself in raising her children without their father's support, both financial and otherwise. The father of the deceased has to leave with the trauma of watching the lifeless body of his son lying in a pool of blood, and the experience of having to bury his only son. An aspect which has also affected the deceased's grandmother. These are all factors which clearly have no bearing on accused 3 as he goes on with his life. It is therefore difficult for me to find that the accused is a suitable candidate for rehabilitation, given that he cannot even take responsibility for his action, a step usually considered as a basis in determining one's suitability for rehabilitation.
- [29] With these factors considered cumulatively, I find that the prescribed minimum sentences are just sentences on the circumstances of this matter, proportionate to the offender, the offences committed by the accused and the legitimate interests of society.
- [30] Consequently, the accused are sentenced as follows:
- a) Count 1: Accused 1 is sentenced to undergo 10 years imprisonment.
- Accused 3 is sentenced to undergo 15 years imprisonment
- b) Count 2: Accused 3 is sentenced to undergo 15 years imprisonment.
 - c) Count 3: Accused 3 is sentenced to undergo 5 years imprisonment.
 - d) Count 5: Accused 3 is sentenced to undergo 15 years imprisonment.
 - e) Count 6: Accused 3 is sentenced to undergo 8 years imprisonment.
 - f) Counts 7: Accused 3 is sentenced to undergo 10 years imprisonment.
 - g) Count 8: Accused 3 is sentenced to undergo 15 years imprisonment.
 - h) Count 11: Accused 3 is sentenced to undergo 15 years imprisonment
 - i) Count 12: Accused 3 is sentenced to undergo life imprisonment.

By operation of the law, any sentence imposed together with life imprisonment shall run concurrently with such sentence of life imprisonment.

[31] No otherwise order is made in terms of section 103(1) of the Firearms Control Act (Act 60 of 2000), (both accused persons remain unfit to possess a firearm).

V NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES

For the State:

Adv Makasana

For Accused 1:

Adv Slabbert

For Accused 3:

Adv S Cubungu

Date:

19 December 2024

[1] 2013 (2) SACR 165 (SCA); see also DPP v Gwala

[2014] ZASCA 44 (unreported, SCA case no 295/13, 31 March 2014).

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