

SOUTH AFRICA / JUDGMENT

S v Mbatha (170/2018) [2018] ZAGPJHC 502 (13 August 2018) [2018] ZAGPJHC 502

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ratshibvumo

CASE / FILE NUMBER

170/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 170/2018

In

the matter between:

THE
STATE
And
MHLONGO
MBATHA,
SAMUEL
VUSI JAMES

JUDGMENT

RATSHIBVUMO AJ:

1.

Introduction:

[1] The accused in this case is Mhlongo-Mbatha Samuel Vusi James, a male person who was initially charged with twelve (12) counts and after withdrawal of certain charges he remains facing six (6) counts.

[2] Count 1. Housebreaking with the intent to steal and theft.

The state alleges that on or about 18 June 2006 and at or near [...] V Road, Krugersdorp in the district of Mogale City, the accused and one Anthony Almando Francisco, did unlawfully and intentionally and with the intent to steal, break and enter the house of Hendrik Van Kaam, a seventy eight (78) years old male and Niesje Van Kaam, a seventy two (72) years old female by removing the louvres thereof with intent to steal and did unlawfully steal a TV, a sowing machine, two (2) guitars, CD player, DVD player, clothing and two (2) carry bags, the property of or property in the lawful possession of the persons mentioned above.

[3] Count 2. Robbery with aggravating circumstances.

The state alleges that on or about 16 July 2006 and at or near the address mentioned in count 1 in the indictment, the accused and one Anthony Almando Fransisco did unlawfully and intentionally assault Hendrik Van Kaam, a seventy eight (78) years old male and Niesje Van Kaam, a seventy two (72) years old female, and did then and there and with force take from the persons mentioned above: a Telefunken radio/CD/Cassette boombox; Fuji 35mm Camera; Magralite 3 "D" Flashlight; Nokia 3410 cellphone; Nokia 6210 cellphone; a brown table cloth; James Avery large 'dove silver necklace; ladies gold ring with rubies; 18 ct ladies 3mm wedding ring; two (2) ladies watches; Swiss Cuckoo clock silver necklace; thick 3mm silver necklace, red Agate /Pietersen/Pearl necklace; 18ct ladies antique ring with three (3) stones; gents watch, gents navy fleece; gents 9ct wedding ring; grey gents leather jacket, a pair of black men's shoes, a pair of brown men's shoes, Poiner DVD player; Samsung tape deck, VCR multimedia device, four hundred rand (R400) in cash and wallet; brown men's suede wallet, and a brown sued ladies jacket, the property of the persons mentioned above and or property in their lawful possession and did thereby rob them with aggravating circumstances as defined in section 1 Act 51 of 1977 being present, to wit, the inflicting of grievous bodily harm.

[4] Count 3. Attempted murder.

The state alleges that upon or about the date and at or near the place mentioned in count 2, the accused and one Anthony Armando Fransisco did unlawfully and intentionally attempt to kill Niesje Van Kaam, a seventy two (72) years old female.

[5] Count 4. Murder.

The state alleges that upon or about the date and at or near the place mentioned in count 2, the accused and one Anthony Armando Francisco did unlawfully and intentionally kill Hendrik Van Kaam, a seventy eight (78) years old male.

[6] Count 5. Robbery with aggravating circumstances.

The state alleges that on or about 18 August 2006 and at or near [...] W. Street, Kenmare, Krugersdorp, in the district of Mogale City, the accused and two other men whose identity is unknown to the state at this stage did unlawfully and intentionally assault Hendrik Jacobus Buitendag, a seventy seven (77) years old male and or his wife and did then and there with force take from the persons mentioned above cash and other property of which the exact details are unknown to the state at this stage to the value of approximately thirty thousand rand (R30 000); the property of the persons mentioned above and or property in their lawful possession and did thereby rob them of same with aggravating circumstances as defined in section 1 of Act 51 of 1977, being present, to wit, wielding firearms and or threatening to inflict grievous bodily harm.

[7] Count 12. Housebreaking with the intent to steal and theft.

The state alleges that upon or about 11 June 2017 at or near [...] P Street, Monument Krugersdorp in the district of Mogale City, the accused did unlawfully and intentionally and with the intent to steal, break and enter the house of Shaun Leon Van Oudvorst and unlawfully steal a welding machine and tools to the value of six thousand rand (R6000), the property of and or property in the lawful possession of Shaun Leon Van Oudvorst.

[8] Defence Counsel is Mr Lidovho, Counsel for the State is Mr Van Wyk and language service is rendered.

Plea:

[9] The accused understood the charges against him as well as an explanation on the prescribed minimum sentence applicable on conviction for robbery with aggravating circumstances and for murder respectively. The accused pleaded not guilty to all the counts and elected not to make any statement in terms of the provisions of section 115 of Act 51 of 1977, (herein after called "the Act").

Admissions:

[10] The accused however made several admissions which were with his consent recorded as formal admissions in terms of section 220 of the Act. Such admissions will be mentioned later in the summary of evidence in respect of each count.

[11] Documents marked exhibit "B"; "C"; "D"; "E"; "F"; "G"; "H"; "J" and "V" respectively, were accepted as the correct reflection of the facts recorded thereon. Exhibit "B" is the finger print report on count 1 which shows finger print identical to that of Anthony Armando Francisco.

Exhibit “C” is the medical report in respect of injured Niesje Van Kaam.

Exhibit “D” is the post mortem report in respect of the late Hendrik Van Kaam.

Exhibit “E” is the crime scene album in respect of counts 2 and 4.

Exhibit “F” is a finger print report showing finger print identical to that of Anthony Armando Francisco.

Exhibit “G” is a fingerprint report of a finger print identical to that of the accused before court.

Exhibits “H” and “J” are finger print reports showing finger print identical to that of the accused in respect of count 5.

Exhibit “V” is still prints of surveillance video in respect of count 12.

Opening Address by Prosecution:

[12] In addressing the court in terms of Section 150(1) of the Act the state submitted that witnesses will testify, documentary evidence will be tendered and that the principles of “similar fact evidence” will be invoked to prove identity of the perpetrator in respect of count 1.

[13] To prove its case the state led oral evidence of 10 witnesses and in addition to the documents mentioned in paragraph [11] above submitted the following documents/items:

Exhibit “G1”

- black foil used by inspector Pillay to lift the fingerprints in respect of counts 2 to 4

Exhibit “G2”

- set of fingerprints per SAPS 192 in respect of counts 2 to 4

Exhibit “G3”

- court chart in respect of counts 2 to 4

Exhibit “G4”

- fingerprints taken before court in respect of counts 2 to 4

Exhibit “J1”

- set of fingerprints per SAPS 192 in respect of count 5

Exhibit “J2” – Scotch tape in respect of count 5

Exhibit “J3” – court chart in respect of count 5

Exhibit “1” – USB for video footage in respect of count 12

[14] At the close of the state case, an application for the discharge of the accused in terms of section 174 of the Act on count 1 was unsuccessful.

[15] The defence led the evidence of the accused and handed a statement by Rosemary Menezes marked exhibit “w”.

2. Summary of Evidence:

2.1 Case for the Prosecution

Counts 1 - 4

[16] Evidence on counts 1 to 4 respectively relates to incidents that occurred at a house situated at [...] V Avenue, Krugersdorp that belonged to Hendrik Van Kaam and Niesje Van Kaam.

[17] On count 1. House breaking with the intent to steal and theft:

Formal admissions are to the effect that on or about 18 June 2006 a housebreaking occurred in the mentioned house during which the items listed in count 1 in the indictment were stolen. On the same day, Inspector Tony Astle, a fingerprint expert in the employ of the South African Police Service lifted fingerprints from the louvre panel outside the dining room of the mentioned house.

On the 18th July 2006, he compared fingerprints lifted on the 18th June 2006 with fingerprints of Almon Anthony Armando Francisco and found them to be identical with his right middle fingerprint. The linked suspect is no more; he passed away during May 2012 whilst being a trial-awaiting prisoner at the Krugersdorp prison.

[18] Count 2. Robbery with aggravating circumstances, Count 3, attempted murder, Count 4 Murder:

The incidents in counts 2 to 4 occurred at the same house mentioned in count 1 on or about 16 July 2006. Formal admissions are to the effect that on that date, Hendrik Van Kaam, aged 78 years and his wife aged 72 years were accosted and assaulted in their home and robbed of their items mentioned in count 2 in the indictment.

[19] As a result of the assault, Niesje Van Kaam sustained a stab wound and or fractured ribs. Medical report marked exhibit “C”,

shows multiple fracture of ribs and internal injuries in the chest. During that attack Hendrik Van Kaam was killed and the cause of his death was found to be consistent with the application of pressure to the neck as per post mortem examination report marked exhibit “D”. That the accused before court was never lawfully at or near the premises mentioned in counts 1 and 2 prior to and or on the dates mentioned in counts 1 to 4 respectively.

[20] On counts 2 to 4 evidence of a fingerprint expert, Captain Jagnathan Krishna Pillay, a member of the South African Police Service

stationed at the Krugersdorp Local Criminal Record Centre is to the effect that on the 17th of July 2006 he lifted finger prints from the louvre window panel lying on the ground below the window from which it was removed at [...] V. Road Monument. On the 28th July 2006, he compared the fingerprint lifted by him with those of Almon Anthony Armando Francisco and found it to be identical with his right index finger.

- [21] On the same day, he also lifted fingerprint from a wooden clock, on the top right side. The clock was found lying on the ground in front of main entrance at [...] V. Road Monument. On 28 July 2006 he compared the mentioned fingerprint with finger prints of Mbatha Sam Vusi and found it to be identical with his right thumb fingerprint. Mbatha Sam Vusi is the accused before court. He explained the procedure followed in lifting fingerprints until at the stage of comparison and identification. On comparing the fingerprint lifted from the scene of the crime with that of the accused before court, he found nine (9) points of similarity.
- [22] He is of the opinion that fingerprint lifted at the mentioned address belongs to no other person than the accused before court. He ruled out the possibility of fingerprint having been transplanted as according to him the fingerprint at the property in issue existed in 2006, long before the accused's set of fingerprints was taken. Under cross-examination he stated that when he lifted the fingerprints on both the window louvre panel and the wooden clock, they were fresh as they reacted clearly to the powder that was used. On the ownership of the clock from which the fingerprint was lifted, he stated that it belonged to the complainants.
- [23] Willem Esterhuizen testified to the effect that the late Hendrik Van Kaam was his father in-law and Niesje Van Kaam his mother in-law. He more often frequented their property. During the period June to July 2006, he was familiar with people working for his parents in-law. In explaining how the perpetrators gained access to the house of his parents in-law, he stated that the perpetrators removed the louvre window into the dining room.
- [24] For the incident of the 16 July 2006, he stated that the perpetrators removed the louvre window on the bedroom side and entered the house. He was familiar with the furniture in that house and there was a wooden clock in the living area near the dining room. After the incident he visited his mother in-law who was hospitalised for injuries sustained during the robbery. He also referred the court to exhibit "E" photo 29 which shows words written on the wall, "VEND ESTA CASA", Portuguese words meaning "sell this house". He saw such words on the wall after the incident of the 16 July 2006.
- [25] The clock that was found with fingerprint was at a different place from where it used to be. His mother in law who was seventy two (72) years old during the incident is now eighty four (84) years old. According to him, she is a frail old woman with difficulties in walking and hearing. The death of her husband at their property troubled her and after discharged from the hospital, she had to stay with them for two (2) months. She could not attend her husband's funeral as she was still in the hospital. She refused to go back to the property until they cleaned it and removed old furniture. He did not know of any person who before the incident wanted to buy that house.

[26] Conrad Robertson, a member of the South African Police Service is an investigating officer in this case. He testified to the effect that for counts 1, 2, 3, 4 and 5 respectively, sets of fingerprints were lifted immediately after the incidents. Such fingerprints were kept in the AFIS data base. On 6 July 2018 he handed a set of fingerprints of the accused to Captain Pillay for the compilation of court chart. According to the information at his disposal, the accused is a Mozambican national. The language popularity used in Mozambique is Tsonga and Portuguese. According to him, the accused does not have a fixed address in South Africa.

[27] Sgt Rasimati Andrea Maswangwanyi testified on counts 2 to 4 to the effect that before Conrad Robertson took over, he was an

investigating officer in various cases involving the accused before court. After the accused was arrested on the 11th of June 2017, he took a set of fingerprints from the accused and submitted it to the Local Criminal Record Centre in Krugersdorp. Fingerprints lifted on the 18th June 2006 at [...] V. Street, Krugersdorp linked Antony Armando Francisco. During his investigations he found that the said Armando Francisco died in prison in 2012 whilst awaiting trial for other cases. He confirmed that Rosemary Menezes who arrested the accused on the 11th June 2017 is a member of the Community Police Forum and that they are allowed to effect civilian arrests. He disputed that the accused was assaulted after the arrest.

[28] Count 5. Robbery with aggravating circumstances.

On count 5, the accused made formal admissions to the effect that robbery with aggravating circumstances occurred on the date and at the address mentioned in the indictment as a result of which items mentioned in this count in the indictment were stolen. That on the 19th of August 2006 a fingerprint expert, sergeant Otsesitswe Meshack Legae of the South African Police Service, analysed fingerprints lifted by Constable Matebese Daniel Selepe. He admitted the correctness of facts and results recorded by the mentioned officials on the exhibits "H" and "J" respectively.

[29] Hendrik Buitendag an eighty nine (89) years old senior citizen testified to the effect that, late in the evening of 18 August 2006, at least 3 robbers accosted him and his wife inside their home when they were sleeping. They robbed them of their items mentioned in the indictment. He further stated that the perpetrators gained entry by removing glass panels from a louvre window. He confirmed that on 19th August 2008, a member of the South African Police Service lifted fingerprint from one of the glass panels that were removed from the louvre window. On whether he knew the accused before court, he stated that the accused is unknown to him and had never been lawfully on his premises prior to or on the date of the robbery.

[30] Sergeant Selepe confirmed that he had lifted a fingerprint from a glass panel of the louvre at the house of Hendrik Buitendag on 19 August 2006.

[31] Warrant Officer Legae testified to the effect that he analysed the print lifted by Sergeant Selepe and on comparison found the fingerprint identical to that of the accused. He concluded without doubt that the lifted fingerprint belongs to the accused before court.

[32] Count 12. Housebreaking with the intent to steal and theft:

On count 12, the accused's formal admissions are to the effect that a housebreaking occurred on the date and at the address

mentioned in the indictment, during which items mentioned in the indictment were stolen.

[33] He further admitted facts that he was arrested at or near [...] P. Street, Krugersdorp in the district of Mogale City by members of the local Community Police Forum (hereinafter called the CPF) and members of the South African Police Service.

[34] Rosemary Menezes who is a member of the CPF, testified to the effect that during the early hours of the morning on 11 June 2017, she received information from an armed response security company (EPR), about a housebreaking that occurred at or near [...] P Street, Krugersdorp. The CPF was requested to assist in tracing the suspects. As she knew the area well and having done patrols in that area prior to that day, she and another CPF member went to park their vehicle next to the wall of the hospital with lights off.

[35] Vehicles were parked next to an exit path of a veld that lies between the hospital and [...] P Street. She then saw a person walking casually emerging from the veld's footpath at about 4h20. He was 3 to 4 paces away from the vehicles when they started the vehicles and switched on lights. That person whom she identified as the accused before court started running, jumping walls of houses one after the other. With the assistance of other CPF members and the armed response, the place was cordoned off and when the accused emerged from one of the yards she arrested him.

[36] The accused was wearing a dark blue jacket with various layers of shirts underneath the jacket. The shirts varied from light to yellow colours. He had green/khaki pants on and was wearing black shoes. She informed the accused that he was being arrested for housebreaking at [...] P. Street and for trespassing as he had jumped over various walls of houses prior to arrest.

[37] According to her estimation, it took about 20 minutes from the time she received a report of housebreaking until the accused emerged from the veld. She further stated that the accused was alone at all times and no other suspects were seen. The accused had nothing in his possession. It was her first time to see the accused. She handcuffed the accused and waited for the police to come. On arrival the police took the accused to the scene of the crime but she did not accompany them to the scene of the crime.

[38] Under cross-examination she explained the role of the CPF in the community and its powers. She further explained that the accused,

when he emerged from the veld, he was walking in a direction from [...] P Street. She disputed that the accused could have been coming from a tavern going to a taxi rank by indicating that there is no tavern or taxi rank in that area.

- [39] Her sworn statement marked exhibit “W” was used under cross-examination and she was questioned on the use of the phrase “we went to [...] P Street”, if she did not go to the scene of the incident. She responded by indicating that she used the word “we” referring to members of the CPF as a collective. She disputed that the accused was assaulted during the arrest.
- [40] When it was put to her that the accused was wearing a blue top, which he was wearing under another top which he exhibited in court, and white and blue tekkies when arrested, she stated that it was possible that he could have been wearing the same blue top exhibited, but disputed that he was wearing tekkies. On whether she was allowed to arrest and handcuff a suspect, she stated that the law allows them to effect civilian arrest.
- [41] Shaun Oudvorst is the owner of the property at [...] P Street, he testified on the download of the surveillance footage marked exhibit “L”. The video footage shows three people entering the property twice at between 2h11 and 2h19 on the 11 June
2017. He testified on the authenticity of the footage and explained what could be seen from the visuals with particular reference to the clothing of the suspects and the direction to which they ran after the alarm was activated. He further stated that after observing the images from the video footage he gave the security company descriptions of the clothing that one of them was wearing a dark shade of clothing.
- [42] He referred the court to the second exit of the suspects on which he identified a welding machine that was being carried away by one of the suspects. The suspects were seen climbing the wall to exit the property and moved to the veld on the other side of the property.
- [43] When the accused was brought to the property after the arrest he noticed that he was wearing a navy blue wind-breaker, khaki pants, and layers of clothes under the wind-breaker with light and yellow colours showing out. When he compared the video footage with the person brought by the police, he concluded that the accused before court was one of the three suspects seen in the video footage.
- [44] Under cross-examination he admitted that it is difficult to say that the accused is one of the people seen in the video when one looks at images in the video footage. He disputed that photos of the accused were taken in his presence.

[45] Clarendia Viviers is the girlfriend of Van Oudvorst. Her explanation of the incident was to a large extent similar to that of Mr Oudvorst. She stated that after seeing the accused and looking again at the footage she realised that the suspect with the dark shade clothing had a light shirt protruding at waist level and at the cuffs. Based on the clothing that the accused was wearing she concluded that he is one of the three people captured by the surveillance camera. She disputed that the accused was assaulted in her presence.

2.2 Defence Case

[46] In his defence, the accused testified to the effect that the Krugersdorp area is well known to him as he worked in that area for a white man called Fannie from 2004 to 2008. On the 11 June 2017 he was still living around the Krugersdorp area. On that day he accompanied his friends to an open field to attend an event where artists were performing. The event continued until early hours of the next morning. When the event attendees dispersed, he parted ways with his friends and walked alone towards the taxi rank. He was walking on a tarred road when he came across people including the state witness Menezes who questioned him on where he was coming from and also informing him that there was a robbery that took place in that area. They instructed him to lie down, handcuffed him and even assaulted him.

[47] While he was still at the place where he was arrested, a certain white male came and took photos of him and left. He later returned saying that when he compared the photos taken and the images in the video footage he found that he was involved in the commission of the offence. That white male insisted that the people should go to his house to watch the video footage. He was taken to the complainant's yard and shown where the incident happened. He was thereafter taken to the police station. He disputed that he came from the veld or that he jumped over properties' walls running away. According to him, he was on his way to his home at Emnandini.

[48] On the fingerprints lifted in addresses mentioned in other counts, he stated that although he worked in various houses in Krugersdorp, he was never employed in the addresses mentioned in the charges. He does not know how his fingerprints landed in those addresses. He disputed that the video footage depicts him as one of the suspects, as on the date of the incident he was wearing a blue top, blue and black coloured tekkies and a white cap.

[49] On counts 2 to 4 at [...] V Road on 16th July 2006, he disputed that he committed such offences. He claimed his innocence when his Counsel referred him to the similarities in the modus operandi in respect of the commission of the various offences with which he was charged. He disputed that he committed

robbery in respect of count 5 at [...] W Street, Kenmare in Krugersdorp. He told the court that he can speak Shangaan, Tshopi,

Nyembane and Portuguese languages but cannot write as he never attended school. He further stated that he was never found in possession of any of the alleged stolen or robbed items listed in respect of charges that he is facing.

[50] Under cross examination the accused confirmed that the words carved on the wall of the murder scene, “VEND EST CASA”, are Portuguese words meaning ‘sell this house’. He admitted that he knew Anton Armando Francisco whose fingerprints were also found at the murder scene and the housebreaking scene in respect of count 1. He explained that they both worked for one Fannie for the period 2004 to 2008.

[51] At the close of the defence case, both the state and the defence submitted heads of argument, with the state arguing for the

conviction of the accused on all counts and the defence arguing for his acquittal on all counts. The thrust of their submissions will be addressed later in this judgement.

3. Evaluation of Evidence

[52] The accused made several formal admissions in this case, and therefore, facts so formerly admitted become common cause between the parties.

The issue for determination in this case, is the identification of the perpetrator(s) of the offences under consideration.

[53] The criminal standard of proof is proof beyond a reasonable doubt and the courts have articulated its meaning in a number of different ways. In *S v Sithole* 1999(1) SACR 585 (W) Nugent J and Schwartzman J stated, “There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true...”

[54] Nugent J in *S v Van der Meyden* 1999(1) SACR 44 (W), 448 elaborated the above mentioned view by stating: “These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other. In which ever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”

[55] In this case, there is no direct evidence on the identification of the perpetrators, in respect of all the charges. The state is entirely relying on circumstantial evidence that calls for inferential reasoning of the court.

In evaluating the evidence, the court is guided by the cardinal rules of logic set out in *R v Blom* 1939 AD 188 at 2002 – 3 by Watermeyer JA who said that two cardinal rules of logic which could not be ignored when it comes to reasoning by inference are:

- (1) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. These rules have been adhered to and applied by the courts almost as if they were statutory enactments.

[56] In *Rex v De Villiers* 1994 AD 493, 508-9, it was pointed out that the court should not consider each circumstance in isolation and then gives the accused the benefit of any reasonable doubt as to the inference to be drawn from each single circumstance. In *Rex v Mthembu* 1950 (1) SA 670 (A) it was stated that the approach can also be put differently: the state must satisfy the court, not that each separate item of evidence is inconsistent with the innocence of the accused, but only that the evidence taken as a whole is beyond reasonable doubt inconsistent with such innocence.

[57] In view of the admitted facts and evidence tendered I find this to be a case that rests entirely on circumstantial evidence which falls into three categories:

- (i) Circumstances that led to accused's arrest for count 12 on 11 June 2017;
- (ii) The presence of fingerprints at the crime scenes in respect of counts 2 to 5; and
- (iii) Similar fact evidence on the identification of the perpetrator on count 1.

[58] Circumstances that led to the accused's arrest for count 12:

In this regard the state is relying on the oral evidence of three witnesses and real evidence in the form of video footage. None of the state witnesses saw the accused committing an offence.

Counsel for the state submitted that the state witnesses were impressive and had no motive to falsely implicate the accused. He argued that the accused was not a credible witness and that he raised a false alibi. Based on the facts that the accused was seen emerging from the veld during the early hours of the morning and having been identified through his clothing as well as images in the video footage, he requested the court to draw an inference that the accused had entered the yard at [...] P Street and committed an offence as charged. The defence counsel conceded that the state witness's version was credible but on the video footage he submitted that the identification by video footage is not definitive.

[59] In this regard I have taken into account that the accused was arrested at 04h20 whereas the alarm at the complainant's

property went off at 02h19; this makes it almost two hours before the accused emerged from the veld. The accused had nothing in his possession. Under cross examination the complainant conceded that from the video footage images, one would not be able to indicate with certainty that the accused was amongst the three people whose images were observed.

- [60] The court had an opportunity to observe the downloaded video footage being replayed in court as real evidence. One could see images of three (3) persons, one of whom had darkish top and others with lighter clothes. It was not possible to see facial appearances of such persons.
- [61] The accused disputes that he entered the complainant's property that night. He stated that he was at a music festival and was arrested while on his way home during the early hours of the morning. Even if the witnesses testified in a straight forward and convincing fashion, none of them is certain whether one of the images seen in that video footage is that of the accused before court. Although the accused had difficulties in explaining certain inconsistencies in his evidence, he raised a defence of an alibi, explaining where he was during the relevant time. Evidence that he was at the complainant's property, during the relevant time lacks certainty. There is no burden of proof on the accused to prove his alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. – *S v Malefo* 1998 (1) SACR 127 W at 158 a-e.
- [62] Real evidence in the form of video footage as it is, does not aid the state's case in as far as the identification of the perpetrator is concerned as it does not clearly show identifiable features of human beings. Facts on which the witnesses suspect the accused to have been one of the three (3) images seen in the video footage do not lead to an inference that excludes other reasonable inferences. In considering evidence in totality, it is doubtful that the accused before court is one of the three people whose images were seen in the video footage.
- [63] The presence of finger prints at the crime scenes mentioned in counts 2 to 5 in the indictment:

For counts 2 to 4, the fingerprint was lifted from the wooden clock found lying on the floor in front of the main entrance. For count 5 the fingerprint was lifted from the louvre glass that was removed from the window.

Evidence that finger prints were found at the scene of the crime or on a particular object is often of strong probative value in linking the accused with the commission of a crime.

- [64] Fingerprint identification in criminal proceedings must be done by an expert witness. The duties placed upon the court when assessing the evidence of fingerprint experts, was set out in *S v Gumede & Another* 1982 (4) SA 561 (T). The courts must, first be satisfied that the witness is competent to give evidence, that he is properly trained and has sufficient experience. Secondly, it must be satisfied as to the origin of the sets of fingerprints that are being compared, meaning the set that was found at the scene of the crime and the set of the

accused. Thirdly, it must be satisfied that the expert conducted a proper enquiry in comparing the two sets and that he is capable of referring to sufficient points of similarity. In practice there should be at least seven (7) points of similarity before our courts will accept the identity to be sufficient –S V Nala 1965

(4) SA 360 (A).

[65] In the case under consideration, the fingerprint investigators and the fingerprint experts testified. These witnesses testified in a coherent, consistent and credible manner in explaining the process followed in lifting finger prints until comparison was done. They demonstrated remarkable skills in doing their job of investigating fingerprints. I am amply satisfied that they conducted a proper enquiry in comparing sets of fingerprints lifted from the crime scenes and those of the accused before court. The accused does not deny that sets of fingerprints lifted at the crime scenes belong to him. He however does not know how such prints landed at the scenes. He further explained with certainty that he has never worked or lawfully found himself in the property from which his fingerprints were lifted prior to or on the dates of the incidents. For both the incidents of 16 July 2006 and that of 18 August 2006 respectively, the experts identified nine (9) points of similarity in each, thereby exceeding the required seven (7) points of similarity. Such points of similarity are sufficient to prove beyond a reasonable doubt that the prints were made by one and the same person, in this case the accused before court.

[66] Mr Esterhuizen testified on the ownership of the wooden clock from which fingerprints were lifted and the after effects of the incident on his mother in- law.

Mr Buitendag testified on how he and his wife were attacked and their belongings stolen. Evidence of both Mr Esterhuizen and Mr Buitendag is found to be satisfactory in all material aspects.

On counts 2, 3, 4 and 5, I have no doubt that the accused before court was involved in the commission of the offences as charged.

[67] Similar fact evidence on the identification of the perpetrator on count 1.

The general principle in respect of the admissibility of evidence is provided for in terms of section 210 of the Act as follows:

“No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point of fact at issue in criminal proceedings.”

[68] In as far as evidence of similar facts is concerned, the general principle is that, evidence of similar fact is inadmissible because it is irrelevant – see generally Zeffert & Paizes , The South African Law of Evidence, 2nd edition page 271.

- [69] In *Nduna v State* 2011 (1) SACR 115 (SCA), it was stated that the ultimate test is and must always be, the relevance of such similar fact evidence as the foundation for its admissibility against the accused person: the evidence will be admissible if it is relevant to an issue in the case.
- [70] In this case, the court reiterated with approval the manner in which the rule was set out in *Matthews v State* 1960
- (1) SA 752 (A) at 758 B-C. In *Matthews*' case the court (per Schreiner JA) stated the rule succinctly when he said: "Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible..,Katz case is authority for asking oneself whether the questioned evidence is only, in common sense, relevant to the propensity of the appellants to commit crimes of violence, with the impermissible deduction that they for the reason were more likely to have committed the crime charged, or whether there is any other reason which, fairly considered, supports the relevance of the evidence"- *R v Katz* 1949 AD 71
- [71] From the above mentioned authorities it is clear that the test for the admissibility of similar fact evidence remains the relevance of the evidence. Evidence of similar facts will be admissible when it becomes legally relevant. It will be legally relevant when there is such a strong and significant link between the similar fact and a fact in issue that because of the strong link, the similar fact can be used to prove a fact in issue.
- [72] The connection between similar fact and the fact in issue must be such that a reasonable and proper inference can be made. The probative value must be great enough to make the investigation into a collateral matter worthwhile – *Trupedo* 1920 AD 58, *Shabalala* 1986 (4) SA 734 (A).
- [73] The improbability of coincidence in similar facts has been highlighted in the case of *Moti* 1998 (2) SACR 245 SCA, where evidence showed that the accused and another perpetrator had participated together in other robberies with a modus operandi identical to their robbery in casu, committed precisely during the same period and in precisely the same area. The notion that these similarities are only incidental, is too improbable a chance to be true. The evidence of a common modus operandi and of the accused's and other perpetrator's direct involvement in similar cases of robbery was relevant, not to sustain an inference that the accused had participated in the robbery under consideration, but as corroboration of the identification by two witnesses that it was the accused who had killed the deceased. Therefore the similar fact evidence is admissible to corroborate doubtful evidence of identification.

- [74] Similar facts sought to be invoked in the case under consideration are not related to the accused's previous conduct, but are in connection with the offences committed within a certain period of time and in respect of which the accused is facing multiple counts. In this case the court is requested to infer from the manner in which offences in other counts were committed to find if the accused could have committed the offence on the count under consideration which is, count 1.
- [75] Evidence on one count is ordinarily not admissible on another unless, according to the principles applicable to similar fact evidence, it has sufficient probative value force to warrant its reception – *S v Gokool* 1965 (3) SA 461 N at 475 E.
- [76] In his argument, Counsel for the State identified nine areas of similarity:
- (a) That in count 12, the accused committed an offence with two other suspects.
 - (b) That in count 5 the complainant Mr Buitendag mentioned that robbery was committed by three (3) persons and the accused's fingerprint was found in the crime scene.
 - (c) That in counts 2 to 4, offences were committed by more than one person, and that the accused's and Armando Francisco's fingerprints were found on the crime scene.
 - (d) That Armando Francisco's fingerprint was lifted from the same crime scene a month earlier when the Van Kaam family fell victim to a housebreaking on 18 June 2018.
 - (e) That on both the crime scenes mentioned in count 2 and 5 respectively, the louver windows panels were removed, which was also the case in respect of count 1.
 - (f) The fact that Francisco's fingerprints were lifted at the housebreaking of the Van Kaam home both in June 2006 as well as the murder scene in July 2006 at the same address proves return of the same perpetrator(s) to the same-targeted premises. This was exactly the same modus operandi in respect of count 12, where within ten minutes (10) minutes after leaving the premises with stolen items, they returned. In count 12, the accused was also involved.
 - (g) The fact that the accused knew Francisco and they worked together in Krugersdorp during the period 2004 to 2008.
 - (h) That the timing of the housebreaking at [...] P Street on 11 June 2017 was also when the residents were sleeping.
- [77] He submitted that in the light of the above mentioned similarity in modus operandi, the only reasonable inference to be drawn is that the accused had perpetrated the offence alleged in count 1 with Francisco. He further submitted that one person would not have managed to carry away the items mentioned in count 1. He further referred to the court's ruling when an application for discharge was refused at the close of the state case, that the accused did not give evidence to prevent the prima facie status of the evidence establishing the identity of the accused as a co-perpetrator in count 1, from becoming conclusive proof thereof. Defence Counsel submitted that the accused did not commit the offence in count 1.

[78] In applying the established principles in the evaluation of evidence of similar fact I should take the following aspects into consideration.

- (a) Evaluating the degree of similarity between the acts and decide whether the evidence is sufficiently similar to be admitted.
- (b) Identifying the issue for determination in the particular case and the purpose for which the evidence sought to be introduced and other available evidence.
- (c) Ensuring, where evidence of similar fact is tendered to prove the identity of a suspected offender, that such evidence will only have sufficient cogency to be admitted where it is highly distinctive or unique, because otherwise the evidence will not be useful to differentiate the accused from other potential offenders.
- (d) That in case where the evidence shows a unique trademark or signature that is present in the offence for which the accused is being tried, the evidence will normally be sufficiently probative to warrant admission.
- (e) Where the prosecution seeks to use evidence from one count of an indictment as similar fact evidence on a separate count (such as in this case), the court must also consider whether such use could unfairly lead the trier of fact to reject defences raised by the accused in relation to other charges.

(The list of the mentioned aspects for consideration is not exhaustive.)

[79] Now, being mindful of the established legal principles in this regard, I find the following:

- (a) That similarities mentioned by counsel for the state are relevant to the count in issue.
- (b) That there are striking similarities in the modus operandi in the commission of offences in counts 1, 2 and 5 in that:
 - The offences are committed by more than one person.
 - Properties of senior citizens are targeted.
 - Offences are committed during the night when people are asleep.
 - Entry in respect of all offences is gained through removal of louver windows.
 - Victims of crime are threatened with grievous bodily harm, and those who resist are assaulted and even killed.
 - Large quantity of items is taken away.
 - The accused and one Francisco linked through fingerprints were co-workers, both Mozambican nationals who among others speak Portuguese language.
 - The offences in count 1, 2 and 5 were committed during the period June, July and August 2006 when the accused and one Francisco were co-workers under the same employer.

· All the offences were committed in the Krugersdorp area only, an area in which the accused and one Francisco resided and worked during that period.

[80] Taking together these similarities of facts, I find their degree of similarity rendering the likelihood of coincidence improbable.

In my view the evidence relating to *modus operandi* on counts 1, 2 and 5 respectively, supported by the fingerprints evidence, is relevant and admissible.

[81] Although each offence has been established independently in this case, the cumulative effect of evidence of similar conduct on all counts weighs heavily against the accused.

All the mentioned factors lead me to conclude that the perpetrator who is linked to the commission of offences in counts 2 and 5 respectively committed the offence in count 1 as well. The only inference to be drawn from the proved facts is that the accused before court was involved in the commission of house breaking with the intent to steal and theft in count 1.

4. Verdict:

[82] Based on the mentioned findings, the accused is found:

Guilty on Count 1: Housebreaking with the intent to steal and theft.

Guilty on Count 2: Robbery with aggravating circumstances.

Guilty on Count 3: Attempted murder.

Guilty on Count 4: Murder as contemplated in section 51(1) Act 105 of 1997.

Guilty on Count 5: Robbery with aggravating circumstances.

Not Guilty on Count 12: Housebreaking with the intent to steal and theft.

Judgment

on merits handed down on the 10th August 2018

JUDGMENT ON SENTENCE

1.

Introduction

[83] Mr/MBATHA-MHLONGO

You have been convicted of one count of housebreaking with the intent to steal and theft, two counts of robbery with aggravating

circumstances, one count of attempted murder and one count of murder.

The court is about to sentence you now.

2. General sentencing principles

- [84] In order to arrive at an appropriate sentence the court is required to consider the broad judge-made guiding principles known as the TRIAD of Zinn as set out in *S v Zinn* 1969 (2) SA 537 A when the AD held that in imposing a sentence “what has to be considered is the triad consisting of the CRIME, the OFFENDER and the INTERESTS OF SOCIETY” (my emphasis). These factors must be considered equally and one should not be heavily relied upon over the others- *S v Holder* 1979 (2) SA 70 A.

With regard to the crime there is a constitutional requirement that the punishment imposed, including when it is set by the statute, must not be disproportionate to the offence- *Dodo v S* 2001(3) SA 381(CC) at paragraph 37.

- [85] In as far as the offender is concerned, considering the personal circumstances of the offender (also known as individualization)

requires that the sentence fits the offender.

- [86] In as far as the society is concerned; a sentence that is imposed should serve the public interest. In *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1 (CC) it was held that it is not the community’s wishes but rather their interests that serve as the overriding principle. The interests of the society are not best served by too harsh a sentence, but equally so they are not properly served by one that is too lenient. I understand this to mean that the determination of an appropriate sentence should be guided by the public interest and not by public poll. Public interest incorporates the traditional purpose of punishment that is deterrence of criminals, prevention of crime, the possibility of rehabilitating the offender, protection and retribution- *S v Rabie* 1975 (4) SA 855 A at 866 A-C.
- [87] I am also mindful of the fact that punishment should fit the criminal as well as the crime and be fair to society and be blended with a measure of mercy according to the circumstances. In other words punishment should be tempered by humanity (Ubuntu) and compassion. I am not supposed therefore to sentence in order to take revenge or destroy the offender- *S v Kumalo* 1973 (3) SA 697 (A) at 698.

3. Minimum sentence

- [88] In your case among the offences for which you are convicted there is one count of murder and two counts of robbery with aggravating

circumstances. These are offences that attract minimum sentence as prescribed in terms of the Criminal Law Amendment Act 105 of 1997 (hereinafter called the Act). Relevant to your case, an explanation was given before you pleaded that if you are convicted of murder as contemplated in section 51(1) of the Act, the minimum sentence prescribed would be imprisonment for life, for robbery with aggravating circumstances, a period not less than 15 years, for the first offender, not less than 20 years for the second offender and not less than 25 years for the third or subsequent offender.

[89] Mr Mbatha-Mhlongo, you should bear in mind that the minimum sentence legislation was enacted in response to the public demand for more stringent punishment for convicted offenders and to restore confidence in the ability of criminal justice system to protect the public against crime. It is aimed at curbing the increased crime rate, the crime pandemic that engulfs our country, protecting

communities against criminals and to ensure that courts are able to deal effectively in terms of sentencing for the serious crimes that are experienced in our country. As emphasised by the Supreme Court of Appeal in the case of *Matyityi* 2011 (1) SACR 40 (SCA); that our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. It is “no longer business as usual”, so said Marais JA in *Malgas* 2001 (1) SACR 469 SCA at paragraph [7]. Courts are obliged to impose the prescribed minimum sentences unless there are truly convincing reasons for departing from them.

[90] It has therefore become important for this court to balance all factors relevant to the sentencing against the benchmark as laid down by the legislature in respect of this crime. The legislature has however created a mechanism whereby a court may be freed from the obligation of a minimum sentence prescribed if there are substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed one-section 51(3)(a) of the Act.

4. Crime

[91] In passing a sentence the court must take into account the moral and ethical nature of the crime, and the gravity of the offence. The sentence therefore must be commensurate with the gravity or otherwise of the crime, which is a necessary concomitant of punishment.

4.1 Murder and Attempted murder

[92] Murder and attempted murder are serious violent crimes, causing or attempting to cause the death of a human being are extremely

serious. In terms of section 12 (1) (c) of the Constitution of the Republic of South Africa, 1996, everyone has the right to be free from all forms of violence from any source and in terms of section 11 of the Constitution, everyone has the right to life. Your conduct was a violation of the victims’ constitutional rights against violence and to life. In the Constitutional court judgment of *Makwanyane*[1995] ZACC 3; , 1995 (3) SA 391 (CC) the court described the rights to life and dignity as the most important of all human rights, and the source of all other personal

rights in the Bill of rights. Mr Mbatha-Mhlongo, you should bear in mind that life is the most precious gift a human being can receive and once it is taken away from him/her it can never be returned. The dominant theme of a culture based on Ubuntu is that the life of another person is at least as valuable as one’s own life.

- [93] Taking into account the circumstances and the manner in which the above mentioned crimes were committed you and your cohorts attacked the elderly couple in their home, killing the husband aged 78 years, seriously injuring the wife aged 72 years and looted a large quantity of their valuable goods. This was not their first loss as the same property was broken into in just a month prior to this attack. Medical report marked exhibit “C” shows that Niesje Van Kaam sustained a stab wound and fractured ribs. The post mortem report marked exhibit “D” shows that the deceased died as a result of application of pressure to the neck. He died a painful death indeed.
- [94] The manner in which these crimes were committed suggests that you do not value the sanctity of life. In a serious crime of this nature, the court must in its imposition of sentence, promote respect for the law and in so doing must reflect the seriousness of the crime- *S v Ngcongco* and another 1996 1 SACR 55 (A). The court must never create an impression through its sentences that human life in the eyes of law is cheap- *S v Mgwathi* 1985 4 SA 22 (T).

4.2 Housebreaking and robbery:

- [95] Housebreaking and robbery are serious offences. They are not crimes that are ordinarily committed on the spur of the moment, they are pre-planned to ensure that resistance from victims of robbery cases are subdued and perpetrators are difficult to trace. In housebreakings, perpetrators target time when property owners are absent or fast asleep and are difficult to trace. Robbery is a violent crime as force is used to subdue victims. Victims that resist are assaulted, threatened with death, injured and even killed for their belongings.
- [96] In your case you and one Armando Fransisco targeted the property of Mr and Mrs Van Kaam where you committed housebreaking in June and house robbery in July 2006. In August 2006 you and your friends committed house robbery at the property of Mr and Mrs Buitendag, elderly people. You committed this offence at gun point. Being pointed with firearms, this couple was traumatised by the possibility of death hovering in attendance. Mr Mbatha-Mhlongo you should bear in mind that house robbery and housebreaking are among the most frightening and dangerous crimes to experience.
- [97] The commission of these offences is frightening because it violates victims’ private space at the very place that people think to be their sanctuary. Home robberies fuel fear in communities because they put people at risk of personal injuries and emotional trauma in their homes, where they should feel safest. The current unprecedented wave of robberies and burglaries in this area imposes a responsibility on the courts to act fearlessly and in unambiguous terms to discourage this conduct.

5. Interests of society

[98] The court fulfils an important function in applying the law in the community. It has a duty to maintain law and order. It should be borne in mind that the court operates in a society and its decisions have an impact on individuals in the ordinary circumstances of daily life. The role of the state in a violent society is rather to demonstrate that we are serious about the human rights the

Constitution guarantees for everyone.

[99] The seriousness of these crimes is seen from the outlook of society, the indignation with which this crime is held in the eyes of the society when people are attacked in their homes, killed and injured for their hard-earned belongings and when their homes are burgled and valuable goods are stolen. Courts are expected to be shaped by the spirit of their times and be responsive to the outlook of the community to which they belong. To allow perpetrators of these crimes to create an environment of terror and insecurity in the minds innocent citizens is totally against the interests of society.

[100] It is so, that, society cries for protection against all types of criminals who should not be sent to prison today to return tomorrow showing bold daring faces as heroes of crime in a community that shuns crimes. The society expects the convicted offenders to do their stint in prison for all serious crimes so that when they return they must respect the right to life and dignity and all other rights of the citizens. The society needs criminals who have committed serious and outrageous crimes such as the ones under consideration to be ideally removed from society for a long time. In that way courts would be fulfilling their role in protecting the society against lawlessness.

6. Evidence and address on sentence

[101] In terms of section 274 CPA 51 of 1977, a court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. In this regard the court considered evidence tendered by the accused, as well as submissions on mitigating and aggravating factors.

6.1 Evidence in mitigation of sentence:

[102] The accused testified to the effect that he is 38 years old married with 3 minor children. Before arrest he was employed in the construction company earning R180.00 per day. He left school doing Standard 2 due to lack of financial support, as after the death of his father nobody assisted him to further his studies. He experienced hardship and had to look for work while still young. He left home to e-Swatini where he was employed to look after cattle. His mother was employed as a domestic worker and she had difficulties in raising him together with his 3 siblings. His 2 siblings passed on and he is left with his sister. Before arrest he was staying at Emnandini in Krugersdorp in a house belonging to an old man from Mozambique. He acknowledged his previous conviction of receiving stolen property committed in 2003. While working he was supporting his wife and children. He requested the court to be lenient with him saying that he is remorseful for his conduct.

However under cross examination he insisted that he did not commit the offences for which he is convicted. He was in custody for 14 months pending finalisation of this case.

6.2 Address in mitigation of sentence

[103] The Defence Counsel conceded that the accused is convicted of serious offences involving elderly people as victims, one of whom was killed. He also conceded that from the accused's personal circumstances there are no factors that constitute substantial and compelling circumstances for court to deviate from imposing the prescribed minimum sentence where applicable. He however requested the court to be lenient with the accused in view of the fact that he is from a poor background and he grew up without a father figure in the family. He requested the court to order that sentences in all counts run concurrently.

6.3 Address on aggravating factors

[104] Counsel for the State requested the court to find the following factors as aggravating:

- The seriousness and the prevalence of these offences in this Division and the need for the protection of society against the accused and other potential offenders;
- The modus operandi of the accused that reveals high degree of ruthlessness and cunningness;
- The timing of the attacks on victims that are done during the night in the cover of darkness;
- Targeting defenceless vulnerable elderly people;
- The accused's previous brush with the law which demonstrates that he is not a candidate for rehabilitation;
- The daring conduct of the accused and his cohorts who targeted the same property twice and on their last attack left message on the wall to read "sell this house";
- Devastating after-effects of the death of Hendrik Van Kaam on the family members;
- Serious injuries suffered by Niesje Van Kaam and obviously psychological trauma on the untimely death of her husband;
- Lack of remorse on the part of the accused when he insists that he did not commit offence despite overwhelming evidence against him.

[105] Based on the mentioned factors he submitted that the accused is a danger to society and recommended sentence which will deter him from reoffending and that would convey a message to the 'would be' offenders of similar crimes that courts will not tolerate such conduct. According to him there are no substantial and compelling circumstances for the court to deviate from the prescribed minimum sentences. He suggested life imprisonment for murder, 10 years imprisonment for attempted murder, 15 years imprisonment each of the two counts of robbery with aggravating circumstances and 5 years imprisonment for housebreaking with the intent to steal and theft.

7. Evaluation:

[106] After considering the mentioned factors, I find the period of pre-trial incarceration as the only factor that mitigates his case. The following are factors raised by the defence to be considered by court as mitigating. I will give reasons why I do not find them to be mitigating the accused's case.

(i) Poor background and absence of father figure in the family:

[107] While the mentioned factors, prima facie, appear to be extenuating circumstances. They do not apply to the accused in respect of the offences under consideration because he was gainfully employed by one Fannie during that period. His poor background and absence of a father figure in the family did not have an influence in his conduct in this case.

(ii) Family responsibilities:

[108] Another factor brought to the attention of the court is the accused's family responsibilities, while this could a mitigating factor in other cases, it should however be borne in mind that 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 employed, 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-S v Vilakazi 2009 1 SACR 552 (SCA) par 58. The accused cannot be said to be a primary-care giver to his minor 3 children as they are left with their mothers.

(iii) The "falling away" of previous convictions:

[109] Section 271A of the CPA 51 of 1977 provides that certain previous convictions "fall away" after a period of 10 years, provided the offender has not committed a fairly serious crime within that period. In this case the accused is convicted of serious offences committed during 2006 which period falls within 3 years since his previous conviction in 2003. This clearly demonstrates that the sentence imposed for his previous conviction was not adequate to deter him from re-offending within that period of 3 years. It is my view that the mentioned factor would not qualify to serve as a mitigating factor in this case.

I find the following factors aggravating the accused's case:

(i) Targeting defenceless older persons (vulnerable victims).

[110] In this case the accused and his cohorts targeted older persons; Hendrik Van Kaam was 78 years old, Niesje Van Kaam was 72 years old and Hendrik Buitendag was 77 years old when attacked. In terms of section 30 (4) of the Older Persons Act 13 of 2006, 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 may be regarded as an aggravating circumstance for sentencing purposes. In Ivanisevic 1967 (1) SA

572 (A), the court confirmed that the fact that the victim was defenceless old lady was aggravating. The accused and his friends showed no respect or mercy to the elderly people when they attacked them and killed one of them. In the Congo there is a say that: “A

youth that does not cultivate respect for and friendship with the elderly is like a tree without roots”. Just like children and women older persons are also vulnerable to all kinds of violence. It is unfortunate that the National Crime statistics does not show breakdown of crime victims in terms of age groups, one would notice that violence against older persons and eldercides (killings of elderly persons) are also on the increase in our country.

(ii) Use of weapons in the commission of the offences.

[111] Persons committing assaults with knives or other dangerous weapons must be punished more severely. By using weapons there is always the possibility of death hovering in attendance- Bernadus 1965 (3) SA 287 (A). In this case Hendrk Buitendag and his wife were pointed with firearms until the accused and his friends disappeared with their

belongings. One hates to imagine as to what was going on in their minds during that period when pointed with such lethal weapons.

(iii) Lack of remorse.

[112] Lack of remorse is also an aggravating factor.

Throughout the trial the accused never demonstrated any sense of remorse. Even after it has been found that he was linked to the commission of offences through his finger prints, he insists that he is innocent.

(iv) The brutal manner in which the offences were committed.

[113] I had an opportunity to see photos in the photo album of the crime scene at the property of Van Kaam family. It looks like a war zone with scattered goods, blood stains all over and the body of Hendrik Van Kaam lying motionless. It is from this property that they took away a huge quantity of goods, none of which was recovered. The accused and his cohorts showed a collous disregard for the integrity and privacy of the victim's household when during the night they broke into the property assaulted victims, applying pressure on the neck of one of them until he died and robbed them of their valuable goods. I regard as aggravating the fact that the accused and his friends acted in a brutal and brazen fashion. It was a gruesome murder and the accused together with his cohorts were determined to kill and had direct intention to kill Hendrik Van Kaam.

(v) The impact of the crimes on the life of Niesje Van Kaam

[104] Besides sustaining serious injuries which landed her in the hospital for a long time, she did not attend the funeral of her husband and she did not want go back to the house after discharged from the hospital. She was traumatised by the incident and the untimely death of her husband.

(vi) Prevalence of the crime

[105] The prevalence of a particular kind of crime , or noticeable increased occurrence of such a crime, may lead to an increased

severity in sentences-S v Mohase 1998 (1) SACR 185(O) at 193d-e, (in this case it was taken into account that armed robbery was assuming serious dimensions, which makes a severe sentence important as a message to other offenders). In the case under consideration Counsel for the State submitted that offence committed by the accused are on the increase in this Province.

8.

Conclusion

[108] In this case I find aggravating factors overshadowing mitigating factors by far. From the accused's personal circumstances, I do not find substantial and compelling circumstances justifying deviation from imposing the prescribed minimum sentences on the

charges of murder and robbery with aggravating circumstances respectively.

[109]Mr Mbatha-Mhongo, I agree with Counsel for the State that you are a danger to society. In this regard I am of the view that to protect the society and to deter potential offenders from committing similar crimes you deserve to be separated from society for your entire life.

On the concurrent running of sentences ,section 39(2)(a)(i) of the Correctional Services Act, 111 of 1998 provides that any sentence imposed in addition to life imprisonment will automatically be served concurrently with the life imprisonment.

8.1 Sentence:

[110] Mr Mbatha-Mhlongo you are sentenced as follows:

Count1: Five (5) years imprisonment

Count 2: Fifteen (15) years imprisonment

Count 3: Seven (7) years imprisonment

Count 4: Life imprisonment

Count 5: Fifteen (15) years imprisonment

8.2 Orders

[111] Mr Mbatha-Mhlongo you have been convicted of violent crimes and

I do not find you suitable to possess a firearm.

In terms of section 103 (1) Act 60 of 2000, the accused is DECLARED UNFIT TO POSSESS A FIREARM.

RATSHIBVUMO AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearing for the State: Adv. Van Wyk

Defence Counsel: Adv. Lidovho

Instructed by: Legal Aid South Africa

Date of hearing: 06 August 2018

Date of Judgment: 13 August 2018

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Prepared on 10 October 2026 · Esheria