

SOUTH AFRICA / JUDGMENT

S v Mshubi and Another (Sentence) (SS69/2021) [2022] ZAGPJHC 83 (18 February 2022) [2022] ZAGPJHC 83

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

SS69/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

CASE NUMBER : SS69/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

18/2/2022

In the matter between:

THE STATE

and

LUCKY MSHUBI

ACCUSED 1

THABO MAMBILA

JUDGMENT-SENTENCE

DOSIOJ

SENTENCE

- [1] Accused 1 has been found guilty of six counts. Count one is the crime of murder read with the provisions of s51(1) and Part 1 of schedule 2 of Act 105 of 1997 ('Act 105 of 1997'). Count two is a charge of housebreaking with the intention to commit the crime of robbery and kidnapping. Count 3 is a charge of robbery read with the provisions of s51(2) and part II of schedule 2 of Act 105 of 1997. Count 4 is a charge of kidnapping. Count 5 is a charge of attempted extortion and count 6 is a charge of defeating or obstructing the administration of justice. Accused 2 has been found guilty of five of the same counts as accused 1, with the exception of the charge of attempted extortion which is count 5.
- [2] For purposes of sentence this court has taken into consideration the accused's personal circumstances, the seriousness of the offences and the interests of the community. The court has borne in mind the main purposes of sentence which is deterrence, retribution, reformation and prevention.

PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [3] The personal circumstances of accused 1 are as follows:

He was born in the Eastern Cape on the 26th of November 1985 and is 37 years old. His highest level of education is standard 3 as he dropped out of school due to financial constraints. His biological mother passed away when he was 8 years old. He was raised by his stepmother. He is married and has 3

children aged 2, 9 and 16 years old. Prior to his incarceration he was the primary caregiver of these children, but due to his

incarceration the mother of the children has taken them to a place that is unknown to him. Prior to his incarceration he was no longer employed because the people where he was working as a security guard lied to his employer saying that he had broken into their trucks and had stolen diesel. He used to earn R2000 but due to these allegations his salary for one month was reduced to R1000. He did not have enough money to buy milk, nappies and formula for the youngest child. After he was dismissed as a security officer he tried to look for employment but he did not even have enough money for taxi fare. In conclusion this accused stated that he wanted the family to forgive him as it was never his intention to kill the deceased. Accused 1 has a previous conviction of robbery committed in 2009 for which he was sentenced to two-years imprisonment.

- [4] The personal circumstances of accused 2 are as follows:

He was born on 22 September

1990. He is currently 31 years old. He has 2 children aged 2 and 5 years respectively. His kids are in the Eastern Cape and they live with their mother who is unemployed. The highest grade accused 2 passed was standard 5. He dropped off in standard 6 because of financial constraints. He has been in custody since May 2021. He was staying in Pumla Mqashi with his sister prior to his arrest. He stated that he helped accused 1 to commit the crime because he wanted money. He was going to send the money to his kids in the Eastern Cape.

The last amount that he sent to his kids was R350-00. In conclusion he stated that he wants to say sorry to the family of the deceased

SERIOUSNESS OF THE OFFENCES

[5] In respect to the seriousness of the offences this court would like to state as follows:

These crimes were committed in the early morning whilst the deceased and her four children were asleep in their home. The deceased was kidnapped and removed from her own home by force and was buried in accused 1's garden.

[6] The State called two witness in aggravation of sentence, namely Mr Ismael Genner (the deceased's father and Naailah Genner (the deceased's sister).

[7] Mr Ismael Genner testified that the deceased had four children aged ten years, seven years, four years and 1 year and 8 months. On the 22nd of April around 06h30 there was a loud knock at their door and the four children of the deceased, who live 2 flats away from them were outside the door screaming and crying. His ten year-old grand-daughter was holding his one-year old grandson in her arms and his other grandson was holding the ten-year old's leg. His grandchildren narrated what had happened to the deceased and also

explained that two of the grandchildren were assaulted as well. This witness saw strangulation marks as well as a blue eye on his

grand-daughter. His grandson also had an injury to his hand which his grandchild stated was sustained by the men hitting him with a brick before they took his mother away. This grandson also had a bandana on his mouth which the grandson informed him was put on his mouth to prevent him from screaming.

[8] The effect of this ordeal on his family was huge as the family had to source various psychologists to assist the grandchildren and Mr Genner's wife who were traumatised by this ordeal. In addition, the deceased's husband moved into a home with Mr Genner and his wife as the deceased's husband could no longer cope on his own or look after all four children. The youngest grandchild went to live with the deceased's sister and her husband.

[9] Naailah Genner testified that the youngest of the deceased's children live with her now. She stated that although this child is young, he will have many questions about his true mother. She expressed in very clear terms that these children will mourn their mother and that this ordeal has been very difficult.

[10] It is clear that Mr Ismael Genner and his whole family suffered terribly as a result of the loss of a daughter, mother and sibling.

[11] This country has witnessed an ever-increasing wave of violence. Kidnapping for ransom and murders are on the increase. Innocent and defenceless victims continue to fall prey to these types of offences. In this instance, a young married mother with four children was brutally kidnapped, tied up, smothered to death and buried in the garden of accused 1.

- [12] Murder is the most serious of crimes. It not only ended the life of the deceased but it left much pain for the family members left behind.

INTERESTS OF THE COMMUNITY

- [13] In respect to the interests of the community, this court has taken note of the fact that the community observes the sentences that courts impose and the community expect that the criminal law be enforced and that offenders be punished. The community must receive some recognition in the sentences the courts impose, otherwise the community will take the law into their own hands. If a proper sentence is imposed it may deter others from committing these crimes. Due to the fact that murder of helpless and innocent victims have reached high levels, the community craves the assistance of the courts.
- [14] In *S v Msimanga and Another* 2005 (1) SACR 377 (A), it was held that violence in any form is no longer tolerated, and our Courts, by imposing heavier sentences, must send out a message both to prospective criminals that their conduct is not to be endured, and to the public that Courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.
- [15] In respect to the murder count, section 51 (1) of Act 105 of 1997 dictates that if an accused has been convicted of an offence referred to in part 1 of schedule 2, he shall be sentenced to life imprisonment.
- [16] Section 51 (3) of Act 105 of 1997 states that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.
- [17] As stated by the learned Marais JA in the case of *S v Malgas* 2001 (1) SACR 469 SCA, paragraph I; 'if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'
- [18] Notwithstanding the application of the prescribed minimum sentences in respect to count 1 and 3 this court has considered other

sentencing options, however direct imprisonment is the only suitable sentence as both accused are a danger to the community.

- [19] This court cannot only consider the accused's personal circumstances, but must also consider the interests of the community

as well as prevention and deterrence. To focus on the well-being of the accused to the detriment of the interests of the community would result in a distorted sentence.

[20] Accused 1 lost his job as a security officer and he didn't have enough money to even get a taxi to go and find a new job. Although it may seem at the outset that he committed this crime out of need, the value of the items, namely real exhibits 1-5 was very low, as stated by the State Advocate it would possibly have amounted to a value of R200. In addition, the car that was taken was never sold, therefore this court cannot come to the conclusion that this crime was committed out of need. It is rather clear to this court that this crime was committed out of need to get revenge.

[21] Accused 1's counsel argued that the following are substantial circumstances not to impose the minimum prescribed sentences in respect to count 1 and 3, namely:

1. That accused 1 is 37 years old and that although he has one previous conviction of robbery which is more than 10 years old, that this previous conviction should be left out of account when determining an appropriate sentence.

2. That even with very little education accused 1 having achieved grade 3 at school, he still managed to work and earn a living and maintain his family.

3. That accused 1 pleaded guilty to counts 2, 3, 4 and 6 and told the police and this court what had transpired on the day the deceased was kidnapped and died.

4. That the accused apologised to the family of the deceased in court.

5. That the murder was not planned and that this court found him guilty of murder on the basis of *dolus eventualis*.

6. That accused 1 was shocked when he realized that the deceased had passed away.

[22] As regards accused 2, it is clear that accused 2 harboured no grudge against the deceased, however, accused 2 was paid R150 and this is not a large sum for this court to assume he committed this crime out of need. It is clear accused 1 aligned himself with the actions of accused 1. The reasons why he did so are unknown to this court because from the inception, accused 2 never played open cards with the court.

[23] The fact that the accused are 37 and 31 years old respectively, is certainly a positive factor in their favour, but it can hardly be a substantial and compelling circumstance on its own. (see *Shubane v The State* (073/14) 2014 ZASCA 148 26 September 2014).

[24] The learned Poonen JA in *S v Matyityi* 2011 (1) SACR 40 SCA at paragraph [14] stated That: 'at the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor'.

[25] The learned Poonen JA stated further at paragraph [24];

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming...one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed

by the legislature for the flimsiest of reasons... As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences...Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's notion of fairness.'

[26] The counsel for accused 1 referred me to the case of S v Swart 1999

(2) SACR 380 (C) where it was stated that 'not all murders carry the same moral blameworthiness, and it is to say that there is a difference even in the heart of darkness'. This court must state that this deceased was in the company of both

accused for a considerable amount of time. Already at the time the accused exited the gate of the deceased's complex, accused 1 saw that the deceased could not breathe. Yet irrespective of this observation, the deceased was left with a dish cloth in her mouth. In addition, her hands were tied behind her back to prevent her from removing the cloth from her mouth. There is nothing about this murder that makes it in anyway less serious than any other murder. In fact, this form of smothering or gagging is nothing more than a planned torture of the deceased. Even though the accused were found guilty of murder on the basis of *dolus eventualis* and not *dolus directus*, I find no basis to find that this gruesome murder and burial of the deceased was any less heinous than other murder cases that are heard in the high court. In fact the only differentiation between a murder where *dolus directus* is the required *mens rea* as opposed to *dolus eventualis*, is that the death itself may have occurred quicker in a situation of *dolus directus* as opposed to *dolus eventualis*.

[27] Although accused's counsel argued that the fact that an accused had intent in the form of *dolus eventualis* rather than *dolus directus* may be a factor to be taken into account in reaching a conclusion that there are substantial and compelling circumstances to depart from the prescribed minimum sentence, so too is the fact, as in the matter in *casu* that the continued and prolonged gagging and smothering of this deceased is a factor to be considered why there are not substantial and compelling circumstances in respect of count 1. To add to this, even though the accused were not charged for the assault of the young children of the deceased, the testimony of the deceased's father states that the children of the deceased were also assaulted during the kidnapping of the deceased. This was not disputed during cross-examination and neither did the accused

express any remorse towards the deceased's children. The horrific circumstances that prevailed on that early morning on this

deceased's household cannot be over-looked by this court.

[28] Although remorse is definitely a factor that this court should consider when imposing a sentence, there is a difference between

regret for what you have done as opposed to genuine remorse that comes from your heart. This court observed the two accused when the deceased's father and sister testified. Both the deceased's father and sister continually broke down crying and battled to give their evidence as to how much this tragic event had impacted on their lives. Both accused on the other hand merely looked on. At no stage did this court observe any grief on the part of both accused for the crimes they had committed. Had the accused been under such shock, immediately after the death of the deceased, they would not have smoked dagga and consumed liquor regardless of what had happened. It is noteworthy that accused 2 disputed the confession that he made and never pleaded guilty to the charges 1,2,3,4 and 6. If he truly wanted to show remorse, he would not have placed the court through a trial within a trial to eventually find that the confession was correctly made. In fact, accused 2 later admitted the confession was made according to all the correct procedures.

- [29] Any offence which has the effect of holding a human life cheap and involves any loss of life is serious. This sentiment should be reflected in the sentence imposed by the courts.
- [30] Accused 1 and 2 knew that if one cannot breathe you will die. The fact that neither the deceased's husband or brother paid any ransom allows this court to find that the accused wanted the deceased to suffer. This was a revenge attack. It was stated by both Mohammed Genner and accused 1 in his confession that if no one paid money, someone would die. No money was received and the accused left this deceased to die like an animal.
- [31] The charge of murder on count 1 falls under the provisions of part 1 of schedule 2 in that the offence was committed by a group of persons acting in the execution or furtherance of a common purpose.
- [32] This Court finds there are no substantial and compelling circumstances present in respect to the accused that warrants a departure from the prescribed statutory norm in respect to count one.
- [33] Both accused have been in custody since 22 and 27 April 2021 respectively. In the case of *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014) it was held 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 and whether it is proportionate to the crimes committed. It was further stated in this case that the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence is a just one.
- [34] In respect to the second charge of housebreaking, the third charge of robbery and the fourth charge of kidnapping, this court finds they are inextricably linked in that they happened almost at the same time or at most, in a very short period from each other.

- [35] Accused 1 pleaded guilty to count 2,3,4 and 6 whereas accused 2 pleaded not guilty to all counts. It is so that in respect to count 3 there is a minimum sentence applicable in that the offence of robbery involved the taking of a motor vehicle, accordingly, count 3 falls under the provisions of schedule 2 part 11 and the minimum prescribed sentence is 15 years imprisonment applicable for a first offender of robbery and a sentence of twenty years imprisonment applicable in respect to a second offender.
- [36] This court has considered the effect of a previous conviction of robbery which accused 1 has and even though it was committed in 2009 it remains a previous conviction. Accordingly, in respect to accused 2 the sentence of 20 years imprisonment should apply. However, this Court has taken into consideration that accused 1 did plead guilty in respect to count 3 and this court finds it is a substantial and compelling circumstance not to impose a term of 20 years imprisonment. Accordingly, in respect to count 3 accused 1 is sentenced to 17 years imprisonment. Accused 2 is sentenced on count 3 to 15 years imprisonment.
- [37] In respect to count 2, for the charge of housebreaking, both accused are sentenced to 5 years imprisonment. In respect to count 4 both accused are sentenced to 2 years imprisonment.
- [38] The cumulative effect of sentences has been considered by this court and so has the period of detention pending the finalisation of this matter been considered by the court.
- [39] This court orders that the sentence imposed on count 2 and 4 in respect to accused 1 will run concurrently with the sentence of 17 years imprisonment imposed on count 3. In respect to accused 2, the sentences imposed on counts 2 and 4 will run concurrently with the sentence of 15 years imprisonment imposed on count 3.
- [40] In respect to count 5 accused 1 is sentenced to 3 years imprisonment.
- [41] In respect to count 6, it is clear that the hiding and burial of the deceased in the ground led to an increased state of decomposition of the body complicating the ability to determine the cause of death of this deceased. Any form of defeating the ends of justice needs to be punished harshly. In respect to count 6 both accused are sentenced to 6 years imprisonment.
- [42] In the result the following order is made:

Count 1

Both accused are sentenced to life imprisonment

Count 2

Both accused are sentenced to 5 years imprisonment

Count 3

Accused 1 is sentenced to 17 years imprisonment

Accused 2 is sentenced to 15 years imprisonment

Count 4

Both accused are sentenced to 2 years imprisonment.

Count 5

Accused 1 is sentenced to 3 years imprisonment

Count 6

Both accused are sentenced to 6 years imprisonment

Accused 1

In terms of s280(2) of the Criminal Procedure Act, the sentence of 5 years imprisonment on count 2, the 2 years imprisonment in respect to count 4 will run concurrently with the 17 years imprisonment imposed on count 3.

Accused 2

In terms of s280(2) of the Criminal Procedure Act, the sentence of 5 years imprisonment on count 2, the 2 years imprisonment in respect to count 4 will run concurrently with the 15 years imprisonment imposed on count 3.

[43] In terms of section 103 (1) (g) of Act 60 of 2000, both accused are declared unfit to possess a firearm.

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JUDGE OF THE HIGH COURT

Date sentence imposed: 18 February 2022

Appearances:

On behalf of the State Adv Le Roux

On behalf of Accused 1 Adv Milubi

On behalf of Accused 2 Adv Monare

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