

SOUTH AFRICA / JUDGMENT

S v Rankali and Others (Sentencing) (KS 3/2019) [2025] ZANCHC 26 (11 March 2025)

[2025] ZANCHC 26

COURT

Northern Cape High Court, Kimberley

BEFORE

Lever

CASE / FILE NUMBER

KS 3/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Reportable:

YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates:

YES/NO

Circulate to Regional Magistrates: YES/NO

Case No: KS 3/2019

In the matter between: THE STATE and MORAPEDI RANKALI Accused 1 MOTLALENTWE QHAUTSE Accused 2 LIZBETH NDLALA Accused 3 THEMBA LAWRENCE MAJA Accused 4 OUPA JEFFREY MAHOMANE Accused 5 SAMSON SAM MBOKANE Accused 6 JABULANI WILSON ZUMA Accused 7

Coram: Lever J

JUDGMENT ON SENTENCE

Lever J

1. On the 28 January 2025, the seven accused in this matter were all convicted of various offences arising from an attack and robbery on the farm of the deceased, Piet Arnold Els, during the early morning hours of the 24 January 2018.
2. All seven of the accused now stand to be sentenced on their respective convictions.
3. On the 28 January 2025 accused one was convicted of theft. A competent verdict in respect of the charge in count 1.
4. Accused two was convicted of: Housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1); sexual assault (count 3); and murder (count 4).
5. Accused three was convicted of housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1).
6. Accused four was convicted of housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1).
7. Accused five was convicted of: Housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1); sexual assault (count 3); and murder (count 4).
8. Accused six was convicted of housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1).
9. Accused seven was convicted of housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1).
10. The exercise of sentencing a person convicted of a crime is an exercise of finding the correct balance between several competing factors and considerations.
11. Accordingly, the proper starting point is what has become known as the triad, being: the considerations and circumstances relevant to the particular crime, the circumstances of each individual criminal involved, and the interests of society. This is set out in the classic case of *S v ZINN*[1] as the crime, the criminal and the interests of society.
12. Also, one considers whether, on the facts of the case before the court, the sentence to be imposed should be blended with a measure of mercy. The extent to which mercy is appropriate has been dealt with in the cases of *S v Rabie*[2] and *S v Du Toit*[3].
13. In respect of ‘mercy’ being a consideration and the manner and extent to which it should be applied, it is useful to quote the views of Corbett JA (as he then was) in the case of *S v Rabie*, where his views were set out as follows:

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand surrender to misplaced pity. While not flinching from firmness,

where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.”[4]

14. Further, one should also consider the main purposes of punishment, being deterrent, preventative, rehabilitative, and retributive effects of such punishment. There is no pre-set hierarchy in relation to these purposes of punishment. The facts of the relevant case will bring one of these purposes of punishment to the fore. Sometimes, the facts of the case concerned, will bring a combination of these objects of punishment to the fore.
15. When considering the personal circumstances of the offender as contemplated in the Zinn case, it is proper to consider whether the

offender has shown remorse. The importance of the distinction between ‘regret and remorse’ has been set out by Ponnai JA in the case of *S v MATYITYI*[5].

16. Certain of the accused have been convicted of crimes that carry with such convictions certain prescribed minimum sentences as is contemplated in sections 51(1) and 51(2) of the Criminal Law Amendment Act[6] (CLAA) this Act is colloquially known as the Minimum Sentence Act.
17. In circumstances where the accused are convicted of crimes covered by the CLAA where minimum sentences are prescribed. The prescribed sentences must be applied unless the court finds ‘substantial and compelling circumstances’ to depart from the prescribed minimum sentence as contemplated by section 51(3)(a) of the CLAA.
18. The ‘determinative test’ as set out by the Supreme Court of Appeal (SCA) in the case *S v Malgas*[7] at paragraph [25] sub-paragraph I, is the test to be applied to determine if substantial and compelling circumstances are present in any individual case. I will quote paragraph [25] of the Malgas judgment in its entirety as it provides valuable insight into the approach to be taken in the application of minimum sentences.

“[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

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 they 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.[8] (my emphasis)

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.”[9]

19. It is clear from the summary of the findings of the SCA in the Malgas judgment as set out in paragraph 25 thereof, which is quoted above, that all aspects of sentencing are important to determine whether on the facts of this case there are grounds to depart from the statutorily prescribed minimum, on the basis that there are 'substantial and compelling' grounds to do so. That in the application of this determinative test, the cumulative effect of all the said aspects 'determines' whether 'substantial and compelling' grounds have been established.
20. Accordingly, the triad of the crime, the criminal, and the interests of society, as set out in the classic case of *S v ZINN*[10] is the proper point of departure in this exercise.
21. Turning now to the said triad as it is applicable to accused one. Accused one has been convicted of the offence of theft. Theft being a continuing offence, he assisted his brother in concealing the deceased's ring. Viewing the evidence holistically accused one had knowledge of the robbery, but there was no evidence connecting him to the relevant robbery. There is no doubt that he knew that the broken ring he had taken possession of on behalf of his brother originated from the said robbery. When he took possession of the ring it was broken into two pieces and the diamond was missing. The evidence established, for the gold content alone, the ring still had significant value. The evidence established that even in that condition, the ring was worth in the region of R30 000.00 (thirty thousand Rand).
22. Accused one chose not to give evidence in mitigation of sentence. His advocate, Mr Schreuder, placed his personal circumstances on the record from the Bar. The personal circumstances of accused one are: He was born in Lesotho on the 16 July 1993; He attended school until form E. Mr Schreuder advises that form E equates to our grade 12; He trained as a plumber in Lesotho, but never practiced or traded as a plumber; He obtained a code 14 heavy vehicle licence in South Africa in 2016; He has no permanent employment, but from time to time he works for a certain Mr Roger Celluda in driving a heavy duty truck; He has no fixed income; He is not married and is not in a romantic relationship; He has no children; He lives in Kimberley; He has no previous convictions; and he spent two years and three months in prison awaiting trial and while the trial proceed when he ultimately was given bail.
23. Mr Schreuder submitted on behalf of accused one that when the police arrived, he cooperated with them and immediately informed them who had given him the ring. Mr Schreuder informed the court that accused one wished to develop his skills as a code 14 truck driver. He was a first offender and had the potential to avoid a life of crime and that he had already spent two years and three months incarcerated whilst on trial before he was released on bail.
24. Mr Cloete who appeared for the State in this matter conceded that the position of accused one was different from that of the other accused. His moral blameworthiness is substantially less than that of the other accused.

25. Taking into account that accused one has already been incarcerated for a period of two years and three months before he was granted bail in this matter. I believe a wholly suspended sentence would be appropriate in all the circumstances of this case. A sentence of this nature will also assist accused one to rehabilitate himself and avoid a life of crime as the consequences of a relapse should motivate him to steer away from criminal activity. In all the circumstances of the case as are applicable to accused one I believe a sentence of 3 (three) years imprisonment, wholly suspended for a period of 5 (five) years on condition that he is not involved in a crime involving theft or dishonesty for which a period of direct imprisonment is imposed during the period of suspension, is the appropriate sentence.
26. Turning now to consider an appropriate sentence for accused two. Accused two has been convicted of: Housebreaking with the intention to commit robbery and robbery with aggravating circumstances (count 1); sexual assault (count 3); and murder (count 4).
27. The victim impact reports of Ms A and the son of the deceased, Petrus Arnoldus Els, were handed in and form part of the record by agreement as exhibits “LL” and “KK” respectively. The testimony of Ms A as well as the victim impact report filed by her, being exhibit “LL” establish that the crime of robbery was exceptionally violent. The deceased was immediately hit with an iron bar when the perpetrators, accused two among them, entered the bedroom where the deceased and Ms A had been sleeping. Both the deceased and Ms A were violently assaulted, including being burned with a clothes iron. Ultimately, the deceased died in hospital from the effects of such assault.
28. The victim impact report of the deceased’s son Petrus Arnoldus Els shows that he is having difficulty in coming to terms with the violent attack on his father and the nature of the death his father suffered.
29. The victim impact report of Ms A showed that she felt powerless during the attack. She witnessed the violent attacks on the deceased and endured violent attacks on her own person. She also suffered sexual assaults and the secondary trauma of having to give evidence of such assaults and endure cross examination on her evidence in court.
30. All of this is a summary of the evidence in relation to the crimes for which accused two must be sentenced.
31. In respect of the conviction relating to the robbery with aggravating circumstances and the conviction in relation to the murder, these both carry minimum prescribed sentences under the CLAA.
32. The conviction for robbery with aggravating circumstances is governed by sub-section 51(2) (a) of the CLAA, as it falls under Schedule 2 Part II. This sub-section prescribes a sentence of not less than fifteen (15) years imprisonment for a first offender. A second offender is to be sentenced to a period of not less than twenty (20) years imprisonment and a third or subsequent offender to a period of imprisonment of not less than twenty-five (25) years imprisonment.

33. The conviction for murder in this case falls under sub-section 51(1) as the murder of the deceased falls under the definition of murder in Schedule 2 Part I and in particular paragraph (c)(ii) of such definition. Accordingly, the prescribed minimum sentence is life imprisonment.
34. As is set out above these minimum prescribed sentences are to be imposed unless 'substantial and compelling circumstances' exist that justify the imposition of a lesser sentence.
35. Accused two did give evidence under oath in mitigation of sentence. It is clear from his evidence that he accepts no responsibility for any aspect of his conduct that led to his convictions.
36. The personal circumstances of accused two as emerged from his testimony are: He is 42 years old; He is not married; He has one son who is currently 12 years old; His son is in school, but he has no knowledge as to which school his son attends or what grade he is currently in; The child stays with his unemployed mother in Kimberley; His mother supports herself from a State Pension and supports the child from a Government Grant; He has not seen the child's mother since he was arrested in 2018; His highest level of education is standard 5; He completed standard 5 in the year 2000; It was established that accused two was already serving a sentence when he was convicted in this matter; before his conviction for which he is already serving a sentence he was employed as a worker in the building industry; He earned seven hundred and fifty Rand (R750.00) per week; He shared this salary with his mother who used it to support his child; He also had part time employment on the weekend working as security at a tavern.
37. Accused two acknowledged two previous convictions. The first for assault with intent to do grievous bodily harm. The conviction for assault GBH occurred on the 18 December 2014. On this conviction he was sentenced to 12 (twelve) months imprisonment, which was wholly suspended for a period of 4 (four) years. On the 24 August 2021 accused two was convicted of robbery and he was sentenced to 10 (ten) years imprisonment. The robbery concerned was committed on the 6 January
2016. However, having regard to the date of conviction Mr Cloete who appeared for the State conceded that in the light of fact that the present crime was committed on 24 January 2018, that this conviction should not be counted for the present sentencing proceedings. Accordingly, for the present purposes accused two is a second offender subject to a minimum sentence of twenty (20) years in respect of count 1, the robbery with aggravating circumstances conviction.
38. In respect of the murder conviction (count 4), based on what is already set out above there is a minimum prescribed sentence of life imprisonment.

39. No substantial and compelling circumstances have been established to depart from the relevant prescribed minimum sentences and indeed I can find no substantial and compelling circumstances to depart from the said prescribed sentences.
40. It is clear from the evidence before the court that accused two has a history of violence. The assaults during the robbery, which also led to the conviction for murder were extremely violent. It is clear from the evidence that the deceased suffered a long and agonising death. This is not an appropriate case to show mercy. The prescribed minimum sentences are fitting and appropriate and serve the public interest in these circumstances.
41. The sexual assault conviction in respect of count 3 also calls for a period of direct imprisonment. Considering all the factors set out above I believe a sentence of five years would be an appropriate sentence in all the circumstances.
42. Having regard to the practicalities of a life sentence on count 4 the sentences in respect of count 1 and count 3 will run concurrently with the life sentence in respect of count 4.
43. Accused three has been convicted of the crime of housebreaking with intent to rob and robbery with aggravating circumstances. The extreme violence of the robbery has already been described above. It was clear the robbery was planned well in advance. Each of those convicted had a role to play to ensure the success of the robbery. She is a traditional healer. She was part of a team of three traditional healers, which included her husband (accused four) and accused six. Their role as traditional healers was to use their powers to ensure the success of the criminal enterprise. Accused three and accused four recruited accused five to represent them, as it were, in the execution of the robbery itself. Aside from that accused three, four and six played a comparatively minor role in the planning and execution of the robbery.
44. However, it is important to note and not lose sight of the fact that the evidence of accused five shows that he informed accused three, four, six and seven of the details of the robbery and the assault on Ms A and the deceased, who at the time of the robbery were 67 and 86 years old respectively. Despite this none of accused three, four, six and seven disassociated themselves from the robbery and all of them kept the loot that was their share of the proceeds of the robbery.
45. Accused three did give evidence under oath in mitigation of sentence. Her personal circumstances are as follows: She is presently 61 years old and she is from Mpumalanga; She is married by customary rites to accused four but they are presently separated; They had been married for 21 years; She and her husband (accused four) were arrested together; She has three children from a previous relationship; She has five grandchildren; Two of her children still live at her home together with her grandchildren; Her eldest daughter, who is 40 years of age is employed; Her other two children are not employed; She never attended school; She is not working and receives a State old age pension; She states that she took care of her children and grandchildren; Her grandchildren receive child grants; She states that she also worked as a street vendor selling tomatoes and cabbages; She states that since her

arrest she suffers from high blood pressure, a heart condition and arthritis; She has both medication prescribed by medical doctors and traditional medicine; She is at present receiving medication from the prison clinic; She is a first offender; She attended her trial while being out on bail; For each sitting of the court during this trial she had to travel from Mpumalanga, she had no formal accommodation in Kimberley and had to sleep rough at the taxi rank; and She attends the Zion Church.

46. Mr Diba, who represented accused three, argued that I should consider a sentence of correctional supervision either under section 276(1)(h) or (i) of the Criminal Procedure Act[11]. Having regard to the prevalence of robbery within the jurisdiction of this court and the nature and extent of the particular crime in question I do not believe correctional supervision would be an appropriate sentence at all. In all the circumstances of this case, it would not serve the public interest.
47. However, I must have regard to the ‘determinative test’ set out in the Malgas case, quoted above, to establish whether the statutorily prescribed minimum sentence of 15 years imprisonment is appropriate in the circumstances of this case.
48. Having regard to the fact that accused three is a first offender in the absolute sense of the term. Her first brush with the law was at a relatively advanced age. She is currently 61 years of age. She has relatively serious medical conditions, which appear to be properly managed in her current circumstances. She played a lesser role in the planning and execution of the robbery in this case. All these factors would cumulatively render the statutorily prescribed minimum sentence of 15 years imprisonment unfair and unjust on the accused. Accordingly, in terms of the ‘determinative test’ set out in the above – quoted Malgas case these factors constitute ‘substantial and compelling circumstances’ to depart from the statutorily prescribed minimum sentence of 15 years.
49. Taking all the relevant circumstances into account I believe a sentence of ten (10) years imprisonment is the appropriate sentence to impose on accused three.
50. Accused four was convicted of the same crime as accused three. The circumstances of the crime in question are identical. There is no need to set out the facts and circumstances of the crime again.
51. Accused four did not give evidence under oath in mitigation of sentence. Mr Schreuder who also represented accused four placed the personal circumstances of accused four on the record from the Bar. The personal circumstances of accused four are as follows: He was born on the 13 February 1962 and he turned 63 in February of this year; He attended school until standard 4; He is married to accused three in a customary union; He has one child, apparently from a previous relationship; This child is a daughter who is presently 19 years old; Accused four’s daughter lives in Carltonville with the mother of accused four; His daughter attends school and is presently in standard 10; Accused four has not had permanent work since his 60th birthday; He has no previous convictions; and Mr Schreuder indicated that when he came to Kimberley for the purposes of the crime presently relevant,

he was merely a learner traditional healer.

52. The contention that accused four was a learner traditional healer at the relevant time conflicts with the evidence of accused three. However, in my view accused four was not under the influence of accused three. This is illustrated by the fact that accused four was involved with recruiting accused five to represent him and accused three in the execution of the relevant robbery. Accused four was also in contact with accused five during the execution of the relevant robbery.
53. Considering the facts of the matter as they apply to accused four to determine if there are substantial and compelling circumstances to depart from the statutorily prescribed fifteen (15) year minimum sentence. The circumstances are similar to those applicable to accused three. Accused four is 63 years old. He is also a first offender in the absolute sense of the term. Accused four played a relatively minor role in the organising and execution of the robbery concerned. An application of the relevant determinative test shows that there are substantial and compelling circumstances to depart from the prescribed minimum sentence of fifteen
- (15) years imprisonment.
54. However, the public interest still demands a lengthy term of direct imprisonment. In my view ten (10) years imprisonment would be appropriate and would adequately serve the public interest in all the relevant circumstances.
55. Accused five was convicted of: Housebreaking with intent to rob and robbery with aggravating circumstances (count 1); sexual assault (count 3); and murder (count 4). The circumstances of all these crimes are identical to those already set out in respect of accused two. Accordingly, there is no need to repeat such facts and circumstances.
56. Accused five did not give evidence under oath in mitigation of sentence. Mr Pretorius who represented accused five placed the personal circumstances of accused five on the record from the Bar. The personal circumstances of accused five are as follows: He was born on the 28 February 1976; He attended school until grade 9 and was forced to leave school due to financial circumstances; He trained as a security guard and completed a four-month course. He has worked for various employers in the security industry and earned a salary in the region of R2500.00 (two thousand five hundred Rand) per month; He has two (2) wives and is in a customary union with both of them; He has been married to his first wife for a period of fifteen (15) years and he has been married

to his second wife for a period of ten (10) years; He has two (2) children with his first wife, both daughters who are respectively

twenty-two (22) and twenty (20) years old; He has three (3) children with his second wife all daughters who are respectively fourteen

(14); twelve (12) and six (6) years old; whilst he was employed he maintained both these families, he paid R500.00 (five hundred Rand) per month to his first wife and R1000.00 (one thousand Rand) per month to his second wife; He owns a house in Pienaar, Mpumalanga

worth approximately R30 000.00 (thirty thousand Rand); both of his parents are deceased; he has one younger brother; He denies

involvement in the robbery and accepts no responsibility for any of the crimes involved; and He was arrested in 2020 and has spent more than four (4) years in custody awaiting trial in this matter.

57. On the version of accused five he was not involved in the robbery or the assaults and at some point, he disassociated himself from the robbery. This version was rejected for the reasons set out in the judgment that led to his conviction. I can mention at least that after this purported disassociation he collected and appropriated to himself his share of the loot associated with the robbery concerned.
58. Accused five is not a first offender when it comes to the consideration of an appropriate sentence in respect of the robbery with aggravating circumstances conviction. It is common cause between the State and accused five that he has one previous conviction that is relevant. This means that the minimum prescribed sentence is twenty years imprisonment on count 1.
59. The victim impact reports and the evidence adduced at the trial show that the robbery and assaults carried out were exceptionally violent. The victims were aged respectively as 67 (sixty-seven) and 86 (eighty-six) years old at the relevant time. Accused five was one of the intruders and on the evidence of Ms A, they all actively participated in the assaults of both Ms A and the deceased.
60. In the case of accused five no substantial and compelling circumstances were established to depart from the prescribed minimum sentences and I could not find any I find that the minimum prescribed sentences of 20 (twenty) years on count 1 and life imprisonment in respect of the murder conviction on count 4 are both appropriate and called for in the relevant circumstances.
61. In a case where life imprisonment is the sentence imposed the period spent in custody awaiting trial fades into the background and it does not assist accused five.
62. In respect of the sexual assault conviction, I believe the appropriate sentence to be five years direct imprisonment.
63. As a life sentence is imposed in respect of the murder charge (count 4) it is appropriate to order that the sentences in respect of count 1 and count 3 will run concurrently with the life sentence imposed in respect of count 4.

64. Turning now to the sentence to be imposed on accused 6. Accused 6 was one of the traditional healers who was convicted of housebreaking with intent to rob and robbery with aggravating circumstances.
65. Save for the recruitment of accused five by accused three and four the circumstances of the crime involving accused six are the same as those for accused three and four. Accordingly, there is no need to set these facts and circumstances out again.
66. Accused six did give evidence under oath in mitigation of sentence. His evidence was to the effect that: He is 68 (sixty-eight) years old; He lives in Mpumalanga; he has been married for many years but his wife has been hospitalised for the last two years
- (2) with cervical cancer; This is his second wife, the first wife passed away; He has had children with both wives; He has 14 (fourteen) children; He can't remember their exact ages but he has 4 (four) children under 18 (eighteen) years of age; These four children are still at school; His highest level of education was grade 2; He suffers from a medical condition where he urinates blood on occasion and one of his testicles is enlarged; He needs to walk with the assistance of a cane and cannot stand for extended periods; He is receiving treatment for this condition in prison; He was on bail during the proceedings and save for when his medical condition did not allow him to travel from Mpumalanga he always attended these proceedings; As was the case for accused three and four accused six also slept rough at the taxi rank; and accused six accepts no responsibility for the crime he has been convicted of.
67. Having regard to the relatively advanced age of accused six, the fact that he is a first offender in the absolute sense of the phrase, the medical condition of accused six, and the relatively minor role he played in the planning and execution of the said robbery, taken cumulatively, these factors do constitute 'substantial and compelling reasons' to depart from the prescribed sentence of fifteen (15) years imprisonment. Taking all of the relevant considerations into account I believe a sentence of ten
- (10) years imprisonment will achieve the correct balance in the circumstances and serve the interests of society.
68. Accused 7 has also been convicted of housebreaking with intent to rob and robbery with aggravating circumstances (count 1). Save for the fact that the cell phone evidence and the evidence of accused five show that accused 7 played a greater role in the organising and execution of the robbery than the traditional healers, the circumstances of the crime were the same as already set out in respect of accused three, four and six. There is no need to repeat these particulars.
69. Accused 7 did not give evidence under oath in mitigation of sentence. Mr Mogwera, who represented accused 7, placed his personal circumstances on the record from the Bar. The personal circumstances of accused 7 were stated as: His date of birth is the 28 December 1959; He is currently 67 (sixty-seven) years old; He has 7 (seven) children ranging in age from 35 (thirty-five) to 5 (five) years old; the two youngest children are still in school being in

grade 1 and grade R; His highest level of education is grade 12; He is not a first offender; He is a diabetic; and He spent just short of four (4) years in custody before conviction in these proceedings.

70. Accused 7 acknowledged 3 (three) previous convictions that would be relevant to the sentencing exercise contemplated by section 51(2)(a) of the CLAA. However, Mr Mogwera argued that as two of these convictions for robbery pre-date the CLAA that if this court takes such convictions into account, it would be an impermissible retrospective application of that Act. In my view this is not a valid argument. The CLAA clearly contemplates taking into account convictions that pre-date the act itself. Accordingly, taking such convictions into account is merely an application of the CLAA and not an unlawful retrospective application of the CLAA.
71. Having regard to the relevant three previous convictions the minimum prescribed sentence is not less than 25 (twenty-five) years imprisonment.
72. This court must now consider whether there are substantial and compelling circumstances to depart from this prescribed 25 (twenty-five) year minimum sentence. The process is as already set out above. The relevant factors applicable to accused seven are: his relatively advanced age of being sixty-seven years old; the fact that he has already spent just shy of 4 (four) years in custody prior to and during these proceedings; and the fact that he is a diabetic. Cumulatively, these do constitute substantial and compelling circumstance to depart from the prescribed minimum sentence of 25 years imprisonment.
73. Taking all of the relevant factors into account which includes the fact that when the present crime was committed accused seven was out on probation and that such probation is set to last until 2037 and that the previous convictions show a propensity for violence, I believe a long term of imprisonment is still called for and in the public interest. In my view the appropriate sentence to be imposed on accused seven is 20 (twenty) years imprisonment.

Accordingly, the following sentences are imposed:

- 1) Accused One:
 - a. On the conviction for theft, 3 (three) years imprisonment, wholly suspended for a period of 5 (five) years on condition that he is not involved in a crime involving theft or dishonesty for which a period of direct imprisonment is imposed during the period of suspension.
- 2) Accused Two:
 - a. On count 1, the conviction for housebreaking with intent to rob and robbery with aggravating circumstances, 20 (twenty) years imprisonment.
 - b. On count 3, the conviction for sexual assault, 5 (five) years imprisonment.
 - c. On count 4, the conviction for murder, life imprisonment.

- d. The sentences in respect of count 1 and count 3 are to run concurrently with the life imprisonment sentence imposed in respect of count 4.
- 3) Accused Three:
 - a. On count 1, the conviction for housebreaking with intent to rob and robbery, 10 (ten) years imprisonment.
- 4) Accused Four:
- 5) Accused Five:
- 6) Accused Six:
- 7) Accused Seven:
 - a. On count 1, the conviction for housebreaking with intent to rob and robbery, 20 (twenty) years imprisonment.

L.G. Lever

Judge

Northern Cape Division, Kimberley

Representation: For The Applicant: ADV H CLOETE Instructed by: DIRECTORS PUBLIC PROSECUTIONS For The Accused 1&4: ADV J SCHREUDER Instructed by: LEGAL AID SA (JUDICARE) For The Accused 2, 3 & 6: ADV T DIBA Instructed by: LEGAL AID SA (JUDICARE) For The Accused 5: ADV K PRETORIUS Instructed by: LEGAL AID SA (JUDICARE) For The Accused 7: MR T MOGWERA Instructed by: LEGAL AID SA (JUDICARE) Date of Sentence: 11 March 2025

- [1] 1969 (2) SA 537 (A).
- [2] 1975 (4) SA 855 (A) at 862G and particularly at 866A – C.
- [3] 1979 (3) SA 846 (A) at 857H to 858B.
- [4] S v Rabie 1975 (4) (AD) at 866A to C.
- [5] 2011 (1) SACR 40 (SCA) AT 47a-d.
- [6] Act 105 of 1997.
- [7] 2001 (1) SACR 469 (SCA) at para [25] I.
- [8] This is the ‘determinative test’. The determinative test has also been set out in slightly more detail and in different

language in paragraph [22] of the Malgas judgment.

- [9] Malgas., above at para [25].

- [10] 1969 (2) SA 537 (A).

[11] Act 51 of 1977.

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