

SOUTH AFRICA / JUDGMENT

S v Shezi (SS76/2023) [2024] ZAGPJHC 839 (26 August 2024)

[2024] ZAGPJHC 839**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela

CASE / FILE NUMBER

SS76/2023

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****1.****REPORTABLE:**

NO

2.

OF INTEREST TO
OTHER JUDGES: NO

3.

REVISED: NO

26

August 2024

CASE

NO: SS76/2023

In

the matter between: THE
 STATE
 And
 SHEZI,
 NDUNDUZO NDUMISO
 Accused

JUDGMENT

Mdalana-Mayisela J

Introduction

- [1] The accused is charged in count 1 with murder of Mhlopheki Petrus Mazibuko (“the deceased”), read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, as amended (“the CLAA”) and further read with section 258 of the Criminal Procedure Act 51 of 1977 (“the CPA”); count 2 with robbery with aggravating circumstances as defined in Section 1 of the CPA read with section 51(2) of the CLAA and further read with section 260 of the CPA; count 3 with contravention of section 4(1)(a), read with sections 1, 103, 117, 120(1)(a), 121, and schedule 4 of the Firearm Control Act, 60 of 2000 and further read with section 250 of the CPA – unlawful possession of a fully automatic firearm; and count 4 with contravention of section 90, read with sections 1, 103, 117, 120(1)(a), section 121 read with schedule 4 of the Firearm Control Act and further read with section 250 of the CPA – unlawful possession of ammunition.
- [2] In count 1, the state alleged that on or about 20 December 2022 and at or near 3[...] M[...] street, T[...], E[...] N[...], the accused acting in concert with persons unknown to the state, in furtherance of a common purpose, did unlawfully and intentionally kill the deceased, an adult male person.
- [3] In count 2, the state alleged that upon or about the date and/or near the place mentioned in count 1, the accused, acting in concert with persons unknown to the state, in the furtherance of a common purpose, did unlawfully and intentionally assault the deceased and did then and there and with force take out of his possession a 9mm parabellum calibre Beretta model, semi-automatic pistol with serial number A[...], being his property or property in his lawful possession, aggravating circumstances as defined by Section 1 of the CPA being present.
- [4] In count 3, the state alleged that on or about the date and/or near the place mentioned in count 1, the accused did unlawfully and intentionally possess an automatic assault rifle, of which the further particulars are unknown to the state, without being the holder of a license, permit or authorization in terms of Act 60 of 2000 to possess such fully automatic firearm.

- [5] In count 4, the state alleged that upon or about the date and/or near the place mentioned in count 1, the accused did unlawfully and intentionally possess at least one 5,56 x 45 mm calibre cartridge, without being the holder of a license in respect of a firearm capable of discharging that ammunition; a permit to possess ammunition; a dealer's license, manufacturer's license, gunsmith's license, import, export or transit permit or transporters, permit issued in terms of this Act; or were otherwise authorized to do so.
- [6] The accused is in custody. He is legally represented by Mr T Hadebe. The parties have negotiated and entered into a written plea and sentence agreement in terms of section 105A(1) of the CPA ("the agreement") before the accused pleaded. The agreement is signed by all the relevant parties. From the information provided by the parties, I am satisfied that the requirements of subsection (1)(b)(i) and (iii) were complied with before the agreement was concluded.
- [7] I am also satisfied that before the agreement was concluded the accused was informed of his rights to be presumed innocent until proved guilty beyond reasonable doubt; to remain silent and not to testify during the proceedings; and not to be compelled to give self-incriminating evidence.

Conviction

- [8] At the commencement of the proceedings in court, the accused was required to plead to all the charges. He pleaded guilty to all of them. His legal representative confirmed that the plea was in accordance with his instructions. The court ordered that the contents of the agreement be disclosed in court. Thereafter, the accused, upon being questioned by the court, confirmed the terms of the agreement and admissions made by him in the agreement.
- [9] Briefly, the admissions made by the accused in the agreement are as follows. On 20 December 2022, the accused, acting in concert with persons unknown to the state, in furtherance of a common purpose, formed an agreement, which included a monetary compensation to kill the deceased at his residence in a drive by shooting. The deceased was unknown to the accused. He was first shot by a co-perpetrator and thereafter by the accused. Whilst he was lying on the ground the accused robbed him of his 9mm parabellum calibre Beretta model, semi-automatic pistol with serial number A[...]. Thereafter, the accused and his co-perpetrator fled the scene. The deceased died at the scene as a result of multiple gunshot wounds.
- [10] The accused further admitted that at all relevant times he intended to kill the deceased, and he knew that murder, robbery with aggravating circumstances, unlawful possession of firearm and ammunition are offences punishable by law and he acted in accordance with such knowledge. He also admitted that he had no right to act in the manner he did and therefore he has no excuse for his actions. He also admitted the chain evidence, photo album and contents of the postmortem report.

[11] I am satisfied that the accused admitted the allegations in the charges to which he has agreed to plead guilty. I am also satisfied that the agreement was entered into freely and voluntarily in his sound and sober senses and without having been unduly influenced. I find that the accused is guilty of all the offences in respect of which the agreement was entered into.

Sentence

[12] Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender,

the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions (see *S v RO and Another*[1]). In imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused's particular circumstances at the time of the offence.[2]

[13] In applying the abovementioned principles the court must consider whether the agreed sentence is just. The state did not prove previous convictions. The parties informed the court that before agreeing on a sentence, they considered the seriousness of the offences, interests of the community and personal circumstances of the accused.

[14] The accused has been charged in terms of the provision of section 51(1) and (2) of the CLAA which requires the court to impose the prescribed minimum sentences applicable to the relevant offences unless the court is satisfied that there are substantial and compelling circumstances warranting deviation from the prescribed minimum sentences. The accused's personal circumstances are as follows. He is the first offender. He was born on 2 June 1994 in Msinga and is 30 years old. His highest level of education is Grade 10. He is married and his wife is unemployed. He has three children. His two sons are aged 3 and 2, and a daughter is aged 7. He co-owns a taxi with his uncle. He supplemented his income by selling meat to occupants of Tembisa hostel. He earned R10,000.00 per month. He is a bread winner to his family. He also financially supports his elderly parents. He has been in custody since his arrest from 9 March 2022 and has spent approximately 18 months in custody pending the finalization of his matter. He pleaded guilty. He has shown remorse in the agreement. He has reasonable prospects of rehabilitation. He co-operated with the police and made a confession statement. He is willing to testify as a state witness in the trial against his co-perpetrator and has made an affidavit in this regard. In my view the accused's personal circumstances cumulatively taken warrant deviation from the

prescribed minimum sentences.

- [15] The offences that the accused has pleaded guilty are serious and prevalent within this court's jurisdiction. The accused has admitted that the violence used against the deceased was brutal in nature and senseless. His acts were callous and have sparked public outcry and sent shock waves through the community.
- [16] I am satisfied that the agreed sentence reflects the elements of deterrence, prevention, retribution, reformation and a measure of mercy. The state has consulted with the family of the deceased and afforded them the opportunity to make representations before the agreement was concluded. In my view the agreed sentence is just, it fits the accused as well as crimes, it is fair to him, the victims and society. In the premises, the accused is convicted and sentenced in terms of section 105(A)(8) of the CPA.

Order

[17] The following order is made:

1. The accused is convicted on counts 1, 2, 3 and 4 as charged.
2. Count 1: The accused is sentenced to 20 years direct imprisonment.
3. Count 2: The accused is sentenced to 15 years direct imprisonment.
4. Count 3: The accused is sentenced to 5 years direct imprisonment.
5. Count 4: The accused is sentenced to 3 years imprisonment.
6. The sentences imposed in counts 2, 3 and 4 shall run concurrently with the sentence imposed in count 1. The effective sentence is 20 years direct imprisonment.
7. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

MMP Mdalana-Mayisela

Judge of the High Court

Gauteng Division, Johannesburg

Date of delivery: 26 August 2024 Appearances: On behalf of the State: Adv A de Klerk Instructed by: National Prosecuting Authority On behalf of Accused: Mr T Hadebe Instructed by: Hadebe Attorneys

[1] 2000

(2) SACR 248 SCA.

[2] S v Mashego (CC142/2017) [2019] ZAGPPHC 95 (22 March 2019).

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