

SOUTH AFRICA / JUDGMENT

S v Njova and Others (43/2016) [2019] ZAECMHC 45 (23 August 2019) [2019] ZAECMHC 45

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

43/2016

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE HIGH COURT: MTHATHA]

Case No. 43/2016

In the matter between:

IN THE STATE

And

THEMBILE NJOVA ACCUSED

NO. 1

SIBONELO MBIZENI ACCUSED

NO. 2

MFUNDISO MBIZENI ACCUSED

NO.3

MSAWENKOSI STEVE MADIKIZELA ACCUSED

NO. 4

LINDANI CANDLOVU ACCUSED

NO. 5

SENTENCE

JOLWANA J

Introduction

- [1] On 7 June 2019 the accused were convicted of a wide range of serious criminal offences committed between January 2015 and May 2015. These offences were housebreakings, robberies with aggravating circumstances, attempted robbery, attempted murder, murders, possession of firearms and possession of ammunition. The main targets of these criminal offences were rural shops owned or run by foreign nationals who ran such business in different localities in Bizana.
- [2] This court must now consider and mete out an appropriate sentence for each of the accused. The fact that these offences are of an extremely serious nature, committed with extreme violence using lethal weapons makes the task even more onerous. The terror, and the loss of loved ones, the widowing unnecessarily imposed on spouses and the irreplaceable loss of a father are all unimaginable. The affected families and communities all demand and deserve justice which must be reflected in the punishment that is imposed on the accused.

The general approach to sentencing

- [3] The Constitutional Court has had occasion to consider the correct approach to sentencing in the constitutional dispensation which should as it must, find a proper and appropriate balance in light of the obviously conflicting interests and seek to achieve a reconciliation of the often times irreconcilable interests of the accused against those of the community and most importantly the bereaved.
- [4] In *S v M* (Centre for child law as amicus curiae)[1] Sachs J restated and reaffirmed the principles of our law on sentencing when he made the following salutary remarks which will

guide this court in passing an appropriate sentence:

“[10] Sentencing is innately controversial. However, all the parties to this matter agreed that the classic Zinn triad is the paradigm from which to proceed when embarking on the lonely and onerous task of passing sentence. According to the triad the nature of the crime, the personal circumstances of the criminal and the interest of the community are the relevant factors determinative of an appropriate sentence. In S v Banda 1991 (2) SA 352 (B) at 355A Friedman J explained that:

‘The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter-balance between these elements in order to assure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.’

And, as Mthiyane JA pointed out in *Director of Public Prosecutions, KwaZulu Natal v P* 2006 (1) SACR 243 (SCA) at para 13, in the assessment of an appropriate sentence the court is also required to have regard to the main purposes of punishment, namely, its deterrent, preventative, reformatory and retributive aspects. To this the quality of mercy, as distinct from mere sympathy for the offender, had to be added. Finally, he observed, it was necessary to take account of the fact that the traditional aims of punishment had been transformed by the Constitution.”

[5] These sentencing principles remain a lighthouse which helps in navigating through often stormy and imprecise waters which a

sentencing court goes through as it seeks to find an appropriate sentence that fits the accused in light of his specific circumstances, the circumstances in which the crime was committed with due regard to the interests of the society. A very important and indispensable tool is the nebulous discretion left only to the sentencing court, the improper exercise of which could easily result in an unjust sentence that serves neither the accused nor the society.

The crimes and interests of society

[6] The accused organised themselves into a heavily armed small army. The assortment of weapons with which they armed themselves included rifles, pump action machine gun and pistols. These were obviously intended to overcome any resistance and use those weapons and even kill the victims of the armed robberies. The members of the communities who came to the crime scenes to stop the criminals from their criminal enterprise were themselves attacked. The police officers who responded to the victims’ cries for help were also attacked. In all the robberies in this case firearms were used and in some cases with fatal consequences for innocent people resulting in wives being widowed, children being rendered fatherless, families losing their loved ones as well as communities and the country losing valuable and law abiding citizens in senseless criminality.

[7] The first person to be killed was Zolani Benjamin Madikizela who was killed on the 18 February 2015. He died of multiple gunshot wounds. The second person to be killed less than a week later was Pervaiz Ahmed who died of gunshot wounds at his place of work on 22 February 2015. Less than three weeks after Mr Madikizela’s killing Mr Mzomhle Sojeleza Mazimbeni was killed on 6 March 2015. He also died of multiple gunshot wounds. Less than two weeks after Mr Mazimbeni’s killing Mr Zolile Skotoyi was killed on 18 March 2015. Mr Skotoyi also died of gunshot wounds and his firearm was taken from him.

[8] These murders are a grim testimony to the fact that the accused and those who were with them were not heavily armed as a scaremongering

tactic but were prepared to use those weapons. As they committed these robberies the accused were prepared to kill and did

kill, not once but four times in different incidents in a period of about one month from February 2015 to March 2015. Other than these robberies in which the deceased were killed other robberies were also committed with extreme violence as well. The victims were lucky not to be killed in those instances.

[9] In respect of the murder and robbery convictions the prescribed minimum sentences in terms of section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997 are life imprisonment and 15 years imprisonment respectively. This Act also gives the court a discretion to depart from the prescribed minimum sentence where the court finds substantial and compelling circumstances to exist which justify a departure from the prescribed sentences.

[10] The approach to section 51 of the Criminal Law Amendment Act 105 of 1997 has been authoritatively stated in *S v Malgas*[2] as follows:

“A. Section 51 has limited but not eliminated the court’s discretion in imposing sentence in respect of offences referred to in Part 1 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 to elicit a severe, standardized and consistent response from the courts.

D. The specified sentences are not to be departed from lightly or for flimsy reasons. Speculative hypothesis 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 however 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 those 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 of all the circumstances relevant to sentencing must be measured against the composite yard stick (‘substantial and compelling’) and must be such as cumulatively justify a departure from the standardized response that the Legislature had ordained.

H. In applying the statutory provisions it is in appropriately 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 it would be disproportionate to the crimes, 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.

J. In doing so, 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 benchmark which the Legislature has provided.”

Personal circumstances of the accused.

Accused no.1

- [11] Accused no.1 was born on 02 February 1982 and is therefore 37 years old. He is married and has been married since 2007. He and his wife are blessed with two children, Avela a twelve year old boy and Lusimanye also a boy who is four years old. He also has four other children born out of wedlock being two girls and two boys. The youngest of these children is 9 years old and the oldest is 15 years old. Therefore, all his children are still minors and some are still very young and all are still schooling. Before his arrest he was providing for his children and his wife as she was not working. He only has a standard four education as he had to leave school to seek employment so as to assist in maintaining his family. He has a driver's licence and a TLB licence.
- [12] His wife has since left their common home for her maiden home due to hardships. Their homestead valued at about R30 000.00 is left unattended and therefore exposed to being vandalized. His mother is 85 years old and the accused assisted in taking care of her before his arrest. Accused no.1 has been incarcerated, since his arrest four years ago at Bongweni Maximum Security Prison in Kokstad. He has ailments such as flu and there is also a possibility of suffering from arthritis.
- [13] He was arrested for these offences for which he has been convicted on 27 July 2015. He has therefore been in custody for just over four years now. He has no previous convictions and is therefore a first offender. In addition to taking into account these personal circumstances, Mr Linyana, his legal representative who made all these submissions urged me to find the following to be substantial and compelling circumstances: His age which is 37 years now, the fact that he has no previous convictions and is therefore a first offender. He is a family man with children to look after. The fact that he has been in prison since his arrest over four years ago as an awaiting trial prisoner.

Accused no.2

[14] Mr Sodo, the legal representative for accused no.2 submitted that accused no.2 was born on 27 July 1990. He is not married but has one child, a girl born on 01 January 2014. He was arrested on 28 July 2015 at the age of 24 years. He has since spent over four years in prison as an awaiting trial prisoner. He worked in the construction industry before his arrest and earned R600.00 per week. He only went to school up to standard 3 as his circumstances would not allow him to proceed further with his education. Before his arrest he supported his child. It was further submitted that he is a first offender, his youthfulness and the rather lengthy pre-sentence incarceration are substantial and compelling circumstances to justify a departure from the prescribed minimum sentences.

Accused no. 3

[15] Accused no.3 was born on 15 April 1986. He is married with two children who are aged 12 and 15 years old. He passed standard 4 and was doing standard 5 when he was arrested. At the time of his arrest he worked for a construction company in Stanger. He is a qualified bricklayer. He also helped to support his younger sister. He was arrested over four years ago and is a first offender.

Accused no.4

[16] Accused no.4 is 46 years old having been born on 20 January 1973. He is married with six children. Four of those children were born of his marriage with his wife and two of them were born out of wedlock. The youngest of these children was born in 2009. All of them are still at school save for the one born in 1996. His wife is unemployed. At the time of his arrest he worked as a security guard at Ntabezulu Senior Secondary School and earned R1200.00 per month. He suffers from arthritis which was diagnosed in 1988. In prison he does not always get his medication as the prison sometimes runs out of stock. He was born out of wedlock and was raised by a single parent. He had to leave school in standard 8 due to financial difficulties. He maintained his children before his arrest. His mother passed on in May 2017 when he was already in prison. He has been in prison for over four years and three months now since his arrest on 20 May 2015. He is a first offender as he has no previous convictions.

Accused no.5

[17] Accused no.5 was born on 6 June 1989 and is therefore 30 years old now. He left school in standard 1 due to financial

difficulties. He worked as a shepherd before his arrest looking after livestock. His mother passed away when he was three years old and was also very young when his father passed away. He was raised by his aunt and is the youngest of three children. Before his arrest he also worked in the construction industry where he earned R1200.00 per month. He suffers from asthma which he treated with traditional medicine before his arrest on 18 May 2015. He has been in prison awaiting trial for four years and three months now. He has no previous convictions and is therefore a first offender.

[18] The above circumstances of all the accused are in my view, neither substantial nor compelling even if considered cumulatively as I was urged to do. The heinousness of these crimes and the brazenness with which they were committed repeatedly with heavy weapons against small businesses and at the homesteads of the victims all militate against the accuseds' circumstances. In *S v Vilakazi*[3] the Supreme Court expressed the following sentiments which are, in my view, relevant to this case:

"[58] ... 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 in employment, are in themselves largely immaterial to what that period should be...But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment..."

[19] In this case the nature of the crimes committed and the fact that they were motivated by greed and naked criminality make the fact that all the accused are first offenders similarly recede into the back ground. They behaved and committed all these offences in a manner that is no different from that of hardened criminals who have no respect for human life. Their lack of remorse is a matter that counts, as it should, quite heavily against them.

[20] I therefore find that in respect of the robbery charges there are no substantial and compelling circumstances that justify the imposition of a lesser sentence than the one prescribed in terms of section 51(2) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act. Having said that, the imposition of a prescribed minimum sentence does not mean that the rather lengthy pre-sentence period of imprisonment should not be factored in. The accused have all spent a period of just over four years in pre-sentence incarceration as awaiting trial prisoners. In *S v Dlamini*[4] the court stated the relevant legal position as follows:

"[41] This brings me to the 10 months Mr Dlamini spent in custody before he was sentenced, which, as I have mentioned, neither the magistrate nor the high court took into account in deciding the appropriate sentence. It is trite that the period an accused is held in custody while awaiting completion of his trial should be taken into account when deciding on the appropriate sentence. This is done by making the period of imprisonment actually imposed shorter than it would otherwise have been. However, courts have not spoken clearly on how to calculate this period. One approach has been to do an exact subtraction; another is to deduct the period actually spent; yet another is to treat the time spent in custody, at the very least, as equivalent to the time spent served without remission; and a fourth, more adventurous method is to treat the period as equivalent to about twice the length, because of the harsher conditions that awaiting-trial prisoners are subjected to in comparison with the conditions of sentenced prisoners."

- [21] It is clear from the above that there is no exact formula to account for the pre-sentence period spent in prison. It should, in my view, like most sentencing decisions, be left to the discretion of the trial court. To try to impose a formula that seeks to account for years, months, weeks, days and hours would be too prescriptive and imprecise. The issue must be left at the principle that the pre-sentence period of imprisonment must be factored in in imposing a just sentence including a sentence in which there is a prescribed minimum sentence period which is not life imprisonment.
- [22] However, the murder charges stand on a different footing. There is something peculiar and in my view, weighty about these murder charges. The evidence is that when these murders were committed it was Sibongo and Ngonini who killed the deceased. According to Ngonini's evidence which has not been challenged, Sibongo was never charged and has since died. While the evidence is that accused no.2, 3 and 4 were at the crime scenes armed with firearms and actually participated in the robberies, there is no evidence that they killed any of the deceased. They had the opportunity and the weapons with which to either participate in murdering the deceased or murder the other victims of the robberies which could have resulted in more people being killed.
- [23] These, considered with the fact that all the accused are first offenders is a weighty justification to depart from the prescribed minimum sentence of life imprisonment. There is nothing to suggest that they could be incorrigible or that they should be deemed incapable of reformation or rehabilitation.
- [24] In fact but for Sibongo and Ngonini it is difficult to exclude the possibility that these armed robberies could have been committed without any lives being lost. This does not take away from the fact that the accused were less concerned about the lives being lost and were happy with the robberies being committed and participating in them while people were being killed who, to them seemed like collateral damage. The rewards for the robberies were too tempting for the lives being lost to really matter. Therefore, while heavy sentences are justified for these murders, the imposition of the minimum sentences prescribed would be inappropriate in the circumstances. Therefore, a departure from the prescribed period of life imprisonment is justified.
- [25] One other consideration is that a sentencing court has to consider and decide on how to prevent the cumulative effect of sentences in situations where the accused committed multiple offences. In *S v Velebhayi*[5] Plasket J had this to say:
- "Once the appropriate sentences have been imposed in relation to each offence of which an accused has been convicted, it is necessary for the trial court to consider the cumulative effect of the sentences and, if necessary, to ameliorate the harshness of the aggregate*
- sentence. In such a case the sentences on several counts may be arbitrarily reduced to adduce a reasonable result when taken

together”

[26] The multiplicity of these offences will have a cumulative effect on sentences imposed. If the cumulative effect is not ameliorated the sentences themselves may be dissonant with the crimes, the offenders and the interests of society. This may unwittingly result in the retributive purpose of sentencing being over-emphasized and other purposes being watered down. That may itself not be in the interests of justice.

[27] In the result the following sentences are, in my view, appropriate in this matter:

1. Accused no.1

1.1 For counts 2, 3, 6, 9, 12 and 14 - armed robberies, you are sentenced to 11 years imprisonment for each count.

1.2 For counts 4, 5, 11 and 16 – housebreakings, you are sentenced to 3 years imprisonment for each count.

1.3 For counts 1, 7, 8 and 17 – the murder charges, you sentenced to 20 years imprisonment in respect of each count

1.4 For count 13 - attempted murder, you are sentenced to 5 years imprisonment.

1.5 For count 10 - attempted robbery, you are sentences to 5 years imprisonment.

1.6 For counts 18 and 19

- possession of firearms and ammunition, you are sentenced to 5 years imprisonment for each count.

1.1.1 The sentences in respect of counts 3, 6, 9, 12 and 14 are to run concurrently with the sentence in respect of count 2.

1.1.2 The sentences in respect of counts 4, 5, 11, 16 are to run concurrently with the sentence in count 2.

1.1.3 The sentences in respect of counts 7, 8 and 17 are to run concurrently with the sentence in respect of count 1.

1.1.4 The sentence in respect of count 2 is to run consecutively with the sentence in respect of count 1.

1.1.5 The sentences in respect of counts 10, 13, 18 and 19 are suspended for 5 years on condition that the accused is not convicted of the offences of possession of firearms, possession of ammunition, attempted robbery, robbery, attempted murder, housebreaking or murder committed during the period of suspension.

1.7 Accused no.1 shall therefore serve an effective term of imprisonment of 31 years.

2. Accused no.2

2.1 For counts 2, 3, 6, 9, 12 and 14 - armed robberies, you are sentenced to 11 years imprisonment for each count.

2.2 For counts 4, 5, 11 and 16 - housebreaking, you are sentenced to 3 years imprisonment for each count.

2.3 For counts 1, 7, 8 and 17 - murder charges, you are sentenced to 20 years imprisonment in respect of each count.

2.4 For counts 13 - attempted murder you are sentenced to 5 years imprisonment.

2.5 For count 10 - attempted robbery, you are sentenced to 5 years imprisonment.

2.6 For counts 18 and 19

- possession of firearms and possession of ammunition you are sentenced to 5 years imprisonment for each count

2.1.1 The sentences in respect of counts 3, 6, 9, 12 and 14 are to run concurrently with the sentence in respect of count 2.

2.1.2 The sentences in respect of counts 4, 5, 11 and 16 are to run concurrently with the sentence in respect of count 2.

2.1.3 The sentences in respect of counts 7, 8 and 17 are to run concurrently with the sentence in respect of count 1.

2.1.4 The sentence in respect of counts 10, 13, 18 and 19 are suspended for five years on condition that the accused is not convicted of the offences of housebreaking possession of fire arms, possession of ammunition, attempted robbery, robbery, attempted murder, murder committed during the period of suspension.

2.1.5 The sentence in respect of count 2 is to run consecutively with the sentence in respect of count 1.

2.7 Accused no.2 shall therefore serve an effective term of imprisonment of 31years.

3. Accused no.3

3.1 For counts 2, 3, 6, 9 and 12 - armed robberies, you are sentenced to 11 years imprisonment for each count.

3.2 For counts 4, 5 and 11 - housebreaking, you are sentenced to 3 years imprisonment for each count.

3.3 For counts 1, 7 and 8

- murder charges, you are sentenced to 20 years imprisonment for each count.

3.4 For count 13 - attempted murder, you are sentenced to 5 years imprisonment.

3.5 For count 10 - attempted robbery, you are sentenced to 5 years imprisonment.

3.6 For counts 18 and 19 – possession of firearms and possession of ammunition you are sentenced to 5 years imprisonment for each count.

3.1.1 The sentences in respect of counts 3, 6, 9 and 12 are to run concurrently with the sentence in respect of count 2.

3.1.2 The sentence in respect of counts 4, 5 and 11 are to run concurrently with the sentences in respect of count 2.

3.1.3 The sentences in respect of counts 7 and 8 are to run concurrently with the sentence in respect of count 1.

3.1.4 The sentence in respect of counts 10, 13, 18 and 19 are suspended for five years on condition that the accused is not convicted of the offences of housebreaking, possession of firearms, possession of ammunition, attempted robbery, robbery, attempted murder, murder committed during the period of suspension.

3.1.5 The sentence in respect of count 2 is to run consecutively with the sentence in respect of count 1.

3.7 Accused no.3 shall therefore serve an effective term of imprisonment of 31 years.

4. Accused no.4

4.1 For counts 2, 3, 6, 9, 12 and 14 – armed robberies, you are sentenced to 11 years imprisonment for each count.

4.2 For counts 4, 5, 11 and 16 – housebreaking, you are sentenced to 3 years imprisonment for each count.

4.3 For counts 1, 7, 8 and 17 – murder charges, you are sentenced to 20 years imprisonment in respect of each count.

4.4 For counts 13 – attempted murder, you are sentenced to 5 years imprisonment.

4.5 For count 10 – attempted robbery, you are sentenced to 5 years imprisonment.

4.6 For counts 18 and 19 – possession of firearms and possession of ammunition, you are sentenced 5 years imprisonment for each count.

4.1.1 The sentences in respect of counts 3, 6, 9, 12 and 14 are to run concurrently with the sentence in respect of count 2.

4.1.2 The sentences in respect of counts 4, 5, 11 and 16 are to run concurrently with the sentence in respect of count 2.

4.1.3 The sentence in respect of counts 7, 8 and 17 are to run concurrently with the sentence in respect of count 1.

4.1.4 The sentence in respect of counts 10, 13, 18 and 19 are suspended for five years on condition that the accused is not convicted of the offences of housebreaking, possession of firearms, possession of ammunition, attempted robbery, robbery, attempted murder or murder committed during the period of suspension.

4.1.5 The sentence in respect of count 2 is to run consecutively with the sentence in respect of count 1.

4.7 Accused no.4 shall therefore serve an effective term of imprisonment of 31 years.

5. Accused no.5

5.1 For count 14 – armed robbery, you are sentenced to 11 years imprisonment.

5.2 For counts 18 and 19 – possession of firearms and possession of ammunition, you are sentenced to 5 years imprisonment in respect of each count.

5.3 The sentences in respect of counts 18 and 19 are suspended on condition that the accused is not convicted of armed robbery, attempted robbery, possession of firearms or possession of ammunition committed during the period of suspension.

5.4 Accused no.5 shall therefore serve an effective term of imprisonment of 11 years.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

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MTHATHA

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Heard on: 19 August 2019

Delivered on: 23 August 2019

- [1] S v M (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC)
 - [2] S v Malgas 2001 (1) SACR 469 at 470 - 471
 - [3] S v Vilakazi 2009(1) SACR 552 (SCA) at 574
 - [4] S v Dlamini 2012 (2) SACR 1 (SCA)
 - [5] S v Velebhayi 2015 (1) SACR 7 (ECG) at para 32
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