IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, NORTH EASTERN CIRCUIT

Case no: **CCD52/2021**

In the matter between:

THE STATE

and

SMANGA PHAKATHI	**FIRST ACCUSED**
SIPHO RICHARD MTHEMBU	**SECOND ACCUSED**
SIBONELO MABOSI SIHLONGONYENE	**THIRD ACCUSED**

JUDGMENT ON SENTENCE

MOSSOP J:

[1] Anyone who heard the evidence of Ms Adele Mathews on Friday, led by the state in aggravation of sentence, would have been moved by what she said. Her evidence was tangibly suffused with anguish and pain. That anguish and pain was directly caused by what the three of you did. In her own words, her world was turned 'upside down' when her husband, Mr Shaun Mathews, died because of your decision to attempt a robbery at the Pongola Rugby Club on 6 March 2020. As a consequence, she lost first her husband and life companion, then her means of support, then her own employment and then her children as she was forced to move away from Pongola to try and pull herself together and get a job to gain income to support her family. Her

life, and the lives of her three young children, went into a downward spiral that continues even to this day, four years after the events at the Pongola Rugby Club. She is now forced to live in Springs, Gauteng, relying on a friend for her accommodation and her three children are being raised by her mother in law in Pongola because of her inability to find employment and her lack of finances. It is a tragedy.

[2] Murder, without fail, brings tragedy. There are always people who suffer when the life of a loved one is unlawfully and unexpectedly taken. The chilling thing about this is that there appears to be no way of guarding against it happening. The only thing that one can do is live one's life the best as one can, do right by others, obey the law and hope that our fellow man will do so as well. That hope, unfortunately, was not realised in this instance. You decided that the laws that most people observe and obey did not apply to you.

[3] But the tragedy does not exist only in respect of the death of Mr Mathews. One of your own number, Mr Xolani Mtshali (the deceased), also lost his life. His family will no doubt find themselves in a similar void that Ms Mathews is now fighting her way through. His family will have felt similar anguish to that felt by Ms Mathews. His parents are as innocent as Ms Mathews is. The only difference is that the deceased went to the rugby club to rob those members of the public there, relaxing at the end of the working week.

[4] And the tragedy does not end there, but ripples outwards beyond the death of these two persons. It extends to you as well. The most valuable thing that a person can ever possess is his or her life. Human beings get only one of them, ignoring for a moment those that believe in reincarnation. It is a tragedy that you chose to act in a way that caused the two men who died to lose their lives. But it is also a tragedy that you have chosen to waste your life, your most precious gift. For the consequence of your actions is that you are to be punished and that punishment will deny you the opportunity to live your life to its full potential. You are going to moulder in a prison. You will lose the ability to decide what you want to do and when you would like to do it. Instead, you will have other people decide what you must do. Whatever potential that you may have had will be restricted by your circumstances. Accused one said during the course of his evidence that he was able to testify as he was doing because

he was now ‘free’. He actually was not free when he said that. He is not free now. Neither are accused two and three. You will not be free for the greater portion of your lives. Confining the three of you to prison is a waste of human potential but it must happen to protect society and to drive it home to you that your conduct is unacceptable.

[5] The imposition of sentence is always a difficult task. It is not easy to punish another living, breathing person and thereby permanently change the course of their life. For it must be acknowledged that we are all human beings, and we all err. Our common humanity must always be acknowledged. The legal system has acknowledged this common humanity in accepting the principle of ubuntu. Ubuntu can loosely be defined as a fundamental African value embracing dignity, human interdependence, respect, neighbourly love and concern. In *S v Mankwanyane*,[1] the Constitutional Court recognised it as one of the values underpinning our Constitution when dealing with the question of criminal punishment. In that case, six of eleven judges identified ubuntu as being a key constitutional value that:

‘. . . places some emphasis on communality and on the independence and on the interdependence of the members of a community. It recognises a person’s status as a human being entitled to unconditional respect, dignity, value and acceptance . . . The person has a corresponding duty to give the same ... ’.

[6] In *Port Elizabeth Municipality v Various Occupiers*,[2] another Constitutional Court judgment, Sachs J said:

‘The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the needs for human interdependence, respect and concern.’

[7] I am an enthusiastic proponent of the concept of ubuntu, and I shall attempt to ensure that it is reflected in the sentence that I am now to impose upon you.

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[1] *S v Mankwanyane* 1995 (3) SA 391 (CC).
[2] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 30.

[8] I am guided in the difficult task of determining an appropriate sentence by legislation passed by the National Assembly which requires certain minimum sentences to be imposed for certain offences. The two murder counts that you were convicted of were framed with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) in mind, and, in particular, part 1 of schedule 2 to that Act. That part of the schedule identifies murder committed when the death of the victim was caused during a robbery with aggravating circumstances. The minimum sentence applicable for that type of murder is life imprisonment.

[9] I advise you that I am not compelled to impose the minimum sentence referred to by the Act. I can impose a lesser sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The Act does not define what 'substantial and compelling' circumstances are, this being left to the courts to determine.

[10] Courts have consequently tried to get to grips with what 'substantial and compelling' means. A leading case on this subject is the matter of *S v Malgas*.[3] Indeed, that case was referred to by both your counsel, Mr Luthuli, and Mr Ngubane for the state, on Friday when they addressed the court on sentence. In that case, Marais JA said that it is incorrect to hold the view that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of being seldom encountered or rarely encountered. He said that whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified minimum sentences are not to be departed from lightly and for flimsy reasons which cannot withstand scrutiny. Speculative theories favourable to the accused person, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy of minimum sentences, and like considerations are obviously not intended to qualify as substantial and compelling circumstances. But Marais JA said that there is no reason to conclude that the legislature intended a court to exclude from consideration, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.

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[3] *S v Malgas* 2001 (2) SA 1222 (SCA).

[11] Marais JA went on to state that courts are required to approach the imposition of sentence conscious of the fact that the Legislature has ordained the prescribed period of imprisonment as being the sentence that should ordinarily, and in the absence of weighty justification, be imposed for the listed crimes in the specified circumstances.

[12] In my view, it is important when considering your sentences not to start with the view that the minimum sentence is, without further consideration, a just sentence. If that was to be the starting point, there would be no purpose in permitting the prescribed minimum sentence to be departed from when substantial and compelling circumstances are found to exist. All the circumstances of the case must be identified, considered, and evaluated and then it should be considered whether the sentence is disproportionate to the crime, the offence, and the legitimate needs of the community. If a just sentence falls materially below the prescribed sentence, there will be substantial and compelling circumstances to depart from the prescribed sentence.[4]

[13] Are there any substantial and compelling circumstances to be found in this matter? During the course of the trial, I looked for signs that there is something in each of you that is worthy of redemption. I thought that perhaps accused two, despite his shameful criminal record, may have displayed some form of human decency for which he could receive credit when he told Col Mbongwa that he was feeling:

'… guilty as I didn't expect that someone will get killed.'

That appeared to me to be a hopeful sign of someone who has perceived the errors of his ways. But, unfortunately, it was not, because accused two took to the witness box and flatly denied that he had ever said as much. Mr Mthembu, you stated:

'I never said I wanted to clear my conscience'.

[14] That being said, I cannot ignore the fact that an apology of sorts was proffered by all three of you to Ms Mathews. Mr Luthuli addressed her while she was in the witness box and said the following:

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[4] *S v GK* 2013 (2) SACR 505 (WCC) para 14.

'I must say to you, your family and children, that they are very sorry for what happened, it was not their intention to take the life of your husband. They ask you to find forgiveness in your heart for what they did. It was not their intention. They are very sorry and are short of words.'

[15] Those words tend to show a contrite attitude. In *S v Matyityi*,[5] Ponnan JA had the following to say on the issue of remorse:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.' (Footnotes omitted)

[16] The words spoken by Mr Luthuli to Ms Mathews were eloquently spoken by him. I had the distinct impression that they were sincerely spoken upon your instruction. To be sure, I asked him whether this was the view of each of the accused, or merely of one of you speaking on behalf of all three of you. I was told that this was the view of each of you. None of you have admitted that you were at the rugby club and you have not taken the court into your confidence. There is, however, a suggestion in what you instructed Mr Luthuli to say on your behalf that you acknowledge your presence and involvement in the events at the rugby club. With some hesitation, I accordingly accept that you have displayed some remorse.

[17] All of you made a extra curial statements of sorts and all indicated that you had gone to the rugby club to commit a robbery. That plan went horribly wrong. Your gang

[5] *S v Matyityi* 2011 (1) SACR 40 (SCA).

was armed to ensure that you could achieve your aims. However, I acknowledge that none of you personally had firearms. Those that had the firearms are either dead or have evaded arrest. Moreover, I do not have a clear picture of what happened at the rugby club and, more particularly, I do not have a clear understanding of what led to the first shot being fired. I do not know whether it was fired by one of your gang members or by a member of the public. You were armed with pangas. A sign that you may have intended to intimidate and not cause lasting harm is the evidence tendered by the state that you did not use the sharp edge of the pangas to strike the patrons, but rather the flat side.

[18] Upon a balanced evaluation of all the evidence, I am persuaded that what you intended to do that evening was to rob the patrons of the Pongola Rugby Club, not commit murder. That was an unfortunate consequence of your conduct. Accused one and three have clear criminal records. Accused two does not and I will consider his criminal record shortly. Despite the horrific consequences of your conduct, I consider all these factors that I have mentioned and I am persuaded that there are substantial and compelling circumstances that justify a departure from the minimum sentence prescribed.

[19] I am fortified in this view by the youthfulness of accused three, aged either 19 or 20 at the time, and the relative youthfulness of accused one, aged 25. Both are of an age that offers the hope of reformation. Accused two cannot benefit from his age, for he was of an age that ought to have seen him dissuading all of the gang members from embarking on this disastrous course of conduct.

[20] While on the subject of accused two, Mr Luthuli expressed his concern that there might be something not quite right with him, something that requires the attention of a psychologist. Mr Luthuli submitted that whilst he was not a psychologist, he had some experience in assessing behaviour arising out of his previous occupation as a schoolteacher. I have spent three weeks in the presence of accused two and I confess that I have seen nothing that tells me that he requires to be psychologically assessed. He is entirely alert and has obviously contributed to his defence. By all appearances, he is entirely normal. Perhaps what concerns Mr Luthuli is not so much his conduct in

this court, but his conduct out of court. He is obviously a person who does not shrink from criminal conduct, as his lengthy criminal record reveals. That, however, does not mean he requires mental assessment. It means that he makes bad decisions or that he has bad values or that he cares little for his fellow man, for he has been given numerous opportunities by the courts to reconsider his path in society but constantly chooses not to curb his criminal instincts. There is no reason for any form of professional inquiry to be undertaken into accused two's conduct. He will have that opportunity available to him, and may choose to avail himself of it, in the place to which I shall shortly dispatch him.

[21] I have mentioned your respective ages but I have not lost sight of your other personal circumstances. Mr Phakathi, you are a Swazi citizen and have two children aged 6 and 9 years respectively. Mr Mthembu, you had a scholastic career that ended in standard 6. You have three children aged 15, 16 and 19 respectively. Mr Sihlongonyene, you are also a Swazi citizen and were self-employed at the time of your arrest. Despite your youthfulness, you are already the father of a young child.

[22] Of the three of you, accused two is the only one with a criminal history. It makes for disturbing reading. It commenced in 2003 with a conviction for dishonesty that attracted a prison sentence of 12 months. There is another conviction for theft in 2006 that led to a sentence of 5 years' imprisonment and a conviction for possessing a firearm and ammunition unlawfully that led to another sentence of five years' imprisonment. In 2015, there is a conviction for housebreaking with intent to steal and theft which resulted in a sentence of 8 years' imprisonment. In my view, while I am not required to impose the minimum sentence, I must ensure that accused two receives a more severe sentence than accused one and three because of his unremitting criminal conduct.

[23] In arriving at the appropriate sentence for each of you, I have taken account of the fact that you have been in custody for four years awaiting trial. That is a sad indictment of our criminal system. That period has already been factored into the sentences that I shall impose upon you.

[24] Finally, you have been convicted of multiple offences. I must ensure that the cumulative effect of the sentences imposed upon you is not unduly harsh. I believe that I have achieved this. I accordingly regard the following sentences as being just in the circumstances of the matter:

1. Accused one:

   (a) Count one: Attempted robbery with aggravating circumstances
   Fifteen years' imprisonment.

   (b) Count two: Murder
   Twenty years' imprisonment.

   (c) Count three: Murder
   Twenty years' imprisonment.

   (d) In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentences on count one and count three shall run concurrently with the sentence on count two.

   (e) No determination in terms of section 103(1) of the Firearms Control Act 60 of 2000 is made.

   (f) Mr Phakathi, you will serve an effective twenty years' imprisonment.

2. Accused two:

   (a) Count one: Attempted robbery with aggravating circumstances
   Twenty years' imprisonment.

   (b) Count two: Murder
   Twenty years' imprisonment.

   (c) Count three: Murder
   Twenty years' imprisonment.

(d) In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that fifteen years of the sentence imposed on count one and the entire sentence imposed on count three shall run concurrently with the sentence on count two.

(e) No determination in terms of section 103(1) of the Firearms Control Act 60 of 2000 is made.

(f) Mr Mthembu, you shall serve an effective twenty-five years' imprisonment.

3. Accused three:

(a) Count one: Attempted robbery with aggravating circumstances
Fifteen years' imprisonment.

(b) Count two: Murder
Twenty years' imprisonment.

(c) Count three: Murder
Twenty years' imprisonment.

(d) In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentences on count one and count three shall run concurrently with the sentence on count two.

(e) No determination in terms of section 103(1) of the Firearms Control Act 60 of 2000 is made.

(f) Mr Sihlongonyene, you will serve an effective twenty years' imprisonment.

Do you all understand? I wish you good luck.

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MOSSOP J

APPEARANCES

Counsel for the state	:	Mr C Ngubane
Instructed by:	:	Director of Public Prosecutions Pietermaritzburg
Counsel for the three accused	:	Mr M Luthuli
Instructed by	:	Legal Aid South Africa Durban
Date of hearing on sentence	:	15 March 2024
Date of judgment on sentence	:	18 March 2024