



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: CC 65/2024

In the matter between:

THE STATE

and

ALUTA HATI

Accused No. 1

LUNGISILE YEKANYE

Accused No. 2

SENTENCE

Govindjee J

[1] The accused acted in the execution of a common purpose and were convicted on charges of robbery with aggravating circumstances, unlawful possession of a firearm and ammunition in contravention of legislation, two counts of kidnapping and two counts of attempted murder. Accused No. 2 (Mr Yekanye) was, in addition, convicted of arson.

[2] The state proved that the two counts of attempted murder (counts 6 and 8) were planned or premeditated and committed in circumstances where the victims were persons likely to give material evidence at criminal proceedings with respect to the offences of robbery that had been committed, by persons acting in furtherance of a common purpose.¹ In terms of s 51(1) of the Criminal Law Amendment Act, 1997,² read with Part I of Schedule 2, and only since 5 August 2022, prescribed sentences of life imprisonment apply in respect of these two counts. The robbery with aggravating circumstances (count 1) attracts a prescribed minimum sentence of 15 years imprisonment for both accused, who are first offenders.³

[3] Section 276 of the Criminal Procedure Act, 1977⁴ provides for the sentences which courts can impose. A sentencing court's discretion must be exercised judicially and properly, and courts are enjoined to temper the punishment with a measure of mercy.⁵ The sentencing court must attempt to achieve a balance in its sentence, and not approach its task in a spirit of anger, but in one of equity. Hastiness, the striving after severity and misplaced pity are out of place, as are so-called exemplary sentences designed to use the crime to set an example for others in society.⁶ Still, more serious cases clearly require severity, with a certain moderation of generosity where appropriate, for the appropriate balance to be struck. The object of sentencing is not to satisfy public opinion, but to serve the public interest.⁷

[4] In the final analysis, the well-known triad of factors to be considered consists of 'the crime, the offender and the interests of society',⁸ and these factors must be applied, in accordance with *S v Malgas*,⁹ to consider whether substantial and

¹ This is an offence referred to in Schedule 1 to the Criminal Procedure Act, 1977.

² Act 105 of 1997.

³ Part II of Schedule 2 read with s 51(2) of the Criminal Law Amendment Act, 1997.

⁴ Act 51 of 1977 ('the CPA').

⁵ *S v Rabie* 1975 (4) SA 855 (A) at 862G–H.

⁶ See *S v Khulu* 1975 (2) SA 518 (N) 521–522.

⁷ *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189. Also see *S v M* (Centre for Child Law as *amicus curiae*) 2007 (2) SACR 539 (CC).

⁸ *S v Zinn* [1969] 3 All SA 57 (A) at 540G–H.

⁹ *S v Malgas* 2001 (1) SACR 469 (SCA).

compelling circumstances exist to deviate from any prescribed minimum sentence.¹⁰

In *S v Matyityi*,¹¹ Ponnann JA held that Parliament:

‘...has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts...and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order’.

Nature of the crime and surrounding circumstances

[5] In convicting the accused I found that Accused No. 1 (Mr Hati) had taken the lead in perpetrating the various offences. He contacted his aunt, Mrs Mali, and, pretending to act kindly, requested to stay at her home. Once the accused arrived there, however, Mrs Mali and her 16-year-old son, Sinelizwi, were bound with cable ties placed around their hands and neck. The firearm was displayed, and they were given various instructions. Motivated by financial gain, the accused robbed Mrs Mali of money from her credit facility and took both complainants phones. They kidnapped the complainants and used Mrs Mali’s vehicle to transport them to a secluded area. When Mrs Mali prayed and pleaded during the journey, she was untied only so that she could attempt to access additional funds for Mr Hati. When he testified, Mr Hati admitted that he had only referred to an amount of R200 000 as the price of his forgiveness ‘so that she can realise that she is the person who led to her silence not me’.

[6] It was Mr Hati who instructed his partner to ‘work and work properly’ prior to Mr Yekanye taking her into her forest. Following further interaction with Mr Hati, Mr Yekanye choked her with the cable tie and stabbed her repeatedly. She pretended not to breath which likely saved her life. Sinelizwi was taken back to his home where he

¹⁰ See *Radebe v The State* [2019] ZAGPPHC 406 para 12.

¹¹ *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23. Also see *S v Malgas* above n 9, in respect of the prescribed period of imprisonment in the Minimum Sentences Act ordinarily being imposed for the commission of the listed crimes in the specified circumstances, in the absence of weighty justification, as quoted in *Otto v S* [2017] ZASCA 114 at para 21.

observed the accused take a blender, television and microwave. Mr Yekanye, now acting at his own behest, and knowing that Sinelizwi's younger brother was sleeping inside, set fire to the home before exiting. With the cable tie still around his neck, Sinelizwi was then taken to various ATMs to draw money for the accused. He too was then taken to a secluded area. Acting in terms of Mr Hati's general instructions, Mr Yekanye placed the firearm to Sinelizwi's head and pulled the trigger. When it failed to fire, he was suffocated by Mr Yekanye with the cable tie and struck with the firearm on the back of his neck and head. A knee was forcibly placed on his chest and he was trampled on for a minute or two before he passed out. The evidence presented confirmed that these attempts on his life were designed to ensure that the accused were not identified as the perpetrators of the robbery.

The accused's circumstances and interests

Mr Hati

[7] Mr Hati is 30 years of age. He has only completed primary schooling and attained a certificate in security. The pre-sentence report accepted into evidence, prepared by Dr Andrews, a clinical psychologist, reflects that he also learned how to build computers while living in Cape Town and he was assessed in the 'high average range' of general intelligence. He was raised without a father and believed that his grandfather was in fact his father. He lived in his mother's flat on her property in Butterworth, with his wife and their four children, aged 13, 12, 7 and 2. Two of the children were brought into the marriage by his wife. Trained in electrician work, and running his own business, he was the sole breadwinner for the family and, it may be accepted, treated them well. His absence from the household since his arrest has caused hardship for his wife and family.

[8] Dr Andrews' report also reflects that Mr Hati's personality functioning contains a so-called 'split-off' aspect, which makes him unpredictable and dangerous to others. In his favour is his plea explanation and admission to being the main perpetrator, despite having acted in common purpose with Mr Yekanye. He is a first offender and expressed deep regret regarding his conduct.

Mr Yekanye

[9] Mr Yekanye had just turned 18 at the time of the incident and had completed only primary school education. He is single with no children. His mother is a domestic worker, and he lived with his father, who is mentally disabled. He only came to know his father for the first time in 2019. A few years prior to this he lost his step-father, which impacted his behaviour negatively. In his words to Dr Andrews, his relationship with his mother deteriorated and he became a gangster, aged 10, also smoking cannabis.

[10] Mr Hati was perceived to be Mr Yekanye's boss by the latter's paternal uncle, who provided information to Dr Andrews. He had attached himself to Mr Hati, who he perceived as an older brother, often staying with him, learning electrical skills from him and working as his assistant. Dr Andrews commented as follows:

'His general behaviour was characterised by his quiet and friendly demeanour. He was polite and forthcoming with information. He impressed as an immature 19-year-old person who was overcome with shame for his behaviour towards an aunt and her young son. The letter of apology he was writing to [both of them] for his shameful behaviour was observed by the clinician. "I am so ashamed of myself that I cannot even look these people in the eyes. I have to write to them instead". His immaturity was observed in the sense that [he] had no insight into his idealisation of his older cousin, Aluta. He tried to create the impression that he was on the same maturity level as Aluta. After having assessed both Aluta and Lungisile, it is clear that Aluta is the mature leader in the relationship. Aluta has a commanding personality, whereas Lungisile's personality is immature, with low self-esteem. His aggressive behaviour in this case is a defensive behaviour to cover up a poor self-concept. Unfortunately, the extent to which Lungisile is prepared to go to defend against his low self-esteem and poor self-concept is antisocial and dangerous to others. Lungisile is assessed to have the potential to benefit from correctional supervision. His youth is to his advantage in this respect.'

[11] The accused have been in custody since February 2024.

The impact on the complainants and the interests of society

[12] Both complainants experienced what Dr Andrews terms as a 'significant negative life event', meaning that their psychological lives and functioning are forever changed and negatively impacted. Mrs Mali is 54 years of age. As her home was

destroyed by virtue of the arson, she has no home of her own and struggles to provide for her family. This has impacted on her self-esteem. She is also now indebted because of the money taken from her credit facility by Mr Hati. Life is difficult for her family, particularly Sinelizwi. She had been on good terms with the accused prior to the incident but has now lost any trust in her family members. She has clearly been scarred by the attempt on her life, also being unwilling to accept any apology and fearful of the accused.

[13] In addition to the various physical injuries suffered by Sinelizwi, he too has been impacted by the after-effects of the incident. The financial situation in his home is poor and his living conditions have deteriorated, which has impacted on his schooling. His mood has changed, he struggled to socialise and even attempted to commit suicide in 2024. He is now taking sleeping and anti-depression medication. He too testified that he was unable to forgive the accused for their conduct. A report prepared by a registered social worker and accepted into evidence confirms the impact of the incident on both complainants.

[14] As for the interests of society, one need only look to the recent amendments to the Criminal Law Amendment Act, 1997. Attempted murder, in circumstances such as the present, attracts the most severe prescribed minimum sentence possible. That the complainants were accosted by family members in the sanctity of their home compounds matters. The evidence reflects that they were most fortunate to survive, particularly considered that the accused were armed and intended to murder them. Society's interests, bearing in mind the various established purposes of punishment, would be served by lengthy periods of incarceration, if not sentences of life imprisonment.

Analysis

[15] Sentencing courts are obliged to consider the 'sentencing triad' to arrive at a just outcome.¹² Punishment must be proportional to the criminal and the crime and be

¹² *S v Zinn* above n 8 at 540G–H. On the functions to be served by sentence, see *S v Matyaleni* [2021] ZAECHC para 13. In this context, these factors must be applied to consider whether substantial and

fair to society. As indicated, it should not be imposed out of a spirit of anger or retribution and should also, where circumstances permit, be blended with a measure of mercy.¹³

[16] While all considerations should be carefully weighed, discretionary minimum sentences are not to be departed from lightly and for flimsy reasons.¹⁴ It may be accepted that the legislature has amended the Criminal Law Amendment Act to include life imprisonment for attempted murder, in certain circumstances, in recognition of the prevalence and seriousness of this offence. This is aimed at ensuring a severe standardised and consistent response from the courts to the commission of such crimes, unless there were, and could be seen to be, truly convincing reasons for a different response.

[17] Several cases have provided non-binding guidance to courts as to when it would be appropriate to make a finding confirming that the ‘composite yardstick’ (substantial and compelling circumstances) has been met.¹⁵ There is, however, seemingly something of a dearth of jurisprudence pertaining to cases of attempted murder after the 2022 legislative amendment to the Criminal Law Amendment Act, 1997. While there are examples of apparent departure from the prescribed minimum sentence for attempted murder, in all the cases brought to my attention this appears to have been predominantly because the court’s focus was on determining a suitable punishment for a murder charge, with the punishment for attempted murder inevitably running concurrently. The effect is that, at least in the decisions brought to my attention, there was little need to conduct an in-depth analysis of the appropriate sentence for attempted murder.

[18] It must also be appreciated that life imprisonment is the heaviest sentence that a person can legally be obliged to serve.¹⁶ The court must consider the traditional mitigating and aggravating factors cumulatively and as part of determining whether

compelling circumstances exist to deviate from a prescribed minimum sentence: *S v Malgas* above n 9 para 18.

¹³ *S v Rabie* above n 5 at 862G–H.

¹⁴ *S v PB 2011* (1) SACR 448 (SCA) para 21; *S v Matyityi* above n 11 para 23.

¹⁵ See, for example, *D v S* [2016] ZASCA 123 para 11.

¹⁶ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

the minimum prescribed sentence is so disproportionate to the sentence that would be appropriate, to the extent that an injustice would be done by imposing that sentence.¹⁷ If, after considering all the factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or, put differently, that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to impose a lesser sentence than the prescribed minimum.¹⁸ Aversion to imprisoning an offender, even for a first offence, is not, on its own, a factor intended to qualify as a 'substantial and compelling' circumstance warranting deviation from the prescribed minimum sentence.¹⁹

[19] An aggravating feature of the present crimes is the manner the complainants were accosted in their home, by individuals they ought to have been able to trust, only to be robbed, kidnapped, attacked and abandoned. The conduct perpetrated violated various constitutional rights of the complainants, including their human dignity, bodily integrity and privacy. The robbery and what followed was planned and brazen. Balanced against these features of the offence are the personal circumstances of the accused and other aspects of the nature of the offence, which I have carefully considered.

[20] It is a settled principle of our law that persons convicted of the same offences must, generally, receive the same punishment. The rule does not apply where the circumstances justify differential treatment. In the present circumstances, the court has found on the evidence that the degrees of participation were unequal and that Mr

¹⁷ See *Dyantyi v S* [2010] ZAECHGHC 120; 2011 (1) SACR 540 (ECG) para 14.

¹⁸ *S v GK* 2013 (2) SACR 505 (WCC) para 9, 14: 'I thus must not approach the present appeal with a mind that a life sentence is a priori a just punishment ... Instead, I must examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence, but have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case ... If the just sentence, approached in this manner, falls materially below the prescribed sentence, there will be substantial and compelling circumstances to depart from the prescribed sentence. As was held in *Malgas*, substantial and compelling circumstances are not confined to circumstances where the prescribed sentence would, in relation to the sentence the court would have imposed, be 'disturbingly' inappropriate or 'induce a sense of shock'. In other words, a discrepancy falling short of the latter test ... may justify a finding that substantial and compelling circumstances exist to depart from the sentence prescribed by the Act.'

¹⁹ *The Director of Public Prosecutions, Grahamstown v T M* 2020 JDR 0652 (SCA) ('*TM*') para 11.

Hati was the most blameworthy offender. As explained below, there are also clear differences in the personal circumstances of the accused that warrant differential treatment.²⁰

Mr Hati

[21] As indicated, there are various aggravating features of the crime. In particular, the accused were family members of the complainants, a woman in her mid-fifties and a child aged 16, and trusted to the point that Mrs Mali was willing to offer them accommodation in her home on the night of the incident.²¹ The state proved beyond reasonable doubt that the crimes were premeditated and planned by Mr Hati.²² On the accepted evidence, these were not impulsive actions caused by rage associated with Mr Hati's own issues about the identity of his father and the fate of his grandfather. Motivated by financial gain, armed, and with Mr Yekanye following his command, he clearly intended to rob Mrs Mali and, thereafter, attempted to ensure that he was not caught by kidnapping and attempting to murder her and Sinelizwi. None of his crimes was on the spur of the moment, rather they were committed over the course of the evening, Mr Hati acknowledging that he appreciated the wrongfulness of his actions.

[22] On his own version, Mr Hati attempted to obtain an additional R200 000 from Mrs Mali knowing that she would be unable to obtain such funds, and to make her feel that she was to blame for what was to follow. In fact, the decision to attempt to murder her had already been taken and Mr Hati trusted that Mr Yekanye would execute the task to completion, having instructed him accordingly. He ignored Mrs Mali's prayers and pleas, which included reminding the accused that they were her family and that she was willing to discuss matters and assist. Later, having dealt with Mrs Mali, no mercy was shown to Sinelizwi, who was driven away to suffer the same fate. The severe impact of the ordeal on both complainants is reflected, above, and speaks for itself.

²⁰ *S v Giannoulis* 1975 (4) SA 867 (A) at 871A–873H.

²¹ See *S v Matoewa* 2009 (2) SACR 303 (ECG) at 307G–H.

²² See *Kekana v S* [2014] ZASCA 158 para 13: it is not necessary to have thought or planned an action a long period of time in advance before carrying out a plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.

[23] In these circumstances, can it be said that Mr Hati manifested genuine remorse following the incident, based on his plea explanation and testimony? The definitive test has been explained as follows:²³

‘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 acknowledgment 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; whether he or she does indeed have a true appreciation of the consequences of those actions.’

[24] It is clear from his plea explanation, testimony and from the evidence of Dr Andrews, that Mr Hati now regrets his conduct. While his plea explanation indicated ‘deep regret’, he attempted to justify his conduct in both his plea explanation and testimony based on a fabricated version, suggesting that his actions had been ‘born out of anger because my aunt did not admit responsibility for the death of my grandfather when I confronted her with the allegation on the night of the incident’. That version has been rejected by this court. Mr Hati also failed to take the court into his confidence, at times justifying his conduct with reference to the traditional healer he had consulted and, with reference to the firearm charge, to Mr Yekanye. He also suggested that Mrs Mali’s shock at what was transpiring explained her inability to recall her discussion with him. Those contrived explanations, together with his version that there had been a change of heart after the firearm malfunctioned, so that the accused had decided to spare the lives of the complainants, were rejected on the evidence following the credibility assessment of those who testified. Such attempts at distorting the truth are contrary to genuine acts of contrition. While an apology was offered during testimony, this was directed equally, and briefly, to Mrs Mali and his wife, with little or

²³ *S v Matyityi* above n 11 para 13.

no mention of Sinelizwi. A general expression of remorse, also towards Sinelizwi, is reflected in Dr Andrews' report. Other than the impending sentence, however, there is no explanation of what has provoked the change of heart.

[25] I have considered the balance of Dr Andrews' report, as well as her testimony, carefully. Mr Hati appears to have been more forthright in his interview with Dr Andrews, also admitting that his financial problems had been a factor in the commission of the crimes. This contrasts with the explanation he presented to court a day or two previously. While Dr Andrews considered his expression of remorse to be sincere, her evidence linked this to the possibility of a sentence of life imprisonment. She also conceded that she was not able to offer expert testimony on the nuances of the distinction between regret and remorse, as her assessment was restricted to what she had been told by Mr Hati. Dr Andrews' testimony and report must also be considered bearing in mind her conclusion that Mr Hati has a 'pleasing personality' and comes across to others as 'highly trustworthy' which, given the 'split-off' aspect of his personality functioning makes him unpredictable and dangerous to others. It also cannot be ignored that Mr Hati's criminality escalated as events unfolded, with little concern as to the consequences for either his aunt or Sinelizwi. Considering all the available evidence, and applying the set test, I am constrained to conclude that genuine remorse has not been demonstrated. Applying the test, his various attempts to justify his conduct and the lack of an explanation as to what has provoked his change of heart count against him, and I am unconvinced that he has a true appreciation of the consequences of his actions on the lives of his victims.

[26] Absent genuine remorse, the question is whether Mr Hati's clean record, plea explanation and subsequent testimony, financial responsibility and care for his minor children and time spent in custody constitute substantial and compelling circumstances. None of these factors on their own suffice. In respect of the plea explanation, it remains to be noted that the evidence against Mr Hati was overwhelming, the complainants being family members well-known to him and, having managed to survive the attempts on their lives, able to describe their ordeal in detail. Considered cumulatively, these factors also do not amount to convincing reasons for departure from the discretionary minimum sentences prescribed. The few factors in Mr Hati's favour are wholly outweighed by the nature of the crimes and the interests

of society, so that the imposition of the strictest sanction possible is proportionate, justified and the only suitable punishment considering the applicable legislative framework.

Mr Yekanye

[27] Dr Andrews' assessment of Mr Yekanye finds support in the available evidence. It must be accepted that he was under the thumb of his older cousin and that his blameworthiness must be reduced as a result. His age, the fact that he was a first offender and, in effect, pleaded guilty must be added to this.²⁴ It may be accepted that his conscience and sense of remorse motivated the admissions he made, which curtailed the present proceedings. As Dr Andrews explained, there appear to be prospects of corrective rehabilitation. I consider these factors to qualify as 'substantial and compelling' and note these reasons on the record. The imposition of the prescribed minimum sentences would be disproportionate in the circumstances.²⁵

[28] Given the facts of the matter, it is, however, clear that a lengthy period of imprisonment is warranted, notwithstanding consideration of these mitigating circumstances. I need not reiterate the various dimensions of the offences, and their likely long-lasting impact on the complainants. It was Mr Yekanye, after all, who followed the prompts and instructions of Mr Hati and who perpetrated the various acts of violence for which he has been convicted. Furthermore, and now acting at his own behest, he has been found guilty of arson, with the intention to injure Nkosinathi Mali. This conduct has compounded the woes of the complainants. I have considered the sentencing triad, including the year already spent in custody, and the legislative provisions already described in imposing various periods of imprisonment on Mr Yekanye, to run concurrently so that the cumulative impact remains proportionate.

Order

[29] The following sentences are imposed:

²⁴ *S v Mendile* 2016 JDR 2010 (ECG) para 11.

²⁵ See, in general, *S v Sekonyela* 2020 JDR 1614 (ECM).

1. Accused no. 1 is sentenced to:

- a) 15 years imprisonment for robbery with aggravating circumstances (count 1);
- b) 5 years imprisonment for unlawful possession of a firearm (count 2);
- c) 5 years imprisonment for unlawful possession of ammunition (count 3);
- d) 5 years imprisonment for kidnapping (count 4);
- e) 5 years imprisonment for kidnapping (count 5);
- f) Life imprisonment for attempted murder (count 6);
- g) Life imprisonment for attempted murder (count 8).

As a sentence of life imprisonment has been imposed, the other sentences automatically run concurrently.

2. Accused no. 2 is sentenced to:

- a) 12 years imprisonment for robbery with aggravating circumstances (count 1);
- b) 4 years imprisonment for unlawful possession of a firearm (count 2);
- c) 4 years imprisonment for unlawful possession of ammunition (count 3);
- d) 4 years imprisonment for kidnapping (count 4);
- e) 4 years imprisonment for kidnapping (count 5);
- f) 20 years imprisonment for attempted murder (count 6);
- g) 7 years imprisonment for arson (count 7);
- h) 20 years imprisonment for attempted murder (count 8).

The sentences in respect of counts 1, 2, 3, 4, 5, 7 and 8 are to run concurrently with the sentence imposed in respect of count 6, so that the effective period of imprisonment imposed is 20 years.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 25, 27 March 2025

Delivered: 28 March 2025.

Appearances:

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