

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, HELD AT CAPE TOWN)

CASE NUMBER:

SS183/03

DATE:

12 AUGUST 2003

5

In die saak tussen:

THE STATE

en

- 10 1. SIYABONGIA SIKRENYA
2. DUMISANI BOQUANA
3. NKOSUBONGILE DYANTYI
-

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S E N T E N C EGRIESEL, R:

The three accused were yesterday convicted of (1) murder; (2)
20 robbery with aggravating circumstances; (3) & (4) two counts
of kidnapping; and (5) & (6) two counts under the Arms and
Ammunitions Act, 75 of 1969. The facts on which these
charges were based are fully set out in our judgment and it is
not necessary to repeat them for purposes hereof.

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When it comes to sentence, the court must have regard to three principal factors, namely:

- 5 (a) the personal circumstances of the individual
 accused;
- (b) the seriousness of the crimes in question; and
- (c) the interests of society.

10 With regard to the counts of murder and robbery with
aggravating circumstances, the court must also have regard to
the provisions of the Criminal Law Amendment Act, 105 of
1997.

15 In respect of murder, sec 51(1)(a), read with Part I of Schedule
2 of the Act provides for a compulsory sentence of life
imprisonment to be imposed, *inter alia* when –

- it was planned or premeditated; or
- 20 • the death of the victim was caused by the accused
 in committing or attempting to commit or after
 having committed or attempted to commit robbery
 with aggravating circumstances as defined in
 section 1 of the Criminal Procedure Act; or
- 25 • the offence was committed by a person, group of

persons or syndicate acting in the execution or
furtherance of a common purpose or conspiracy.

It is clear that the murder of which the accused have been
5 convicted, falls within all three categories.

As regards the count of robbery, sec 51(2)(a), read with Part II
of Schedule 2 of the Act provides for a compulsory sentence of
15 years imprisonment to be imposed when there are
10 aggravating circumstances or when it involves the taking of a
motor vehicle.

Again it is clear the present crime complies with both these
requirements. The crucial question for consideration,
15 therefore, is whether or not there are substantial and
compelling circumstances which justify the imposition of a
lesser sentence than the sentence prescribed as contemplated
by the Act.

20 In the case of S v Malgas 2001(1) SACR 469 the Supreme
Court of Appeal laid down certain guidelines to be followed by
the court in considering whether or not substantial and
compelling circumstances exist. The Court *inter alia* said the
following with regard to these concepts:

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5 "Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were 10 equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have 15 justified differentiating between them."

Later in the judgment, the learned judge said the following:

20 "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 crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, 25 it is entitled to impose a lesser sentence."

As far as the personal circumstances of the accused are concerned, all three of them gave evidence in mitigation of sentence. All three share certain features in common: all of
5 them are first offenders; all three come from the Transkei in the Eastern Cape from deprived and impoverished circumstances. Accused 1 and 3 have advanced at school to Grade 12 and 11 respectively. All of them came to the Western Cape to look for work, but were unemployed at the
10 time of the commission of the offences. All of them had dependants back home, whom they were supporting.

At the same time, none of them have shown any remorse for the crimes that they have committed. Accused 1 and 3 still
15 maintain that they are innocent of any wrongdoing, while accused 2 told the court that he feels "bitter" over what had happened. He claimed that it happened under "verswarende omstandighede", as it was put, by which he presumably meant "versagtende omstandighede".

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It is true, as was submitted by counsel on behalf of the accused that they – like a vast section of our society – lived in conditions of abject poverty. This argument, however, can be turned on its head, because, as Mr Wolmarans on behalf of the
25 State rightly pointed out, the vast majority of people living

under those conditions do not resort to crime in order to make a living. Were it otherwise, or were crimes of violence to be condoned on these grounds, it is clear that we would be living in state of complete anarchy.

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This brings me to the crimes of which the accused have been convicted, which include some of the most serious crimes known to our law. Counsel for the defence, who said everything that could be said in favour of the accused, argued
10 that the crimes could have been so much worse, for example, the accused could have killed or robbed the innocent passengers as well. I agree with counsel for the State that the accused hardly deserve credit for not having killed or robbed more people or for not executing their common purpose with
15 greater skill and professionalism.

What aggravates the crimes in question, are the following facts: firstly, that the crimes have been premeditated and pre-planned; secondly, that the accused deliberately chose a "soft
20 target", like a taxi, which inevitably accepts strangers to enter the vehicles. Taxis provide an indispensable service in society and they are entitled to the full protection of the law in providing that service.

25 Next, there is the fact that the deceased in this case offered

no resistance to the attempts of the accused to rob him of his father's brand new vehicle. All he wanted to do was to try and escape with his life, but he was not allowed to get away with it. Instead, he was shot in the back and killed by accused 1 while
5 accused 2 and 3 held his hands so as to prevent his escape. It was, therefore, a cold-blooded and senseless murder of an innocent victim, who had done them no harm and who posed no threat to them.

10 While it is easy at this stage to look only at the situation of the accused and to consider the devastating effect that a long term of imprisonment will have on each of their lives (of which I am painfully aware), the court cannot be allowed to forget or ignore the fact that the life of another young man with a young
15 family has been prematurely terminated by the callous deeds of the accused. No sentence that the court imposes today can ever return the deceased to his loved ones.

As far as the robbery is concerned, it is accompanied by
20 aggravating circumstances, because a person's death has been caused in the process. Furthermore, it involved the taking of a motor vehicle. Both forms of robbery have been singled out by the legislature for particularly severe punishment. Violent car-jacking has unfortunately become a
25 everyday feature of life in our country. It is easy to commit

and extremely difficult to combat. Were it not for the fact that the minibus in question ran out of petrol, coupled with the vigilance of the members of the police service at Storms River, it is more than likely that the present crimes would have
5 become just another statistic in the police records.

The kidnapping of two innocent passengers, after they were made to witness these terrible and traumatic events, is also a serious crime. I take into account, however, that they were not
10 deprived of their freedom for a lengthy period of time and that no actual physical harm came to them. Counts 3 and 4 will be taken together for purposes of sentence.

With regard to the illegal possession of the firearm and
15 ammunition, it goes without saying that it is likewise a very serious offence. The percentage of illegal firearms in circulation is astronomically high and literally every day our courts have to listen to cases of serious crimes committed with the aid of illegal firearms. What aggravates the present
20 crime, is the fact that the firearm in question is a semi-automatic weapon, in respect of which the legislature has prescribed a minimum sentence of 15 years imprisonment in terms of the provisions of sec 51(2)(a), read with Part II of Schedule 2 of the Act. Fortunately for the accused, however,
25 the State has neither invoked these provisions in the

indictment nor have they been relied upon in argument before sentence.

In the circumstances, the court has an unfettered discretion in
5 this regard. In exercising that discretion, I deem it just to
draw a distinction between the position of accused 1, on the
one hand, and accused 2 and 3 on the other hand. This is so,
because, in my view, the moral blameworthiness of the
accused 1 as actual possessor of the firearm and ammunition
10 is greater than that of the other two accused. Counts 5 and 6
will likewise be taken together for purposes of sentence.

This brings me finally to the interests of society. It is true, as
submitted by Mr Wolmarans, that society has been in the grip
15 of a crime wave for too long now. It is undoubtedly also true,
as submitted on behalf of the defence, that much of it is due to
the fact that we as a society find ourselves in a process of
transition. Be that as it may, the State cannot allow anyone,
at this sensitive stage of our evolution as a democracy, to
20 jeopardise that process by resorting to crime. It is for this
reason that Parliament has promulgated the Act in question, to
make it clear to everybody that serious crime must be
combated with all means at the disposal of the State. To this
end, heavy sentences have been prescribed, from which the
25 courts are not permitted to deviate, save in the case of truly

substantial and compelling circumstances.

Having carefully considered all the circumstances of the present case, I am of the firm view that there are no such
5 substantial and compelling circumstances which may justify the departure from the minimum sentences prescribed by Parliament. Taking into account all the factors mentioned on behalf of the accused, I am in any event of the view that they are far outweighed by the aggravating circumstances which I
10 have mentioned. I conclude, therefore, that on the facts of this case the prescribed sentences are not disproportionate to the crime, the criminal and the needs of society, nor would an injustice be done by imposing those sentences.

15 In the circumstances, all three of the accused are sentenced as follows:

Count 1 (murder): LIFE IMPRISONMENT.

20 Count 2 (Robbery with aggravating circumstances):
15 (FIFTEEN) YEARS IMPRISONMENT.

Court 3 and 4 (Kidnapping – both counts taken together for purposes of sentence): 2 (TWO) YEARS
25 IMPRISONMENT.

Counts 5 and 6 (Illegal possession of a firearm and
ammunition in contravention of the provisions of Act 75
of 1969, both counts taken together for purposes of
5 sentence):

Accused 1: 3 (THREE) YEARS IMPRISONMENT

Accused 2 & 3: 2 (TWO) YEARS IMPRISONMENT

The sentences on counts 2 to 6 shall run concurrently
10 with the sentence on count 1.



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GRIESEL, R