

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A300/2008

DATE:

3 SEPTEMBER 2010

5 In the matter between:

BONGINKOSI GONGOTHA1st Appellant**SIBONISILE MQIGWANA**2nd Appellant

and

THE STATE

Respondent

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J U D G M E N T**BINNS-WARD, J:**

15 In this matter the appellants were convicted in the regional
court on one count of murder, in that on 2 July 2006 at or near
Khayelitsha, they murdered Eric Mziwabanto Nzemla by
shooting him with a firearm and on the same date and place
attempted to murder Lendiwe Magenyesa by shooting her with
20 a firearm. They were also convicted under the Firearms
Control Act 60 of 2000 with possessing a firearm without a
licence, permit or authorisation issued in terms of the act.

On the count of murder, the court *a quo* found that there were
no substantial and compelling circumstances entitling it to
25 deviate from the prescribed minimum sentence of life
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imprisonment; and they were, therefore, on that count sentenced to life imprisonment. In respect of the count of attempted murder, a sentence of ten years imprisonment was imposed on both appellants. In respect of the charge under
5 the Firearms Control Act, they were each year sentenced to five years imprisonment. The sentences on the counts of attempted murder and of the contravention of the Firearms Control Act, were directed to run concurrently with the sentence of life imprisonment.

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By reason of the provisions of section 309 of the Criminal Procedure Act, in particular the first proviso to section 309(1)(a) of that act, the appellants enjoyed a right of appeal to this court without the need to obtain leave from the trial
15 court for that purpose. Section 309(2) of the Criminal Procedure Act provides:

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“An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court, provided that the magistrate against whose decision or order the appeal is to be noted, or of he or she is unavailable, any other magistrate of the court concerned, may, on application and on good cause
25 shown, extend such period.”

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In this matter it is clear from the record that both the trial magistrate and the appellants' counsel at trial were aware of their right to appeal, but it is evident on the record that there
5 was some confusion as to how matters in that regard should be taken forward. That confusion no doubt arose from the fact that the relevant rule of court, being Rule 67 of the Magistrate's Court Rules, was not appropriately amended to give effect to the statutory amendments until sub-Rule 5A was
10 introduced in terms of General Notice 517 of 2009, which was published only on 8 May 2009.

In the circumstances it seems appropriate to treat the document filed of record and drawn, according to its tenor, as
15 an application for leave to appeal, as a notice of appeal in terms of the regulations as eventually promulgated. The grounds of appeal set out in that document make it apparent that the appeal is directed only against the sentences imposed; and in particular only against the life sentence
20 handed down in respect of the murder count. Those grounds are that the magistrate did not give due consideration to the fact that the applicants were first time offenders, that the applicants were only 19 years old at the time, still attending school at the time of committing the offence, that the
25 magistrate erred in over-emphasising the interest of the
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community and the seriousness of the crime.

It is alleged that the magistrate did not give due consideration to the element of mercy to be afforded to the applicants and gave the element of retribution too much weight and consideration. It averred that the term of imprisonment adduced a sense of shock and that too much emphasis was placed on retribution and deterrence. Those provisions appear to pertain only in respect of appellant number 2, but no doubt essentially the same assertions were urged in respect of appellant number 1.

Now, as Mr Theron pointed out in his oral argument today, it is a trite principle that a court of appeal will not interfere with the sentence imposed by a trial court, unless there has been some material misdirection or vitiating error by the trial court in the exercise of its sentencing jurisdiction. In the current matter, and I do not intend to set out the facts in detail, the magistrate's court judgment does that adequately, the appellants made themselves guilty in respect of the murder count of one of the more heinous instances of that offence. For no disclosed reason, in the middle of the night, they intruded into the domestic privacy of the deceased and the complainant on count 2, by breaking down the door to their house and then, having gained entry into the house, breaking

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down the door into the bedroom in which both of them were at that stage, and opening fire on the deceased. In the region of seven bullets appear to have been fired at the deceased, with, unsurprisingly, fatal consequences.

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The evidence shows that the deceased was known to the appellants, although it gives no indication that they would have had any basis to act against him in this entirely unacceptable manner. The evidence also shows that the appellants were
10 known to the complainant on the count of attempted murder, and the evidence indicates that it is clear that it is only fortuitous that the complainant on the attempted murder count, survived this incident. It is obvious that the assault on her, also by firing at her with the firearm, was undertaken with the
15 deliberate intention of killing her, no doubt to try to facilitate that no identifying evidence would be available against the appellants thereafter.

The magistrate took into account the appellants' personal
20 circumstances. She was conscious of their relative youth, but she was also rightly conscious that that factor, as well as the fact that they had no reported previous convictions, could not be seen in isolation and had to be adjudged against the circumstances of the offence and the interests of the
25 community. It does not need repeating how ravaged this

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country is by serious and violent crime and the current matter is an incident of one of the worst kinds of perpetration of that type of crime.

5 As Mr Justice Nugent, Judge of Appeal, remarked in his recent judgment in S v Vilakazi 2009(1) SACR 552 (SCA), in instances of particular serious crime, for which the provisions of the minimum sentence legislation appear to be particularly directed, the personal circumstances of the appellant, while
10 not irrelevant, weigh less in the scales. And that effectively is what the trial court found. In the circumstances I am of the view that no basis for a finding of misdirection by the trial court exists and I would, therefore, dismiss the appeal against the sentence of life imprisonment on the part of both
15 appellants.

KRUGER, AJ: I agree.

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KRUGER, AJ

BINNS-WARD, J: And it is so ordered.

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BINNS-WARD, J

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