

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

SS93/08

5 DATUM:

16 MARCH 2010

In the matter between:

DIE STAAT

teen

10 MTHETHELELI GONILELETHU MAGOQOZA

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LOUW, J:

The two accused in this case have been convicted of various crimes and this court must now impose appropriate sentences.

20 I will deal first with accused 2 since he was convicted only of the theft of the remote control of a DVD player. Accused 2 is still a young man, he was born on 9 May 1989. At the time of commission of the crime he was 17 years and four months old. Today he is 20 years and 10 months old. Despite his youth

25 accused 2 has three previous convictions for rape. These

offences were committed about one year before the present offence on 10 September 2005 when he was 16 years and four months old. On the 9 December 2009 accused 2 was sentenced to 10 years imprisonment on the three counts of rape which were taken together for purposes of sentence. Accused 2 is therefore a person who has previously committed very serious crimes at a young age. Accused number 2 is not married but he has a young boy who was born three months before he was arrested on this matter on the 9 November 2006. Accused 2 was at the time of his arrest still a grade 10 schoolboy. He lived with his maternal grandmother under whose care he had grown up. In 2007, after being ill for eight years, his father died. After his arrest, accused 2 spent one year and one month in custody before he was released on bail of R500 on 17 December 2007. Accused 2 was convicted of stealing an item of no great value. There is a strong suspicion, as I've said in my judgment on conviction, that accused 2 was also involved in the serious crimes that accused 1 was convicted of. He has, however, not been convicted of those crimes and he obviously cannot be punished for them. Given accused 2's previous convictions, I am of the view that direct imprisonment is appropriate in this case. In view of the time spent in custody awaiting trial, a period of six months imprisonment should be imposed. Given the fact that the crimes were committed on two separate

occasions more than one year apart, it would not be appropriate to order that the sentence in this case run concurrently with the sentence the accused is currently serving, as his counsel suggested.

5 I turn to accused 1. On 11 May this year, 2010, he will be 28 years of age. At the time of the commission of the offences he was 24 years and four months old. He has three previous convictions. On 3 March 2005 he was convicted of culpable homicide and of the illegal possession of a firearm
10 and ammunition. On the same day he was sentenced to four years imprisonment which was suspended for five years on the count of culpable homicide. The condition of suspension is that he not be convicted of a crime in which violence to the person of another is an element. In addition, accused number
15 1 was sentenced to three years correctional supervision which included house arrest, 576 hours of community service, attendance of rehabilitation programmes and submission to monitoring by correctional officials. The two convictions on the possession of a firearm and ammunition were taken
20 together for purposes of sentence. On those counts accused 1 was sentenced to three years imprisonment which was suspended for three years. The condition of suspension was that he not be convicted of contravening the relevant sections of the act relating to the possession of a firearm and
25 ammunition. The present offences were committed during the

period that accused 1 was under correctional supervision. In addition, the crimes were committed during the periods of suspension of the two prison sentences. These are aggravating features of this case. The suspended sentences
5 may be put into operation. I will return to this issue later.

The crimes committed by accused number 1 are all, save for the theft, very serious crimes. Accused 1 is a person who had previously caused the death of another person and in this case he was involved in the killing of two defenceless young
10 children who could cause him no harm. He also attempted to kill the witness, Xolani Apleni. In all of this he was again in unlawful possession of a firearm and ammunition. Mr Vakele, on behalf of the State, submitted that by virtue of the provisions of Section 51(1) of Act 105 of 1997 read with
15 paragraph (d) under murder in Part 1 of Schedule 2 of the Act, the minimum sentence in respect of the murder counts is life imprisonment. This is so, he contended, because this is a case of murder committed by accused 1 as part of a group of three persons, "acting in the execution or furtherance of a
20 common purpose." I am not convinced that this case falls under the particular provisions of Part 1 of Schedule 2. That provision applies to the execution or furtherance of a common purpose or conspiracy. Here there was no evidence of a conspiracy or express agreement arrived at beforehand to
25 murder the children. The group of three men came to the

house to look for Siyabulela. Only when they did not find him they threatened and then killed the two young children. It is, however, not necessary to decide this issue in view of the conclusion to which I have come in regard to the appropriate sentences on counts 2 and 3. There is very little to be said in favour of accused 1. He is single but has a girl child who was born in 2005. At the time of his arrest on 2 October 2006 he was working as a painter's assistant at an average wage of R400 per week. Of more importance are the following two considerations. Accused 1 has been in custody awaiting trial and sentence for three years and five months. A medical certificate Exhibit R was handed up which discloses that accused number 1 is HIV positive but that he is doing well on ARV treatment.

By committing these crimes accused 1 has demonstrated his complete disregard for the law and the lives of others. Two innocent young children were killed with direct intention by persons who invaded their home looking for another person. When these children could not or refused, despite threats that they would be killed, to give information regarding the whereabouts of Siyabulela they were executed with single gunshots to the head. The words of Holmes JA in S v Rabe 1975(4) SA 855 (A) at 862G–H that:

"Punishment should fit the criminal as well as the crime, be fair to society and be blended with mercy according to the circumstances."

has often been quoted. In this case the punishment should
5 especially fit the crime. The severity and the nature of the crimes are of cardinal importance. The interests of society and of the victims, that is the family and friends of the deceased are very important in this case. The sentences imposed must also serve to deter other would be criminals. By
10 incarcerating accused 1 society will be protected against him and a message will be sent to other criminals. The aspect of retribution is very important in this case. The crimes are abhorred by the community and the sentences should reflect this. It is right that the sentences imposed will reflect the
15 natural indignation of the family, and friends of the deceased. Not only of the family and friends but also of those that knew these innocent children as well as of society at large. If sentences in crimes of this nature are too lenient, justice may fall into disrepute. People may lose respect for the law and its
20 institutions and people may resort to taking the law into their own hands. Rehabilitation is generally an important consideration when a sentence is considered. However, in this case, rehabilitation is virtually of no importance because the appropriate sentences has little potential to achieve the
25 rehabilitation of accused 1. Accused 1 has shown no remorse

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for the cruel crimes he had committed. Accused 1 has been directly involved in causing the death of the two children and he attempted to kill another person. The sentences should reflect the moral blameworthiness of the accused. It must be proportionate to what he has done. I have earlier referred to the fact that accused 1 has been in custody awaiting trial and sentence for three years and five months. In S v Vilakazi 2009(1) SACR 552 (SCA) at 574i-575b it was said:

“While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.”

In that case the Appeal Court reduced a sentence of life imprisonment imposed for rape to a sentence of 15 years imprisonment. The Appeal Court brought into consideration the two years that the appellant in that case had spent awaiting trial and sentence by making the following order:

“The accused is sentenced to 15 years imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire.”

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The effect of s 282 of the Criminal Procedure Act is that sentences may not be backdated by the sentencing court save where the case is on appeal referred back to the sentencing court.

5 In imposing a sentence in this case this court can, therefore, not backdate the sentence to the date of accused 1's arrest on the 2 October 2006. In the case of a sentence imposed in terms of Section 51, that is of Act 105 of 1997, that is a compulsory minimum sentence, s 51(4) provides that such
10 sentence shall be calculated from the date of sentence. Again, therefore, if a sentence is imposed in terms of the Minimum Sentence legislation, it cannot be backdated. Section 39(1) of the Correctional Services Act, Act 111 of 1998 provides that a sentence of imprisonment takes effect from the
15 date on which it is imposed. Section 392(a)(i) of that Act provides that any determinate sentence of imprisonment to be served by a person runs concurrently with any life sentence. This would include any suspended sentence that may be put into operation.

20 Now, in my view and despite the fact that accused number 1 has already been in custody for more than three years and the fact that he suffers of HIV, the only sentence which would be appropriate to the murder charges are sentences of life imprisonment in each case. Anything less
25 will, in my view, not reflect the seriousness of the crimes in

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this case. I come to this conclusion despite the fact that I cannot, as I see it, make an order in a case where life imprisonment is imposed similar to the order which is made in S v Vilakazi.

5 Having regard to the foregoing, I therefore impose the following sentences:

Accused 1:

ON COUNT 1 – TWO YEARS IMPRISONMENT

10 **ON COUNT 2 – LIFE IMPRISONMENT**

ON COUNT 3 – LIFE IMPRISONMENT

ON COUNT 4 – 8 YEARS IMPRISONMENT

Count 5 and 6 are taken together for purposes of sentence:

COUNTS 5 AND 6 – FIVE YEARS IMPRISONMENT

15 Accused number 2:

ON COUNT 1 – SIX MONTHS IMPRISONMENT

Ms Makoena, I found your interpretation in this case excellent. You were efficient and very professional. I want to thank you for the way in which you dealt with the matter, because I cannot say how good your interpretation was and translations have been, but your conduct has been exemplary.



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LOUW J