Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. CC64/2015

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE STATE

and

BONGANI GOODMAN DLAMINI Accused

SENTENCE JUDGMENT DELIVERED: 17 OCTOBER 2016

BINNS-WARD J:

[1] The accused was convicted on 5 September 2016 of having committed the murder of Anivuyo Ndamase on 1 March 2016. This judgment is concerned with the imposition of sentence.

[2] Anivuyo, who was the daughter of Ms Kholeka Ndamase and Mr Patrick Makade, was only five years of age when she was murdered. By all accounts she had a delightful nature and brought much joy into the lives of her parents. The photographs of her that her mother tendered in evidence show a pretty and happy looking child. It was clear from her mother's evidence in the trial and the content of the victim impact reports put in by the prosecutor as evidence in aggravation of sentence that Anivuyo's murder has resulted, not only in the tragic loss of a promising young life, but also in the devastation of the lives of her parents. It is evident that in the aftermath of the horrific killing of their daughter and the ghastly circumstances in

which her decomposing remains were discovered bundled up in a set of plastic bags put out to be taken away in the weekly garbage collection after they had been searching for her over three days and four nights, the parents have been unable to come to terms with their loss. In a very real sense they are experiencing a living death, and are just as much victims of his crime as was Anivuyo.

[3] The circumstances in which the offence was committed - to the extent that they could be established - were recounted in the judgment delivered by the court on 5 September. I find it unnecessary to revisit them in any detail. Suffice it for present purposes to state that it was found that the accused fatally assaulted the deceased in his house by delivering a blow to her head with a large and heavy hammer. The evidence indicated that the child's head must have been against the floor when the blow was delivered. He shattered her skull. There is no doubt that by striking her on the head with such a weapon the accused actually intended to kill her. It is apparent that the child must have been undressed at the time because, despite the evidence of copious bleeding having occurred, no blood was found on her clothing and the corpse was in an unclothed state when it was recovered from the plastic bags into which the accused had placed it.

[4] Only the accused knows how Anivuyo came to be in his house at the time, how she came to be in an undressed state, what happened in the lead-up to her killing and why he committed the murder. He has chosen not to disclose those facts and has instead consistently professed his innocence in the face of the overwhelming circumstantial evidence that established his guilt beyond any shadow of doubt. In consequence, the child's parents have been left to speculate; and denied the closure, which painful though it would have been, might have assisted them to heal.

[5] The accused's denialism cannot hide the fact that Anivuyo's last minutes must have been extremely traumatic. The objective evidence proves that she was brutally treated. And after she had been killed, the accused dealt with her body cold-bloodedly and contemptuously. His behaviour after the commission of the offence was calculated and cynical. He even participated in a search for her after her mother had raised the alarm about the young girl's disappearance. The manner in which the body was elaborately concealed within a series of interleaved plastic and canvas bags and stored for days before being put out on the day that the local authority collected domestic refuse from the area afforded further indication of the accused's callousness

about what he had done and of his utter disrespect for his victim's humanity. All the while he went on with his life - going to work as usual, and visiting his girlfriend as if nothing had happened.

[6] One can accept the accused's evidence that he experienced some anxiety in the days before his arrest, but it is clear that his concern was only about himself and the danger of his crime being discovered. That attitude continued to characterise his behaviour after his arrest and, indeed, right through the trial. The only chink in his emotional coldness about what he had done was when, very shortly after his arrest, he gave an indication of wishing to make a clean breast of things by making a statement. He, however, quickly reconsidered that position. If he has any remorse, he has chosen not show it, either in word or deed. His lack of remorse has added to the parents' torture.

[7] When a court imposes sentence, it takes into account the facts and considerations that are peculiar to the case. It weighs these in the context of three broad considerations: the nature of the offence, the personal circumstances of the offender and the interests of the community.

[8] The crime of murder is of the most serious kind of offence that the law knows. This is exemplified by the legislature's determination that it should ordinarily be punished by imprisonment for not less than 15 years, unless there are substantial and compelling circumstances justifying a lesser sentence. The special heinousness with which society regards the crime when a child is the victim is reflected in the severity of the sentences imposed by the courts in such cases. The special position of children in society is acknowledged in the Bill of Rights. In terms of s 28(1) of the Constitution every child has the right, amongst other matters, to be protected from maltreatment, neglect, abuse or degradation. The accused's conduct entailed not only a fundamental breach of Anivuyo's rights to dignity and life, but also the most extreme infringement of her basic rights as a child.

[9] The state referred in argument to the example of the life sentence imposed in *S v Isaacs* [2010] 4 All SA 481 (SCA). The factual circumstances bore a striking resemblance to those in the current case in a number of respects. The conviction in that case was also based on circumstantial evidence. The child victim was also murdered in the offender's house and her body subsequently discarded on a refuse

dump. Unfortunately, however, it is not apparent in any detail from the reported judgment what the accused's personal circumstances were. I was informed that the judgment of the trial court has gone missing from the court file.

[10] I have found a number of other judgments, however, which show that even where the offender's personal circumstances are unremarkable, like those of the accused in the current case, a sentence of life imprisonment has been found to be the appropriate punishment.

[11] In *S v Tata* 2015 JDR 2577 (ECG), the accused was a first offender who when aged only 17 raped a 10 year old girl vaginally and anally before killing her by cutting her throat. He was sentenced to 19 years' imprisonment in respect of each of the counts of rape and to life imprisonment for the murder. On appeal, the life sentence was set aside because its imposition had been unconstitutional on account of the accused's age at the time he committed the offences. The maximum sentence to which he could have been sentenced in terms of the Child Justice Act 75 of 2008 was 25 years' imprisonment. The Full Court of the Eastern Cape Division considered that the imposition of the maximum sentence was appropriate. It substituted the life sentence with one of 24 years' imprisonment, allowing a discount of one year on account of time served awaiting trial, and directed that it be served concurrently with the sentences imposed for the rapes.

[12] In *S v Madiba* 2014 JDR 0556 (SCA), the accused, who also appears to have been a first offender, was convicted of the rape and murder of a three-year old child. The trial court imposed a sentence of life imprisonment in respect of the rape conviction and one of 35 years' imprisonment for the murder. The Supreme Court of Appeal confirmed the sentences on appeal, but remarked (at para 14), '*I turn to the sentence of 35 years imprisonment imposed by Hetisani J for the murder of the three year old girl, Ratani. Hetisani J furnished no reasons for imposing a lesser sentence for the murder of Ratani than he imposed for her rape. Her murder was undoubtedly deserving of a sentence of life imprisonment. The State, however, did not seek leave to appeal against this sentence and in fact asked for the sentence to be confirmed. This court is accordingly not entitled to increase the sentence (see Frank Nabolisa v The State 2013 (2) SACR 221 (CC))*'. It seems clear that had the state appealed against the 35 year sentence on the murder conviction, sympathetic consideration would have been given by the appeal court to increasing the sentence to one of life imprisonment.

[13] Life sentences were also imposed for the murder of a child in *S v Mukona* 2015 JDR 2057 (SCA). In that matter, the accused, who had a previous conviction for murder, had assaulted his two children with an axe, as a result of which one of them died and the other was grievously injured. At para 18 of the judgment, Mathopo JA made the following observations which, allowing for the factual differences in the matters, have loud resonance in the context of the offence in issue in this case, '*There is no doubt that the offences were serious to the extreme. What is aggravating is the fact that the arson, murder and attempted murders were committed in the sanctity of the complainants' homes. The children had looked to the appellant for protection and guidance. Instead he abused his position of trust, and killed and injured them. This must have been emotional, traumatic and devastating for the young defenceless children to have had to suffer at the hands of their father. As a result of the assault, Mulanda has been semi-paralysed and been left mentally impaired. She is probably fortunate to have survived but will forever live with the fact that her condition was caused by her father. The appellant showed no remorse for his actions and persisted on his innocence and did not testify or adduce evidence aimed at demonstrating his remorse or contrition*'.

[14] *S v Montsho* 2014 JDR 0743 (GNP) is another case in which a sentence of life imprisonment was imposed for the murder by a 27 year old man of a young boy aged three years who had been playing outside his house when the accused enticed him to accompany him. Thulane AJ describing the special seriousness of the offence remarked (at para 56) '*The right to life is sacred, basic to humanity itself and enjoying Constitutional protection. Children in this country are entitled to play in the streets, especially just in front of their parental home. They have a legitimate claim to play peacefully on the streets, to enjoy their youth, to run around and enjoy the peace and tranquillity of their homes and neighbourhoods without the fear, the apprehension and the insecurity which constantly diminishes the quality of their lives*'.

[15] I am astute to the fact that in some of the matters I have cited the accused had been convicted of the rape and murder of the victim, whereas in the current case, the accused was acquitted on the charge of rape. It is however clear that the courts in the matters to which I have referred treated the counts of murder separately for sentence purposes from the convictions in respect of the sexual offences. These judgments have not been cited in order to suggest that a life sentence is invariably appropriate in

child murder cases. That is not so. Every case must be treated on its merits. The examples that I have cited do serve, however, to confirm - if confirmation were needed - the grievous character of the offence and the weight that the courts do attach in the interests of the community to its sanction by severe punishment.

[16] The accused's counsel argued that the fact that the accused had been drinking on the day the offence was committed diminished his moral blameworthiness. He also pointed to the fact that the accused was a first offender and that he had been contributing towards the maintenance of his disabled younger sister who lives at the family home in KwaZulu-Natal. There is also the issue of the accused's health, which requires him to be on medication. Counsel argued that these factors, and the period of almost 18 months that the accused spent in custody awaiting trial, constituted sufficient reason to impose a sentence less than the prescribed minimum 15 years' imprisonment. I disagree. The seriousness of the offence and the interest of the community in the imposition of suitably severe sentences for offences of this nature mean that the accused's personal circumstances are a relatively subsidiary consideration when there is nothing about them that is particularly compelling.

[17] As mentioned, the accused has not shown a shred of remorse. I can find nothing in the evidence to mitigate his moral blameworthiness. He might have had a few drinks on the day of the murder, but there is nothing to suggest that he was affected to any degree that would have diminished his ability to distinguish right from wrong. He certainly has not claimed that his consumption of a few beers during the course of the day was in any manner relevant to his commission of the offence. Indeed, despite anxious search, I have been unable to find any mitigating feature in favour of leniency whatsoever. By contrast, the aggravating factors are stark. In the circumstances I have concluded that the appropriate sentence is one of life imprisonment.

[18] The accused is sentenced to life imprisonment.

A.G. BINNS-WARD

Judge of the High Court