

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: SS147/09

DATE: 2010/11/14

In the matter between

THE STATE

and

INNOCENT MQALANGA

BONGANI MQALANGA

Accused 1

Accused 2

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED

DATE

SIGNATURE

JUDGMENT ON SENTENCE

VICTOR J:

[1] The accused, who are brothers, have been convicted of the murder of Mr Charles Thora, who died on 12 September 2009 in the Holomisa Section, Bekkersdal, Westonaria. They have also been

convicted of robbery with aggravating circumstances of a bicycle as defined in Section 1 of Act 51 of 1977, read together with the provisions of Section 51 of Act 105 of 1977.

[2] The court found that the accused left John's Tavern in the early hours of the morning of 12 September 2009, and on their way home they encountered the deceased who was on a bicycle cycling to work. It is clear from the evidence that the deceased usually left home at 03:00 in the morning to go to work. He carried a spear-type instrument with him as a means of protection.

[3] When accused 1 and 2 encountered him along the way, accused 1 kicked the deceased's front bicycle tyre causing the deceased to fall off. Accused No 2 went and hid the bicycle behind the corner. During this altercation accused 1 strangled the deceased, who fought back and scratched accused 1 on his throat, presumably with the spear. This was denied by accused 1.

[4] Both accused sat on the deceased. Accused 1 pinned the deceased down while accused 2 repeatedly stabbed him. The *post mortem* report revealed eight stab wounds. They left the deceased for dead and proceeded to their home. They were in the company of Ms

Peter who was the girlfriend of accused 1. She was the main state witness. The deceased was found dead in the morning, and I found that he had died of the multiple stab wounds inflicted by accused 2 whilst accused 1 held the deceased down. It is unknown what the extent of the deceased's pain and suffering was prior to his death.

[5] The accused denied being at the scene. Their defence was that they had left Umswazi Tavern between 21:00 and 21:30 and were at home sleeping at the time of the murder. They called their mother and sister in their defence on the merits. Because of their defence on the merits, during mitigation of sentence, it followed that neither showed remorse or any insight into what was a brutal and senseless murder. Both their mother and sister were chronic alcoholics, and aspect which the court raised with defence counsel on the question of some mental impairment as a result of foetal alcoholic syndrome.

[6] The state proved a previous conviction against accused 1, the crime of rape on 22 January 1999. He was sentenced on 24 July 2001 to two years' imprisonment. Accused 2 was found guilty of culpable homicide committed on 20 February 2008 and he was sentenced on 22 June 2009. He was given a seven year sentence fully suspended for a period of five years', on condition that he was not found guilty on a charge of murder of culpable homicide. Three months have elapsed

from the date of that sentence till the date when he committed this murder.

[8] The following personal circumstances were proffered as substantial and compelling circumstances on behalf of accused 1: He has a child of eight months. Although the child is in the Eastern Cape, he has the intention of bringing the child and the mother to Johannesburg. He also has three other children whom he supports. His mother is unemployed and he contributes to her maintenance. Prior to his crime he worked for Joshua Door as a salesman and earned R6 000 per month with commission. He passed Grade 12. The aforesaid factors demonstrate, in my view, that he is capable of rehabilitation. He was 31 years old at the time of the crime. It was submitted in mitigation, but never raised on the merits, that the accused was intoxicated and not in his sober senses. This feature was raised in the face of the defence that the accused were not present and asleep at home at the time of the murder. No chronic alcoholic pathology was raised. There clearly was not, as accused 1 was employed and went to work the morning after committing the murder.

[9] The primary substantial and compelling circumstances raised on behalf of accused 2 were that he was relatively youthful at the time of the crime, he was 24 years old. It was submitted that the crime of

culpable homicide committed by him was really one of self-defence, as the deceased in this matter was armed with a spear. Accused 2 had passed Grade 4. In my view there were no factors taken cumulatively in respect of accused 2 which could constitute substantial and compelling circumstances. Although he was 24 years old at the time, he was not a first offender. He had killed a person, and clearly learnt nothing from the fully suspended sentence. There was nothing in his profile which suggested that he is capable of rehabilitation.

[10] As I have already indicated, the mother of the two accused is an alcoholic. She had apparently changed her ways and no longer drinks. She testified on behalf of her sons on the merits, and much of her evidence was not helpful or relevant to their defence.

[11] Counsel on behalf of accused 1 suggested rather feintly that maybe a social worker report should be obtained. However, when the accused's mother testified there was no evidence of mental impairment about herself or her sons from her testimony or her demeanour.

[12] I raised a question of possible mental impairment in respect of accused because of his mother's alcoholism, thus raising the possibility of him being mentally impaired by a possible foetal alcohol syndrome.

Counsel for accused 2 took them matter no further.

[13] Accused 2 has two children. One of the children, the three year old, lives with his mother, and I must add that during accused 2's testimony on the merits there was no evidence of him being mentally impaired in any way to the extent that he did not know what he was doing when he repeatedly stabbed the deceased.

[14] On behalf of the state it was submitted that the previous convictions of both accused were in respect of crimes of violence. Counsel for the state submitted that he had conferred with both counsel for the accused and that it was evident that a social worker or pre-sentence report would not assist the court, and I might add that such a report in the absence of insight or remorse in relation to the crime makes a constructive recommendation very difficult.

[15] Counsel for the state submitted that the crimes were committed where the minimum sentence of life imprisonment should be imposed as there were no substantial and compelling circumstances present. In assessing the substantial and compelling circumstances, the usual factors also need to be taken into account. I have already referred to those traditional factors.

[16] Although no evidence was led in aggravation of sentence, however, it was quite clear that Ms Thora, the deceased's wife, was deeply upset. Her child was deeply upset when members of the Community Police Forum brought the bicycle to the Thora home for identification. Ms Thora was a very poor woman. She wore threadbare clothes, and it was submitted on her behalf that she still does not have a grant from government to this day. It was clear to me when she testified on the merits that she was a broken woman. She cried after testifying. She was very thin and presented as a tragic figure in the witness box as she testified to the consequences for her and the children as a result of her husband's murder.

[17] Although life imprisonment is the ultimate penalty, it is not to be imposed lightly, even when there is the prescribed minimum sentence. I have already referred to the fact that whilst accused 2 was 24 years old, he was not such a youthful offender, and he demonstrated none of the positive attributes of accused 1, who despite his mother and sister's alcoholism managed to obtain a Grade 12 certificate and a very good job.

[18] Accused 2 did the odd piece job, and there was no suggestion that he was actively looking for employment or trying to engage in any entrepreneurial activity in order to earn money. He merely helped his

cousin once a week in the Fochville district.

[19] In *S v Mabusa and Others*, Cachalia JA held:

“A court cannot therefore lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so, it would deny the youthful offender the human dignity to be considered capable of redemption.”

[20] The youthfulness of accused 2 must be weighed against all the other factors. The facts in this case are different from *S v Mabusa supra*. The accused in this matter is older than the accused in the *Mabusa* matter. The very difficult socio-economic circumstances in which the accused lived may have played a role. They reside in an informal human settlement. Clearly these poverty related circumstances is no licence to kill, and that for a bicycle.

[21] The court heard the testimony of one of the Community Police Forum leaders. This is an informal settlement where inhabitants have with pride organised themselves into a structured community, with norms controlled by a structured Community Policing Forum. There is even a base where all arrested persons are taken to. They also have

rules as to the time taverns in the area must be closed. In this case the community played a leading role in arresting the accused. This is a proud community that has not shirked its civil duties as a result of poverty.

[21] Given the levels of violence in the area, and the lead role played by the community who police themselves due to the lack of police resources, careful consideration has to be given to the role played by the court when criminals are brought to book by them. The elements of retribution and deterrence should not be overlooked in favour of personal circumstances.

[22] Quite clearly the punishment has to fit the criminal, the crime and the interests of society and the element of mercy and all these must continue to play a role in weighing and implementing the principles of justice. The court must be mindful of the role this particular community has played in this matter.

[23] Accused 2 played a far more violent and lead role in the murder. He had recently killed a man three months before. He was in a murderous frenzy when he stabbed the deceased eight times. This is indicative of a very serious personality problem. There is a singular lack

of insight on his part as to the consequences of killing and his previous lenient sentence acted as no deterrent to him.

[23] In assessing the nature of this crime, the value and the role of the bicycle requires some comment. The deceased used it as his transport to work. He was a conscientious citizen of this country who was committed to his family and took his responsibilities very seriously. He would leave home at 03:00 in the morning to cycle to work to provide for his family. This important fact, namely the bicycle in the Thora family, was what he was murdered for. This murder is a tragic and senseless act of violence. Although the value of the bicycle was not proved, it is incomprehensible how an old bicycle could be of value to the accused.

[24] Accused 1 has a good education. He clearly demonstrated an ability to overcome the negative impact and the role his alcoholic mother played in his life. He was able to earn up to R6 000 per month, and how he could have partaken in a murderous frenzy for a bicycle which he could easily have purchased with his salary remains a mystery.

[25] However, in considering all these factors in relation to accused 1, I continue to give weight to his previous conviction for rape. It is a very serious crime, but he has managed to stay out of trouble since 2001,

and to improve himself since 2001, to the present job where he was earning R6 000 a month with commission.

[26] The sentence which I intend imposing does take into account the different psycho-social circumstances of the two accused brothers. Although they acted together in killing the deceased, the different roles they played in the actual killing, and of course their previous convictions, justify the different sentence that I intend imposing.

ORDER

ACCUSED 1, sentenced to 20 YEARS' IMPRISONMENT in respect of the murder of Mr Charles Thora.

ACCUSED 1, sentenced to 15 YEARS' IMPRISONMENT in respect of the robbery in COUNT 2.

The sentence in COUNT 2 will run concurrently with the sentence in count 1.

ACCUSED 2, sentenced to LIFE IMPRISONMENT IN RESPECT OF COUNT 1.

ACCUSED 2, sentenced to 15 YEARS' IMPRISONMENT IN RESPECT OF COUNT 2.

The sentence in COUNT 2 WILL RUN CONCURRENTLY WITH THE
SENTENCE IN COUNT 1.



VICTOR J