

SOUTH AFRICA / JUDGMENT

S v Mggqobozi (Sentence) (CC33/2017)

[2025] ZAECMHC 60 (25 June 2025)

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COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

CC33/2017

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

Case No. CC33/2017

In the matter between:

THE STATE

and

THANDO MGQOBOZI

Accused

SENTENCE

JOLWANA J

- [1] On 1 December 2015 a request by two young daughters to their parents to attend a traditional initiation ceremony within the local community of Lower Nqadu Locality was, unbeknown to them, the last conversation they would have with their two young daughters. As their parents were granting them permission to spend the night with other young people in the same locality, whatever words were exchanged between the parents and their two young daughters and whoever else they spoke to on that day were the last words they would speak with their family members. As their parents granted them permission, and as they left the security of their homestead at 19:30 that evening, little did anybody know that they would be dead the following day, the 2 December 2015.

[2] This Court has convicted the accused for the gruesome murders of S[...] and C[...] K[...]. It has found that the accused took them to a secluded area in a small forest within Lower Nqadu Locality where they were physically and sexually abused and murdered. Accused has been convicted of the kidnapping of S[...], the aggravated robbery of C[...] of her smart phone, the rape of C[...] and the murders of the two K[...] children. This Court must now consider and pass an appropriate sentence for these heinous crimes. In respect of the aggravated robbery, the rape of C[...] and the murders of the two young girls, the State invoked the provisions of section 51(2) and section 51(1) of the Criminal Law (Sentencing) Amendment Act 38 of 2007 read with Parts 1 and 2 of Schedule 2 of Act 105 of 1997. In doing so, the State indicated its intention to ask the court to impose the prescribed

minimum sentences. The accused, before pleading to the charges, was advised of the State's intention in this regard, in the event of conviction. Chiefly, the main reasons for the minimum sentencing legal framework to be invoked was that the robbery was accompanied by the use of a sharp instrument. In respect of the two murders, the State believed, and the court found that the murders were not just an unfortunate situation that occurred perchance. It was planned resulting in the children who should have gone home when they left the homestead in which the traditional ceremony was held, instead of going home, they were taken to a secluded spot at a nearby forest where the heinous crimes were committed. They left home together and died side by side together for no reason other than just being children and young girls.

[3] In considering an appropriate sentence our courts use what has become commonly known as the Zinn triad. The Zinn triad is based on the case of Zinn[1] in which the manner in which our courts exercise their penal jurisdiction was authoritatively laid down more 50 years ago by the

Appellate Division. In simple terms, the Zinn triad requires the court, in its consideration of an appropriate sentence, to have regard to the offence, the offender and the interests of society.

[4] The approach to sentencing was, shortly thereafter, succinctly summarised in Rabie[2] in which Corbett JA said:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

- [5] The legal representative of the accused accepted that these crimes represent some of the most abhorrent crimes against young girls and women in this country. The K[...] girls were taken advantage of for no reason other than the fact that they were young, female and therefore defenceless. S[...] was only 12 years old when she was abused resulting in the doctor who conducted her postmortem examination finding that she had a vaginal tear in the posterior wall of her vagina which extended to the perineum. The offender has not taken this Court into his confidence and explain what happened to S[...]. He has not explained how she ended up at a forest with a vaginal tear. He has not explained why he had to make these two children go through so much pain. S[...] had no less than 23 stab wounds including wounds to her face and neck. C[...], at a young age of 16 years, was raped and murdered with extreme cruelty resulting in the infliction of thirty-three wounds, some of which penetrated her vital organs including the heart, lungs and liver. As if taking their lives so cruelly was not bad enough, accused also robbed C[...] of her smart phone. All these facts are a clear indication of how atrocious these offences against these children were.
- [6] It is clear that society looks up to this Court for protection from people such as the accused. Our courts are confronted daily with having to preside over cases of violent crimes, sexual abuse of children and women who are amongst those most vulnerable in our society. Where an offender has been convicted of such serious crimes, it follows that the society expects courts to pass sentences that reflect the society's abhorrence of such crimes. That is why the Legislature has passed the minimum sentences legislation to guide our courts in passing sentences that befit both the crime and the offender and where possible, to standardise the sentences that are imposed for such serious crimes.
- [7] As indicated earlier, section 51 of the Criminal Law Amendment Act 105 1997 is applicable to the facts of this matter. This means that the prescribed minimum sentences are, in the absence of substantial and compelling circumstances, applicable. There are sentencing principles that must come to the fore in the consideration of an

appropriate sentence and the court's exercise of its sentencing discretion. These were eminently restated not so long ago in Tsoetsi[3] as follows:

“(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

- (b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in *S v Zinn*.
- (c) Regard must be had to the interests of society (the third element of the Zinn triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in

deterrence, prevention, rehabilitation, and retribution.

- (d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from re-offending and the deterrence of would-be offenders.
 - (e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.
 - (f) Retribution being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.
 - (g) Finally, mercy is a factor. A humane and balanced approach must be followed."
- [8] In the light of the legal framework applicable to sentencing and the approach to sentencing that has been part of our jurisprudence for a very long time, I turn now to consider the personal circumstances of the offender. The accused did not testify in mitigation of sentence. The following submissions were made on his behalf. He was born on 26 January 1995 and is therefore 30 years old now. When he committed the offences on 2 December 2015, he was twenty years old. He is not married and has one child who is still a minor. This child is a girl who is now four years old and stays with her mother. The accused went to school up to grade 11 which he did not pass. At the time of his arrest, he had no previous conviction. However, while this case was pending in this Court, he was convicted of murder which was committed on 24 November 2021. He was convicted of the said murder charge on 19 October 2023. He has since been sentenced to life imprisonment which he serves at the East London Correctional Centre. On 24 March 2021, he was granted bail of R1500.00 by this Court in the interests of justice, as the trial dragged on mostly due to the accused's legal representation which had to change on two occasions thus delaying the finalisation of this trial. At the time he was admitted to bail, he had been in prison as an awaiting trial prisoner for about five years since his arrest on 2 December 2015. It was submitted that this period of pre-sentence incarceration should also be considered. Lastly, it was submitted that on the night in question the accused had consumed alcohol. In the final analysis, it was submitted that these personal circumstances of the offender, considered cumulatively, should result in the court departing from the imposition of the prescribed minimum sentences.
- [9] In aggravation of sentence, the State called Mr & Mrs K[...], the father and mother of the deceased. Mr K[...]'s evidence was that C[...] and S[...] were incredibly good children with very big plans and ambitions for their future. C[...] told them that she wanted to pursue her studies and become a social worker and S[...] said that she wanted to be a doctor. Mr K[...] testified that they asked these children to elaborate on their choice of careers. They said that one of their siblings is disabled and they wanted to be of assistance to him. Mr K[...] testified that after the killing of his children, their lives suddenly changed for the worst. For example, one of their children was doing very well at school before this incident and had progressed up to the second year at university. However, following this incident the said child just said that he no longer wanted to continue with his studies and has been at home doing nothing ever since.

- [11] With reference to a newspaper picture that he pulled out of his pocket, Mr K[...] testified that the said picture was taken on 3 December 2015 and published on 4 December 2015. He said that as could be seen from that picture, his wife was healthy and of full size. However, soon after this incident, she became sickly and was diagnosed with diabetes and hypertension which she did not have before this incident. He had to take her to Groote Schuur Hospital in Cape Town where all these diagnoses were made. In respect of his personal well-being, Mr K[...] testified that before this incident he was very active in his community, even attending community meeting. At the time of the incident, he worked at the taxi rank driving his own taxi, but he could not continue doing so after his children were killed. After this incident he became reserved, mostly quiet and preferred being alone. If he drops something or something falls, he becomes shocked and angry. His sleeping patterns have been negatively affected so much that he has to use sleeping tablets which do not help much. He has since also been diagnosed with diabetes and hypertension for which he collects treatment at a local health facility, which were not there before this incident.
- [14] Mrs K[...]’s evidence was that she is the biological mother of C[...] and S[...]. They were very well-behaved and disciplined children who were doing very well at school. They had big dreams of becoming a social worker and a doctor respectively, saying they wanted to help people. She testified that her life ended in December 2015 when a child from a neighbouring homestead arrived at her homestead and encouraged them to attend a traditional ceremony in the locality. She was surprised when they showed interest in attending it as they did not usually attend such events. They left with the said child saying they would be back soon, but they never came back. She testified that since this incident, she became a very sickly person and was diagnosed with diabetes, hypertension, and heart problems, all of which were not there before this incident. She used to wear a size forty-two but has since lost weight. She is no longer sociable, is irritable and has become very emotional such that she tends to shout or raise her voice. She testified that if the accused is handed a light sentence, she fears that he will return to the community and might repeat what he did to her children whom she believed, could still be alive if he had not returned from Cape Town.
- [16] It was submitted on behalf of the State that while it is so that the accused spent just over five years in prison before he was granted bail by this Court, that fact, while relevant, has to be considered with other factors in determining whether or not it should lead to a departure from the prescribed minimum sentences. It was further submitted that while the accused was relatively young when he committed these offences, no basis was laid for the submission that the accused’s relatively young age, together with the alcohol consumption, should be considered to be substantial and compelling circumstances to justify a departure from the prescribed minimum sentences. No evidence or submission was made on how consumption of alcohol affected his faculties and moral blameworthiness.
- [17] In respect of the personal circumstances of the accused, the court in Vilakazi[4] made the following observations:

“In cases of serious crimes, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of flimsy grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the

accused can be expected to offend again.”

- [18] While the accused had been granted bail by this Court, it did not escape the observation of the court that he was brought into court by correctional services officials. Subsequent to his conviction, it was submitted that he had no previous convictions and should therefore be regarded as a first offender. However, on further probing by the court, it transpired that while he had not yet been convicted of any offence on 2 December 2015, he had already committed a violent crime which he committed on 7 October 2015 for which he was convicted on 2 June 2016. That violent crime was an assault with intent to do grievous bodily harm. He was sentenced to pay a fine of R2000.00 or to serve 6 months imprisonment. That sentence was wholly suspended for 2 years on condition that he was not convicted of any offence of assault committed during the suspension period. It must therefore be accepted that between the 7 October 2015 and the 2 December 2015, a period of less than two months, the accused had committed a number of violent crimes which were, in their very nature, profoundly serious offences. I do not think that in the exercise of its sentencing discretion, the court should ignore that history.
- [19] The accused’s disregard for societal rules for peaceful and safe co-existence and his disregard for the law in general did not end with that history. The accused was granted bail by this Court on 24 March 2021. His warrant of liberation was signed by the Registrar of this Court on 31 August 2021 according to the Registrar’s official date stamp. On 24 November 2021, less than three months after his warrant of liberation was signed and he walked out of prison, he committed four very serious offences for which he was convicted on 19 October 2023. These were aggravated robbery, murder, unlawful possession of a firearm and unlawful possession of ammunition. What this means is that had this Court not granted him bail, he would not have killed his murder victim on 24 November 2021. This is the very point that Mrs K[...] made in her evidence. As indicated earlier, she expressed fear that if the accused is given a light sentence, he might return to the community and do to other children what he did to her children. That, in my view, is very profound and relevant consideration and this Court would be remiss in giving the interests of society due weight, if it did not consider all these facts as relevant circumstances in the consideration of appropriate sentences.
- [20] I am even prepared to go as far as to say that while our courts must consider the fact of an accused being a first offender, they should also our take into account, as part of what is considered to be the interests of society, the accused’s general disregard for law and order before and after the offence for which he stands trial, if he gets convicted of serious crimes

while standing trial. Courts should not, on the technical basis that the accused had not yet been convicted of any serious offence as at the date on which the offences in the matter before it were committed, ignore his general disregard for law and order and the rules which the society has set for mutual co-existence. Doing so would, be paying lip service to the interests of society as a sentencing consideration in my respectful view. The accused in this matter had no previous conviction when he committed these offences. However, he had already committed a very serious offence for which he was later convicted while standing trial in this

matter. These are, in my respectful view, very serious and relevant aggravating circumstances, it being irrelevant that the conviction in respect of the earlier offences happened after these offences had already been committed due to the fact that our criminal justice

systems tends to grind dizzyingly too slow as clearly demonstrated by the fact that it has taken ten years to convict the accused in this matter.

[21] To borrow from the eloquence of Nugent JA in *Vilakazi*, a material consideration is whether the accused can be expected to offend again. The society is currently grappling with the very serious issue of recidivism, which is the tendency of convicted criminals to reoffend which anecdotal evidence suggests, has become too common. In this matter the accused spent more than five years in pre-conviction and pre-sentence incarceration. The period he spent in prison did not teach him anything about respect for law and order and the right to life which is why he committed very egregious offences while on bail. That is a truly relevant consideration, which at the very least, is a clear demonstration of his propensity to commit violent crimes. In addition to his long list of criminal behaviours, three lives have needlessly been lost in his hands including the death of the K[...] young girls one of whom was also raped by him. He clearly is a very dangerous criminal from whom the society is entitled to expect protection from this Court.

[22] It has been said that sentencing an offender, especially one who has been convicted of such serious offences is the most difficult part of a criminal trial. The gruesomeness of the offences in this matter makes it even more difficult, especially if regard is had to the fact that the victims were innocent young girls. They were brutalized in the way in which they were murdered. C[...] was also raped which was, on its own, a very painful experience for any woman let alone the young girls of the ages that C[...] and S[...] were. It is very difficult to get a very good sense of the fear that they went through while the entire ordeal was taking place until they took their last breath.

[23] In *Prins*[5] the Supreme Court of Appeal expressed itself as follows:

“No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad

reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.”

[24] Both S[...] and C[...] are not here to tell us what happened to them. This is because after they were abused in the most horrible manner, they were brutally murdered by being stabbed so many times to ensure that they would not survive to tell anyone what happened in the morning of the 2 December 2015. They are not here to tell us how they left the homestead in which there was a traditional ceremony. They are not here to explain how they were taken to Nqadu forest. S[...] cannot tell this Court how she got to have vaginal tears, and her hands tied to the back. At what stage was C[...] raped and when did her brutal stabbing take place. Who was the first one to be stabbed and what was happening to the second one while the first to be stabbed was being stabbed or if they were stabbed at the same time. The only person who was there that early morning, on the evidence before this Court, was the accused. He has also decided not to tell this Court how these children died and why he killed them so brutally and how he took them to that secluded area and brutalized them so mercilessly.

[25] One of the relevant considerations when it comes to sentencing is the prospects of rehabilitation. The offender in this matter was twenty years old at the time he committed these heinous crimes. Because he was relatively young at the time, one would ordinarily think that there should be prospects of rehabilitation. In *Dyantyi*[6] Petse ADJP, as he then was, had this to say:

“[I]t has often been stressed in some circles that, when it comes to the element of rehabilitation, one ought to move from the premise that every human being is capable of change and transformation if offered the opportunity and resources. See for example, in this regard, The White Paper on Corrections in South Africa

(2005) in para 424 and an article titled ‘The Prospect of Rehabilitation “as a substantial and compelling” Circumstance to Avoid Imposing Life Imprisonment in South Africa’ by Jamil Ddamulira Mujuzi, published in the South African Journal of Criminal Justice

(2008) at 1-21.

But it is, however, my view that seeds of rehabilitation can, in a manner of speaking, germinate only if the convicted person him/herself has, first and foremost, expressed contrition for his/her criminal wrong doing, thereby accepting the gravity of the criminal act of which he/she has been convicted, and commits to return to the path of rectitude. Without expression of contrition, any hope of rehabilitation becomes illusory and thus an unrealistic expectation, and not merely a speculative hypothesis, as the learned author Mujuzi sums it up in his article on the prospect of rehabilitation in South Africa.”

[26] Thando Mggobozi has not expressed any remorse at all, and so it is not even a relevant consideration. There is absolutely nothing on which anyone can have any vain hope that there could possibly be a chance that he can be rehabilitated. He is just a hardened cowardly criminal who sees nothing wrong with brutalising young girls for personal sexual gratification and the twisted joy in murdering his victims to hide his criminal conduct. He has not said anything or done anything to suggest even remotely, that he regrets his actions and what he did in the early hours of the morning of the 2 December 2015. There can therefore be no talk of the presence of substantial and compelling circumstances, on the facts of this case. It follows that the prescribed minimum sentences must be imposed.

[27] In Makhokha[7], Madlanga J, writing a unanimous judgment of the Constitutional Court, explained the application of section 39 of the Correctional Services Act in respect of determinate sentences as follows:

(16) Turning to the direction that the applicant's sentences run consecutively, this is contrary to the provisions of s 39 of the Correctional Services Act. Section 39(2)(a) provides:

'Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently but –

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal; ...'

(17) In Mashava here is what the Supreme Court of Appeal said of para (a) (i) of the section:

'The provision is clear. Any determinate sentence of incarceration, imposed in addition to life imprisonment, is subsumed by the latter. This is logical and practical. A person only has one life and a sentence of life imprisonment is the ultimate penal provision.'

(18) Thus, the regional magistrate lacked the legal competence to direct that the 15-year term of imprisonment should commence to run after completion of the sentence of life imprisonment. To that extent, the regional magistrate's direction exposes the applicant to the possibility of only starting to serve the 15-year term of imprisonment upon release – possibly on parole – from life imprisonment. This, in circumstances where – because of the lack of competence to make the direction – the 15-year term of imprisonment would have commenced to run on the date of sentence and concurrently with the term of imprisonment. For reasons expressed earlier, the regional magistrate's direction constitutes a deprivation of freedom arbitrarily or without just cause, in contravention of s 12(1)(a) of the Constitution."

[28] I am referring to the case of Makhokha to deal with the accused's legal representative's submission that I should make an order for the sentences to run concurrently. Having determined that substantial and compelling circumstances justifying a departure from the prescribed sentences of life imprisonment in respect of counts three, four and five, it becomes superfluous for a court to order any sentence imposed together with a life sentence to run concurrently with such term of life imprisonment.

[29] In the result the appropriate sentences are as follows:

1. In respect of count one, the kidnapping of S[...] K[...], you are sentenced to 5 years imprisonment.
2. In respect of count 2, the aggravated robbery of C[...]’s phone, you are sentenced to 15 years imprisonment.
3. In respect of count 3, the murder of S[...] K[...], you are sentenced to life imprisonment.
4. In respect of count 4, the murder of C[...] K[...], you are sentenced to life imprisonment.
5. In respect of count 5, the rape C[...] K[...], you are sentenced to life imprisonment.
6. The Registrar of the National Register for Sex Offenders is ordered to enter the details of Thando Mggqobozi in the Register of Sexual Offenders in terms of section 50 (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
7. In terms of section 120 (4) of the Children’s Act 38 of 2005 and section 41 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Thando Mggqobozi is declared unsuitable to work with children. It is directed that his particulars be entered in Part B of the National Child Protection Register.
8. In terms of the section 103 of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearance

Counsel for the State : M.D. Nyendwana

Instructed by

: National Prosecuting Authority

Mthatha

Counsel for the accused : A. Madywede

Instructed by

: Legal Aid South Africa

Date Heard

: 24 June 2025

Date Delivered

: 25 June 2025

[1] S v Zinn 1969 (2) SA 537 (A).

[2] S v Rabbie 1975(4) SA 855(A) at 866 A to B.

[3] S v Tsotetsi 2019 (2) SACR 594 (WCC) at page 604

[4] S v Vilakazi 2009 (1) SACR 552 at 574 d.

[5] Director of Public Prosecutions, Western Cape v Prins and Others 2012 (2) SACR 183 (SCA) at 186 f-h.

[6] S v Dyantyi 2011(1) SACR 540 (ECG) at 551 paras 25 to 26.

[7] S v Makhokha 2019 (2) SACR 198 (CC) at 203 g to 204 a to e.

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