



**Republic of South Africa**

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

CASE NO: SS62/2012

In the matter between:

**THE STATE**

and

**MZWANELE MVABAZA**

1<sup>st</sup> Accused

**PULE HENDRICKS**

2<sup>nd</sup> Accused

**MZIYANDA MQUMBISA**

3<sup>rd</sup> Accused

**SIBONGILE PINKANA JAMES**

4<sup>th</sup> Accused

**Court:** NYMAN AJ

**Heard:** 4 June 2013

**Delivered:** 7 June 2013

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**SENTENCE JUDGMENT**

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NYMAN AJ

[1] A close examination of the purpose of sentence is required in the sentencing process for convictions arising from vigilantism. The principles of prevention and

deterrence have to be carefully balanced, while the dialectical relationship between the interest of the offender and the interest of the community should bear scrutiny.

[2] The accused were acquitted of murder. Accused 1, 2 and 3 were convicted of kidnapping. Accused 1, 2, 3 and 4 were convicted of assault with intent to do grievous bodily harm.

[3] Kidnapping is a serious offence that warrants the imposition of a custodial sentence. In *Fourie v S* [2001] 4 All SA 365 (A) a sentence of 15 years imprisonment was imposed for attempted rape, kidnapping and culpable homicide. In *Mapule v S* [2013] JOL 30100 (GSJ) an appeal against a sentence of eight years for kidnapping and eight years for being an accessory after the fact of murder, was dismissed by a full bench.

[4] In my view, the violation of fundamental human rights (first generation rights) that amount to criminal conduct should not be treated lightly. Accused 1, 2 and 3 committed serious human rights violations involving the deprivation of the deceased person's freedom, liberty, dignity and security. The rule of law is another fundamental constitutional value that was breached when accused 2 and 3 kidnapped the deceased and took him to accused 1's house, instead of handing him over to the police. Accused 2 and 3 gave chase and caught the deceased when he attempted to escape. The accused were instrumental in shoving the deceased in the boot of a car when he was already bleeding from his injuries. Through this conduct, the accused undermined the criminal justice system.

[5] Accused 2 and 3 had laudable motives because in their minds, they had come

to the rescue of a victim of robbery committed by, described by them as “a thug”, and handed him over to the victim’s father. They associated themselves with the brutal actions of a mob who assaulted the deceased with sticks and stones.

[6] Revenge spurred accused 1 to take control of the situation from the time when accused 2 and 3 brought the deceased to his house. Accused 1 sought personal retribution for the robbery of his daughter, even though his daughter had told him that she could not identify the deceased as the robber. It is for this reason that accused 1 committed assault with intent to do grievous bodily harm by hitting the deceased with his fists and an iron rod. He did this while the deceased was bleeding from his head and face. In my view, this assault was vicious in nature.

[7] Although kidnapping is a serious offence, it is necessary to take into account that this offence is an example of one of the many acts of vigilantism that occurs in Khayelitsha on a regular basis. It is common cause that the scourge of vigilantism has plagued the community of Khayelitsha. It seems that many members of the community have lost confidence in the police. This problem is so serious that the Premier of the Western Cape has appointed a commission of enquiry to investigate the state of policing in Khayelitsha. An article published in the *City Press* newspaper dated 10 November 2012 reports that one-fifth of 360 murders reported at the three police stations in Khayelitsha during the most recent crime statistic review period, were alleged to have been committed by vigilante groups, while 78 “mob justice” murders were committed in the Khayelitsha policing district, in the space of 14 months.

[8] In terms of the evidence, the police was telephoned on three occasions at the instance of accused 1 while accused 1's friend made a report, in person, of the vigilante violence to the Khayelitsha police station. The police arrived on two occasions; on the first occasion they did not detect a problem. They left when they only found a crowd of bystanders. Upon their second arrival at the crime scene, it was too late. It appears from the totality of the evidence that the police failed to carry out one of its primary constitutional duties of crime prevention.

[9] In a consideration of what impact vigilantism should have on sentencing, in my view, it constitutes a mitigating and aggravating factor. On the one hand, I have to take into consideration that poor policing has caused the accused to lose faith in the criminal justice system and to impose justice in their own way. On the other hand, the extent of lawlessness in Khayelitsha means that I have to send the right message to the community when imposing a sentence, namely that those people who take the law into their own hands will receive stiff sentences. Having said this, I am mindful of the submission made by Mr Caiger on behalf of accused 2 that a sentence should not be imposed to set an example. In other words, the sentence has to fit the offender and the crime.

[10] Although our courts regard kidnapping as a serious offence that warrants a custodial sentence, on the facts of this case, the submission made by Mr Buurman on behalf of accused 1, weighs heavily on me. I have to consider whether the accused are the types of offenders who ought to be removed from society by means of imprisonment or those who, although deserving punishment, should not be removed

from society (*See: S v R* 1993 (1) SACR 209 (A) at 221h). Therefore, the essential issue for determination is whether the accused are suitable candidates for correctional supervision. In order to do so, I need to examine the personal and family lives of the accused in order to obtain a full picture. I will now consider the background and personal circumstances of each accused as described in the presentencing reports.

[11] Accused 1 is 49 years old. He is married and has four children aged 28, 19, 18 and 13. He has a stable family life and maintains close relationships with his wife and children. He grew up in a stable family, with no serious family social problems. He never involved himself in criminal activities as a young child and did not exhibit any anti-social behaviour. Accused 1's highest education level is Grade 10. He worked since the age of 22 as a general labourer. He has been employed as an electrician for the same company for the past 23 years. His wife works as a domestic worker for two days a week. His eldest daughter is in permanent employment. He does not portray any negative behaviour at home or in the community and has no previous convictions.

[12] Accused 2 is 30 years old, is unemployed and has no children. His mother raised him and his siblings in a single parent household. He has no relations with his biological father. He failed to obtain formal sector employment, having only carried out piece jobs in his area. He receives a government grant for a disability arising from the time when he contracted polio as a child. Accused 2 is using crutches. His highest scholastic achievement is Standard 9. He enrolled at a college during 2001 for an Electrical Engineering course which he discontinued after completing 6 months' training. Accused 2 is sociable and he associates with his peers. He spent most of his

time at home taking care of the needs of his family. He never belonged to a gang whilst growing up. He has one previous conviction for possession of dagga for which he received a suspended sentence.

[13] Accused 3 is 24 years old. He is single, unemployed and has no children. His maternal grandmother has cared for him from a young age. His mother lives in the Eastern Cape. He never knew his father. His grandmother passed away during April 2013. Accused 3 had a decent upbringing with his grandmother who worked as a domestic worker and managed to provide for him to the best of her ability. His highest scholastic achievement was Grade 9. He failed to obtain work in the formal sector. He had a carwash business in 2009. He did not join any of the gangs in the area. Accused 3 has two previous convictions for possession of drugs for which he received a suspended sentence and fine.

[14] Accused 4 is 24 years old. His grandmother and mother played a role in his upbringing, but his grandmother was the primary caregiver. He does not know the identity of his father. His mother died during 2009; he mourned her death. His grandmother is the breadwinner of the family. He participated church activities from a young age having attended church with his grandmother on Sundays, except when he was playing soccer.

[15] It appears that accused 4 completed Grade 7. He was unable to secure permanent employment. His lack of schooling hampered his ability to obtain employment. He assisted with chores at home. He was a member of the African Tribe

Soccer Club in Khayelitsha. He played league soccer before his detention in Pollsmoor. Accused 4 has two previous convictions, one for assault with intent to do grievous bodily harm. On 21 May 2008, a sentence of 24 months imprisonment was imposed on him which is totally suspended for 5 years on condition that he is not convicted of assault to do grievous bodily harm committed during the period of suspension. The second conviction is for possession of drugs for which he received a fine.

[16] In my view, the accused are suitable for candidates for a non-custodial sentence. Of importance, is the sentence option of correctional supervision “*comprising elements of rehabilitation, reparation and restorative justice*” (See: *S v M (CENTRE FOR CHILD LAW AS AMICUS CURIAE)* 2008 (3) SA 232 (CC) at 568b). A sentence of correctional supervision integrated with suitable conditions that match the profiles of the accused, could yield greater rehabilitative effects given that it enables the accused to draw on the support of their families and the community, instead of placing them within the alienating confines of the prison walls. In the case of accused 1, who is one of the breadwinners in his family, a sentence of correctional supervision would ensure that his family does not suffer the devastating consequences of direct imprisonment. The penal aspects of correctional supervision encompassing measures such as house arrest and regular community service, would serve the sentencing purposes of prevention and deterrence (See: *Roman v Williams NO* 1997 (2) SACR 754 (C)).

[17] Accused 1 has no previous convictions and has led a remarkable life as a man

who, against all odds in a poor community, has held down a job for a long period and has supported his wife and family. His convictions arise under conditions not totally of his own making. Poor policing in Khayelitsha has played a role in his conduct. I also need to take into account that accused 1 found himself in a situation where it was difficult for him not to retaliate. He came face-to-face with the person whom he believed had just robbed his daughter. However, it concerns me that accused 1 has not shown any remorse. His pre-sentence report points out that when the mother of the deceased went to introduce herself to accused 1 at court, she did not receive any apology from him. The probation officer reports that when she interviewed accused 1, he did not want to accept responsibility for his deeds.

[18] Although accused 2 and 3 are not first offenders, their previous convictions are not relevant. They are young men. The accused were raised by their grandmothers. They did not know their fathers. Despite these adverse conditions, they strove to be decent people who did not submit to the temptation of joining gangs and resorting to criminal conduct to improve their material conditions. Their convictions arise from conduct carried out with righteous intentions. In their eyes, they believed that they had committed heroic deeds. Unfortunately, the situation which they initiated spiralled out of control, resulting in the death of a young man.

[19] I take into account as a mitigating factor that they showed remorse for their conduct and took responsibility for their actions. Accused 2 expressed his regret to his grandmother for his actions. He also admitted that he had committed the assault. In court, accused 3 indicated his willingness to assist the deceased's mother. The

accused have already served a period of 15 months imprisonment as trial awaiting prisoners.

[20] It is necessary to reiterate that this court convicted accused 4 on one count of assault with intent to commit grievous bodily harm. He has a previous conviction for a similar offence. This court passed his conviction during the period of suspension of the sentence imposed for the previous conviction. He is still young and can lead an exemplary life as a soccer player. In this manner, he can act as a role model for the youth in the Khayelitsha community. He has shown remorse for his actions. He took the first step towards rehabilitation when he admitted that he had assaulted the deceased. In my view, this assault was not serious and was of a short duration. Accused 4 has already served a period of 15 months imprisonment as a trial awaiting prisoner.

[21] It is opportune to express my gratitude to Mr Baliwe, the State Prosecutor and the defence counsel instructed by and in the service of the Legal Aid Board for the conscientious manner in which they performed their tasks in these proceedings.

[22] In my determination of the sentence, I have decided to treat the convictions as one for the purposes of sentence, given that accused 1, 2 and 3 carried out the acts as parts of a single course of conduct (*See: S v Dikqacwi*, Case No: SS49/2012, Unreported Judgment by Binns-Ward J). Another reason for adopting this approach to sentencing is that in multiple offenses, a sentencing court must consider “*the totality of the offender’s conduct and moral blameworthiness in determining what effective sentence should be imposed*” (*See: S v Muller* 2012 (2) SACR 545 (SCA) at 549d).

[23] Taking all the counts of which he was convicted together as one for the purposes of sentence, ACCUSED 1 is sentenced to FIVE (5) YEARS' IMPRISONMENT, which shall be wholly SUSPENDED FOR A PERIOD OF FOUR (4) YEARS on the following conditions:

1. That accused 1 is not convicted of any offence committed during the period of suspension involving kidnapping or assault with intent to commit grievous bodily harm for which a sentence of imprisonment without the option of a fine is imposed.
2. That accused 1 undergoes a period of three years of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 comprising of the following community corrections:
  - (a) House arrest for no less than eight hours on every Sunday for the full duration of the period of his correctional supervision placement at his residential address or such other place as might be determined by the Commissioner for Correctional Services on written application by the accused and on terms to be determined by the Commissioner of Correctional Services.
  - (b) Eight (8) hours of community service to be performed every Saturday for the full duration of the period of correctional supervision. The nature of the community service and the place and times during which it shall be undertaken shall be determined by the Commissioner of Correctional

Services.

- (c) Attendance of the Life Skills and Anger Management programs facilitated by a social worker at Community Corrections, Mitchells Plain, as well as other programs determined by a social worker.
  - (d) Inclusion in the Victim Offender Dialogue Program facilitated by an official of Community Corrections, Mitchells Plain.
  - (e) The payment of compensation to Mrs Bongiwe Mzileni (the mother of the late Thabo Mzileni) in the sum of R2000, such payment to be made within one (1) month of the date of sentence.
  - (f) Monitoring by the Department of Correctional Services in order to ensure compliance with the conditions of correctional supervision.
- [24] Taking all the counts of which they were convicted together as one for the purposes of sentence, ACCUSED 2 AND 3 are each sentenced to FOUR (4) YEARS' IMPRISONMENT, which shall be wholly SUSPENDED FOR A PERIOD OF FIVE (5) YEARS on the following conditions:
1. That the accused are not convicted of any offence committed during the period of suspension involving kidnapping or assault with intent to commit grievous bodily harm for which a sentence of imprisonment without the option of a fine is imposed.
  2. That the accused undergo a period of three years of correctional supervision in

terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 comprising of the following community corrections:

- (a) House arrest for the full duration of the period of correctional supervision at their current residential address or such other place as might be determined by the Commissioner for Correctional Services on written application by the accused and on terms to be determined by the Commissioner of Correctional Services, but which shall provide that the accused shall be confined to their residential addresses for no less than eight hours on any day in which they are engaged in employment and for no less than 12 hours on any day in which they are not so engaged.
- (b) Performance of 48 hours of community service per month for the full duration of the period of correctional supervision. The nature of the community service and the place and times during which it shall be undertaken shall be determined by the Commissioner of Correctional Services.
- (c) Performs 8 hours of household and errand services per month for the full duration of the period of correctional supervision to Mrs Bongiwe Mzileni, under the supervision of the Department of Correctional Services and subject to her acceptance thereof. The nature of such service shall be so determined by Mrs Mzileni.
- (d) Attendance of the Life Skills and Anger Management programs

facilitated by a social worker at Community Corrections, Mitchells Plain, as well as other programs determined by the social worker.

- (e) Inclusion in the Victim Offender Dialogue Program facilitated by an official of Community Corrections, Mitchells Plain.
- (f) Refrains for the whole of the period of correctional supervision from the use of alcohol or illegal drugs.
- (g) Prohibition during the whole of the period of correctional supervision from attendance at any place such as a tavern, pub or shebeen where alcoholic beverages are served.
- (h) Monitoring by the Department of Correctional Services in order to ensure compliance with the conditions of correctional supervision.
- (i) That the accused shall report to the Correctional Officer at 17 Corporation Street, Cape Town by no later than 14h00 on Monday, 10 June 2013, for the purpose of commencing their correctional supervision..

[25] ACCUSED 4 is sentenced to SIX (6) MONTHS' IMPRISONMENT, which shall be wholly SUSPENDED FOR A PERIOD OF TWO (2) YEARS on the same conditions as those set out in paragraphs (a) to (j) of the conditions of suspension attached to the sentences of imprisonment imposed on accused 2 and 3.

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**RM NYMAN AJ**

**ACTING JUDGE OF THE HIGH COURT**