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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: B168/2012

CASE NO:A506/2013

DATE:09/07/2013

In the matter between:

THE STATE

and

CT

REVIEW J U D G M E N T

Date of Judgment: 3 July 2013

KUBUSHI, J

[1] The accused, a fifteen year old male, was convicted in the Tonga regional court of the offence of murder. He was on 1 August 2012 sentenced to be detained for a term of five years at the Thokomale Child Youth Care Centre. After sentencing the matter was referred by the trial magistrate to this court for a review of the proceedings in terms of section 304 of the Criminal Procedure Act 51 of 1977.

[2] The matter was initially placed before Legodi J in chambers for a review of the proceedings. Legodi J sent the matter back to the trial magistrate, W J Wilken, with a certain enquiry. When the trial magistrate's response was received by this court, the matter was referred to Ledwaba J for finalisation. Ledwaba J also sent a query to the trial magistrate. The queries of Legodi and Ledwaba JJ together with the trial magistrate's response thereto were sent to the Office of the Director Public Prosecution (DPP) for their comments. The Deputy Director Public Prosecution (DDPP) in the office of the DPP commented on the queries and sent them back to Ledwaba J. The matter was then placed before me in chambers to proceed with the review.

[3] The facts of the case are that the deceased together with the accused and two of his friends W P N and B P N were swimming at the gravel dam at Langeloo Trust. There were other people at the dam including Solomon. The accused pulled Solomon in and pushed his head under water. B and one M jumped into the water to rescue Solomon from drowning.

The deceased who was unable to swim, was sitting next to the dam and assisted to pull Solomon out of the water. The accused then left Solomon, grabbed the deceased and pushed his head five times under the water. After the fifth time the deceased did not reappear above the water surface. He eventually drowned. The accused warned the others not to say that he caused the deceased to drown.

[4] The enquiry by Legodi J sent to the trial magistrate read as follows:

'1. The accused in this case was convicted of murder and sentenced as it appears on pages 44 - 45 of the transcribed record.

2. It is not clear as to why this case has been laid before the judge as automatic review

matter? Please clarify'

[5] The response by the trial magistrate was that he/she was in terms of section 85 of the Child Justice Act 75 of 2008 (the Act), obliged to send the matter on review irrespective of whether the accused was legally represented or not. According to the trial magistrate the matter was referred for review in terms of section 85 of the Act which states that -

'Automatic review in certain cases: -

(1) The provisions of Chapter 30 of the Criminal procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence -

(a) Under the age of 16 years; or

(b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act,

The sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.'

The DDPP also confirmed that the matter was correctly referred for review.

[6] The trial magistrate also referred the reviewing judge to the judgments in S v S 2012

(1) SACR 595 ECP and S v FM 2013 (1) SACR 57 GNP, wherein it was held that section 85 (1) of the Child Justice Act 75 of 2008 (GA) provides for the automatic review in respect of all children convicted in terms of the GA who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act 38 of

2005, including children who are so sentenced in a regional court.

[7] The trial magistrate was indeed correct to have sent the matter on review. The accused was fifteen years old at the time of sentencing and was sentenced to compulsory residence in a child and youth care centre at Thukumula Child and Youth Centre. The sentence was, therefore, subject to review in terms of section 304 of the Criminal Procedure Act.

[8] Ledwaba J made the following enquiry to the trial magistrate:

'1. Having regard to the following:

1.1 W P N and BPN testified that the accused was pushing the deceased into the water for some seconds and made him re-surface again (See page 11 - 12 and page 17 lines 1- 2).

1.2 Accused also pulled Solomon who was rescued by B and M, into the water openly in view of other 15 boys.

2. Has the state proved beyond reasonable doubt that the accused had the intention to kill the deceased?

3. Was the court not suppose [sic] to at least convict the accused on culpable homicide?'

[9] The trial magistrate responded as follows -

'The Court considered the competent verdict of Culpable Homicide but on the accepted evidence

drew the inference that accused had the necessary intent (dolus evestualis [sic]) to kill the deceased

in special regard to the following facts:

(a) B and M realised that S was drowning and had to use force to rescue S (8 years) from being drowned by the accused. Accused held him by his arms and forced him under the

water.

(b) The deceased fought with accused not to press his head under the water and screamed for help, yet accused persisted to push his head under the water. For anyone to be pushed under water without being able to breathe will result in him gasping for air and will swallow water. Anyone in his right mind will foresee that if this is repeated for 5 times it will result in drowning.

(c) After the 5th time deceased did not surface yet accused did nothing to rescue him.

(d) Accused knew that the deceased could not swim.

(e) Accused warned the other children not to say he caused the deceased to drown.

(f) The fact that accused said that if deceased went to the dam he will drown him is hearsay evidence. The court expected the state to call this witness which was not done, which result the accused attention was not drawn to the hearsay evidence. The court ruled this evidence to be inadmissible.

(g) The inference which the court drew that the accused was an aggressive person and tended to bully children was later confirmed in Exh A (pre sentence report) Par 5.2, where it is stated.

".. . he was ill treating other learners. It is also mentioned that he formed a gangster inside the school premises known as TS, meaning "T S" we are beating. Accused was the leader of the group which was very disruptive at school . . . and the learners were no longer safe in the school."

As mentioned in 5 v Lloyd Supra of my judgment page 39 line 25 and page 40, top paragraph - there need not be a purpose to kill proved as an actual fact, it is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not risk is fulfilled in death. See also S v Segwala Supra page 39 of my judgment.

Accordingly the court inferred that the only reasonable inference the court can draw,

including any other reasonable inference, is that the accused had the necessary intent (dolus eventualis) to drown and kill the deceased and convicted him of murder.'

[6] The DDPP, correctly so in my view, confirmed that the trial magistrate was correct to convict the accused of murder on the basis of dolus eventualis or legal intention. According to the DDPP, the conduct of accused fulfilled the prerequisites for the presence of legal intention or dolus eventualis in that: It was the state's evidence that the accused initially grabbed Solomon and dunked him in the water. Solomon had to be rescued from the accused by B and M. Thereafter the accused left Solomon and grabbed the deceased, Sabelo, and proceeded with the same conduct of dunking him in the water at least three times until Sabelo failed to resurface. The conduct of the accused in dunking the deceased was not an isolated incident but one that followed upon the dunking of another child. Despite being aware that Solomon had been rescued, the accused recklessly persisted in dunking the deceased. This conduct shifted what could have been construed as childish horseplay to one of reckless endangerment to life which endangerment subsequently translated into the loss of life. The DDPP submitted that when Solomon had to be rescued the accused must have had an appreciation of the risk to life that his conduct of dunking posed. He nonetheless recklessly persisted in the same conduct with the deceased. In addition, both state witnesses testified that the deceased could not swim well. The accused's version also indicated that the deceased could not swim well. Despite knowing that the deceased was not a good swimmer, the accused persisted with dunking him. The state proved beyond reasonable doubt that the accused had the intention in the form of dolus eventualis to murder the deceased and was therefore correctly convicted.

[7] The DDPP referred the reviewing judge to the judgments in *S v De Bruyn en 'n Ander* 1968 (4) SA 498 (A) at 500, 502 - 503, 506 and 511, *Lloyd v The State* 1963 (2) PH 343

H157, S v Shaik and Others 1983 (4) SA 57 (A) at 62A - B and Tshokolo David Radebe vThe State case NO. 45/2009. A178/10, Free State High Court: Bloemfontein, 28 July 2011. It was stressed in those judgments that legal intention to murder does not per se connote a lesser degree of blameworthiness than actual intention. It is sufficient if the accused foresaw the possibility of the existence of the circumstance and was reckless as to whether it existed or not, that is, if he had legal intention or dolus eventualis.

AD SENTENCE

[8] The DDPP raised the following issues in respect of the sentence:

'The accused was convicted of a schedule 3 offence and in terms of section 77 (3) (a) of the Child Justice Act 75 of 2008 he could have been sentenced to a term of imprisonment. However, in the circumstances of this case, it is respectfully submitted that the imposed sentence is fair. It further accords with the provisions of sections 76 (1) and 76 (2) of Act 75 of 2008. It is however noted that the imposed sentence differs from that which had been recommended by the probation officer. The provisions of section 71 (4) of Act 75 of 2008 enjoins the presiding officer who imposes sentence other than that recommended by the probation officer to enter the reasons for the imposition of the different sentence on the record. The learned magistrate failed to do so. However, the imposed sentence is in fact more lenient than that recommended by the probation officer and as such does not prejudice the accused. Accordingly therefore, the sentence is not vitiated by the omission. Of further concern is the probation officer's report which states that the accused was previously removed from school because it was felt that the learners were no longer safe due to the accused behavioural problems. In terms of section 29 (2) (c) of Act 75 of 2008, the learned magistrate ought to have determined if the accused's behavioural problems placed other children at the Youth Centre at risk or danger. It is respectfully submitted that this concern does not vitiate the imposed sentence.'

The DDPP further recommended that the record be remitted to the trial magistrate to determine whether the accused's behavioural problems would not place other children at the Youth Centre at risk or in danger.

[13] I am in agreement with the DDPP that -

- a. the sentence imposed upon the accused is fair in the circumstances of this matter and that it accords with the provisions of sections 76 (1) and (2) of Act 75 of 2008.
- b. the sentence imposed is not vitiated by the trial magistrate's omission to record the reasons why he/she deviated from the sentence recommended by the probation officer.
- c. the sentence is not vitiated by the trial magistrate's failure to determine whether the accused behavioural problems would place the other children at the Youth Centre under risk or danger.
- d. the record should be remitted to the trial magistrate for such determination.

[14] Consequently I make the following order: a. the conviction is confirmed.

- b. the sentence imposed is confirmed.
- c. the record is remitted to the trial magistrate for a determination of whether the accused's behavioural problems would place the other children at the Youth Centre under risk or danger.

E. M. KOBUSHI

JUDGE OF THE HIGH COURT

I concur and it is so ordered

E. M. MAKGOBA

JUDGE OF THE HIGH COURT