IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
SIGNATURE	DATE: 12 April 2022

Case No: SS92/2021

In the matter between:

THE STATE

and

THEMBILIZWE MAKHENKE Accused

SENTENCE

WILSON AJ:

1 On 22 March 2022, I convicted the accused, Mr. Makhenke, of one count of murder, one count of culpable homicide and one count of arson. It is now my duty to pass sentence.

2 At the outset of the trial, Mr. Mavata, who appeared for Mr. Makhenke, confirmed that Mr. Makhenke had been informed of the minimum sentences

applicable to the offences charged on the indictment, and to the competent verdicts available on those charges.

3 Section 51 (2) (a) of the Criminal Law Amendment Act 105 of 1997 requires me to sentence Mr. Makhenke to at least 15 years' direct imprisonment on the murder count, unless there are substantial and compelling circumstances that justify a lesser period. I will accordingly turn to consider the circumstances placed before me in mitigation and aggravation of sentence, before assessing whether they are, individually or in any combination, substantial and compelling.

Evidence on sentence

4 Mr. Mavata and Ms. Mack, who appeared for the State, were in agreement that no evidence needed to be led during the sentencing phase of trial. The facts and circumstances I will address are uncontested, and were placed before me through submissions from counsel. Mr. Mavata informed me that Mr. Makhenke would not be exercising his right to place a presentencing report before me, or to testify in mitigation of sentence.

5 I am generally reluctant to sentence on such serious charges without the assistance of a presentencing report, but the delay in obtaining one (said to be at least six weeks) has to be balanced against Mr. Makhenke's patent wish to proceed to sentencing as quickly as possible. Mr. Makhenke does not want to testify in mitigation of sentence, and I cannot insist that he does so. If that is so, it seems to me that I cannot compel him to co-operate with whomever compiles the presentencing report. I am also swayed by the State's failure to insist on a presentencing report.

6 I am also conscious of the fact that Mr. Makhenke provided a plea explanation, which he amplified under oath when he pleaded guilty. Although I did not accept Mr. Makhenke's pleas of guilty on the charges of premeditated murder the State originally pursued, there is material in that statement and evidence which may appropriately be taken into account for the purposes of sentence (see *S v Cloete* 1994 (1) SACR 420 at 428a-c).

7 Accordingly, in the circumstances of this case, I am satisfied that a presentencing report would be unlikely to illuminate matters further.

Mr. Makhenke's circumstances

8 Mr. Makhenke is 41 years old. He has a Grade 10 education. He has no previous convictions. He was arrested on 16 April 2021. He has been detained since then. He has a wife, and two children, aged 3 and 9. He worked as a welder before his arrest and incarceration. He earned R1800 per month from that occupation. Since his incarceration, his family have obviously lost that source of support. His wife resides with his children in the Eastern Cape.

The offences

9 It is clear to me that Mr. Makhenke truly regrets what he has done. The objective facts yield no other conclusion. It was not disputed that Mr. Makhenke tried to control the fire that killed the two deceased persons in this case, however ineptly, by patting it with his bare hands just after he lit it. In my judgment convicting Mr. Makhenke, I could not exclude the possibility that Mr. Makhenke never formed a plan to kill, and that the decision to set

the fire that killed his two victims was a very stupid attempt to rouse Mawande Mafuya, who Mr. Makhenke knew to be in the room behind the curtains he set alight.

10 Mr. Makhenke said that he intended no more than to burn the curtains to attract Mr. Mafuya's attention. But during argument on sentence, Ms. Mack, who appeared for the State, relied on crime scene photographs to throw doubt on Mr. Makhenke's version in this respect. Ms. Mack pointed out that crime scene photographs showed a drape hung over the window into which Mr. Makhenke poured the paraffin with which he ignited the fire. The drape was unburnt, which, it was submitted, undermined Mr. Makhenke's version that he intended merely to set fire to the curtains. It was further contended that what really happened was a much more sinister attempt to ignite items inside the room itself.

11 What strikes me about the crime scene photographs, though, is that the curtains to which Ms. Mack draws attention are not just unburnt, they are completely unsinged. They are not marked by soot, and do not otherwise show any indication of ever having been near a fire. Everything else pictured has been burnt and damaged very badly indeed.

12 The photographs were taken almost 24 hours after the fire took place. The only reasonable inference to be drawn is that the drapes pictured in the crime scene photographs were not the curtains to which Mr. Makhenke said he set fire. They had been hung up after the fire had been extinguished. That negates any suggestion that Mr. Makhenke was dishonest about having set fire to Mr. Mafuya's curtains.

13 I am satisfied that Mr. Makhenke's decision to set the fire was taken in a fit of pique. It was perhaps meant as a spiteful prank. But it went horribly wrong. Mr. Makhenkhe attempted to plead guilty to the premeditated murders of both Mr. Mafuya and Siphiwe Buthelezi, who was with Mr. Mafuya in the room. The only explanation for that decision is that Mr. Makhenke is truly remorseful, and was ready to accept the most severe sentence a court can impose for what he had done. Mr. Mavata told Mr. Makhenke that he faced a possible life sentence on each count of premeditated murder. On the facts of this case, Mr. Mavata must also have told Mr. Makenkhe that a conviction carrying a lesser sentence was not just possible, but likely, if he pleaded not guilty. But Mr. Makhenke pleaded guilty anyway.

14 There are decisions suggesting that, in order to be found truly remorseful, an accused person should testify in mitigation of sentence (see, for example, *S v Matyityi* 2011 (1) SACR 40 (SCA), paragraphs 12 and 13). But I do not think that this can be an unbreakable rule. Nor do I think that, read fairly and in context, those decisions were intended to generate such a rule. Where the surrounding circumstances clearly point to remorse, and where, as is the case here, true remorse is the only reasonable inference to be drawn from those circumstances, it seems to me that the accused person need not necessarily testify in mitigation of sentence. I am, moreover, unconvinced that the *ipse dixit* of the accused person facing sentence is any more reliable than the relevant objective circumstances. It may be that, in a case where the surrounding circumstances do not point strongly either way, an accused person's oral evidence may help a court decide whether they are truly remorseful. But where the surrounding circumstances are conclusive, as I

believe they are here, it cannot be right that a finding of remorse is precluded by Mr. Makhenke's failure to testify in mitigation of sentence.

The needs of society

15 Mr. Makhenke's obvious remorse notwithstanding, these were vile crimes. Two people were fatally burned. They took several days to die. While they were conscious, they must have been in agony. All of this was completely foreseeable and avoidable. Not only did Mr. Makhenke foresee these consequences, in the case of Mr. Mafuya, he reconciled himself to them. Society demands a clear retributive response.

Substantial and compelling circumstances

16 Whatever its wisdom, minimum sentencing legislation must be given effect to. It may not be departed from for flimsy or trifling reasons. Although they need not be exceptional, "substantial and compelling circumstances" must be clear-cut and weighty enough to move the sentencer away from the prescribed minimum (*S v Malgas* 2001 (1) SACR 469 (SCA) paragraph 9). They must in some sense be incommensurable with the factors normally presented in mitigation of sentence, such as the ordinary background facts and circumstances of Mr. Makhenke's family life and previous good character (see *S v Vilakazi* 2012 (6) SA 353 (SCA) paragraph 58).

17 That said, I think there are two substantial and compelling circumstances that justify a departure from the minimum sentence on the murder charge in this case. The first is Mr. Makhenke's clear remorse, which extended to

putting himself at risk of two life sentences for crimes that, though serious, plainly did not warrant penalties of that severity.

18 The second is the time Mr. Makhenke has already spent in custody. Ordinarily, the time spent in custody must be, and is, taken into account when coming to a proportionate sentence (see *S v Radebe* 2013 (2) SACR 165 (SCA) paragraphs 13 and 14). But because trial courts are not entitled to antedate the sentences they impose (see *Director of Public Prosecutions Gauteng Division, Pretoria v Plekenpol* [2017] ZASCA 151, paragraph 21) I see no alternative, in the context of minimum sentencing legislation, but to count the time Mr. Makhenke has already been incarcerated as a substantial and compelling circumstance justifying a departure from the prescribed minimum.

19 To hold otherwise would entail accepting that person's criminal penalty can be allowed to vary according to the efficiency of the criminal justice system itself. Where it is avoidable, that consequence is unacceptable (in this respect, my approach is no different to that of Lewis JA in *DPP, North Gauteng v Gcwala* 2014 (2) SACR 337 (SCA), paragraphs 19, 20 and 28).

The sentence

20 Absent Mr. Makhenke's pretrial incarceration and his patent remorse, I would have sentenced him to 15 years on the murder count, 10 years on the culpable homicide count, and 7 years on the arson count. I would have directed that the sentence for arson runs concurrently with the sentences on murder and culpable homicide. I would also have directed that half of the

culpable homicide sentence runs concurrently with the sentence for murder. The effective sentence would have been 20 years' direct imprisonment.

21 However, I find that Mr. Makhenke's remorse, which led to a prompt guilty plea, warrants a four-year reduction in his sentence on the murder charge. I will also credit him a year for the 361 days he has already served in pretrial detention. I will direct that half of the sentence for culpable homicide should run concurrently with the sentence for murder, and that the sentence for arson should run concurrently with the sentences for murder and for culpable homicide.

22 In the result, I sentence Mr. Makhenke as follows –

22.1 For the murder of Mawande Mafuya, 10 years' direct imprisonment.

22.2 For the culpable homicide of Siphiwe Chris Buthelezi, 10 years' direct imprisonment, 5 years of which will run concurrently with the sentence imposed for the murder of Mawande Mafuya.

22.3 For arson, in setting fire to Mawande Mafuya's room, 7 years' direct imprisonment, to run concurrently with the sentences for murder and culpable homicide I have already imposed.

22.4 The effective sentence is accordingly one of <u>FIFTEEN YEARS' DIRECT IMPRISONMENT</u>.

S D J WILSON
Acting Judge of the High Court

HEARD ON:	28 March 2022
DECIDED ON:	12 April 2022
For the State:	Ms. Mack Instructed by National Prosecuting Authority
For the Accused:	A Mavata Instructed by Legal Aid SA