

SOUTH AFRICA / JUDGMENT

# Billy v S (Appeal) (A75/24) [2024] ZAWCHC 376 (12 November 2024)

**[2024] ZAWCHC 376****COURT**

Western Cape High Court, Cape Town

**BEFORE**

Francis, Siyo

**CASE / FILE NUMBER**

A75/24

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**Policy****IN**

**THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION,  
CAPE TOWN**

**Appeal****Court Case: A75/24****Regional****Court Case No: BDSH3/39/2028****In the matter between:****ANDILE****BILLY****APPELLANT****AND****THE****STATE****RESPONDENT****Coram: Francis****J and Siyo AJ****Date****Heard: 18 October 2024****Date****Handed Down: 12 November 2024**

|                                                           |                                                                                                                                                                                                                                                                                              |
|-----------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Delivered:                                                | <p>This Judgment was handed down electronically by circulation to the legal representatives by email.</p> <p>ORDER</p> <p>On</p> <p>appeal from: The Regional Court,</p> <p>Blue Downs, Cape Town, Western Cape Regional Division, (Regional Magistrate, Mr. Francke sitting as court of</p> |
| first instance):                                          | <p>1.</p> <p>The appeal on the murder conviction is dismissed.</p> <p>2.</p> <p>The appeal against sentence is upheld and the</p>                                                                                                                                                            |
| sentence imposed is replaced with the following sentence: | <p>2.1</p> <p>Twenty (20) years imprisonment.</p> <p>2.2 The</p> <p>sentence is antedated to 19 May 2023 in terms of section 282 of the Criminal Procedure Act 51 of 1977.</p>                                                                                                               |

JUDGMENT

- [1] “T[...], T[...], T[...], T[...], please. E[...]'s father has finished me.” These are N[...] T[...]'s (“deceased”) harrowing final words as she succumbed to 25 stab wounds at the hands of her husband, Andile Billy (“appellant”). T[...] M[...] (“M[...]”), whom the deceased cried for as she took her last breath, is the deceased’s brother who witnessed the murder. He resided with the deceased and appellant at the time.
- [2] For this offence, the appellant was tried before the Regional Court, Blue Downs, Cape Town, in the Western Cape Regional Division (“trial court”). On 18 May 2023 he was convicted of murder read together with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“CLAA”), on the basis that the murder was found to have been premeditated. The appellant was sentenced to life imprisonment and declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 on 19 May 2023.
- [3] The trial court also made various ancillary orders relating to the deceased’s family’s right to make representations when the appellant’s parole is eventually considered, the provision of psychological and trauma support to members of the deceased’s family, including children and the provision of social support to the children of the deceased and the appellant.

Trial Court’s

## Judgment

- [4] The trial court accepted M[...]’s evidence to the effect that he observed an altercation between the appellant and the deceased, and the deceased’s subsequent murder through a hole in the door. While the trial court also accepted that M[...] heard the conversation that took place between the appellant and the deceased, it expressed doubt as to whether he was able to observe the entire altercation.
- [5] On the other hand, the trial court found that the appellant’s version “simply imploded” under cross-examination. The trial court also found the appellant’s evidence to be contradictory, inconsistent and implausible. In this regard, the trial court observed that the appellant couldn’t even provide basic information like the sequence relating to how the intruder managed to assault him on his head thereby rendering him unconscious. According to the trial court, this cast doubt on the credibility of the appellant’s evidence.
- [6] Upon a conspectus of all evidence adduced during the trial, the trial court found that it was satisfied that the appellant was solely responsible for the death of his wife, the deceased.
- [7] Mindful that premeditation, as contemplated in section 51 (1) of the CLAA, must be proven during the merits stage of the trial and not during the sentencing stage, the trial court thereafter proceeded to consider whether it can be said that the murder was premeditated.  
[1]
- [8] The trial court found that the appellant engaged in planning that was directed towards killing the deceased. In so doing, it was also inferred that the appellant had the prerequisite motive. Furthermore, the trial court also inferred that the manner of killing was so particular and exacting that the accused must have intentionally killed the deceased according to a preconceived design.
- [9] Despite finding that no direct evidence was led by the State on the appellant’s state of mind, relying on *Kekana*[2] vs State, the trial court concluded that “from these facts the Court infers he acted with premeditation”. On these grounds, the appellant was convicted of murder read together with the provisions of section 51(1) of the CLAA.

## Ground of Appeal

- [10] This appeal, which is against conviction and sentence, comes before this court in terms of the appellant’s automatic right of appeal as outlined in section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 (“CPA”).
- [11] In essence the grounds of appeal against conviction are that the State did not prove beyond reasonable doubt that the appellant was the perpetrator of the murder and that he had an intention to kill. In this regard, the appellant contends that the State’s single witness, who was a minor at the time of the committal of the crime, was inconsistent and unreliable in material respects.

[12] On sentence, the appellant contended that there are substantial and compelling circumstances to deviate from the imposition of a minimum sentence. It was further contended that the life imprisonment sentence for a first-time offence was harsh and excessive.

[13] I address conviction and sentence in turn below.

#### Conviction

[14] At the commencement of the trial, it was put to the appellant that he was charged with murder read together with the provisions of section 51(1) and Part 1 of Schedule 2, of the CLAA in that on 15 November 2016 he unlawfully and intentionally killed the deceased by stabbing her with a knife.

[15] The appellant did not proffer a plea explanation and tendered a “not guilty plea” to the charges levelled against him. The State thereafter called its main witness, M[...], who was a minor at the time of the committal of the crime.

[16] In essence, M[...] testified that after he was asked by the appellant to go to the room and not come out until he (appellant) told him to do so because “he (appellant) doesn’t know what’s going to happen”, a heated exchange erupted between the appellant and the deceased. This exchange soon evolved into violence, which included the appellant assaulting the deceased and dragging her to the kitchen area. Dissatisfied, the appellant drew a knife and repetitively stabbed the deceased, delivering 25 stab wounds predominantly to the neck, chest and back.

[17] Whilst stabbing the deceased, the appellant said “I am making you a person but you are cheating on me”. The murder occurred in the presence of their two-year-old, E[...], who was lying on the couch in the living room at the time.

[18] Although he was in a different room, M[...] testified that he saw everything by looking through a small hole in the door. Furthermore, in succumbing to the stab wounds, M[...] testified that the deceased’s last words were “T[...], T[...], T[...], T[...], please. E[...]’s father has finished me”.

[19] During cross-examination it was put to M[...] that the appellant would testify that he does not know what happened. His version would be that an unknown intruder entered the house and assaulted him with something on his head whereafter he became unconscious. Once he gained consciousness, he noticed that his head and neck were bleeding and that his wife was lying in a pool of blood.

[20] In his defence the appellant testified that on 15 November 2016, he confronted his wife about a text message that he saw on her phone wherein a man had expressed his love for her. The appellant’s version evolved during his evidence. He testified that a physical altercation ensued between him and the intruder when the intruder entered the house. The appellant alleged that he sustained cuts on his hands during this altercation. According to the appellant, the intruder also assaulted him on the head whereafter he became

unconscious. Similarly, once he gained consciousness, he noticed that his head and neck were bleeding and that his wife was lying in a pool of blood.

- [21] When asked who he thought had killed his wife, the appellant responded by stating that “I would think the guy that came there had something to do with his wife. He was more jealous than me about her even though he knew that she was married”. Under cross-examination, the appellant also testified that while he was engaged in a physical altercation with the intruder, the deceased hurled insults that were directed towards the chaotic situation unravelling in their home.
- [22] When probed by the trial court, the appellant also testified that the first person that he called after regaining consciousness was his older brother, Bonisile Billy. He also admitted that he never informed his brother that an intruder had entered the house and that he thought that the intruder killed his wife. The appellant further alleged that he only informed his brother of this version when he came to visit him at Tygerberg Hospital.
- [23] In this regard, Bonisile Billy’s statement stated that he received a call from the appellant who informed him that he killed his wife. The statement was admitted in evidence during the trial, marked Exhibit “E”.
- [24] Faced with this evidence, the trial court correctly devoted time to analysing and evaluating M[...] and the appellant’s evidence.
- [25] On appeal, Mr Paries, who appeared for the appellant, argued that the single witness, who was a minor at the time of the murder, was inconsistent and unreliable in all material respects. He further submitted that the trial court failed to observe that the evidence of a single witness must be satisfactory in every material respect.
- [26] In this regard, Ms Thaiteng who appeared for the State, argued that M[...]’s evidence was corroborated by the appellant. For instance, she highlighted that much like M [...], the appellant had also testified that he had a heated argument with the deceased relating to an extramarital affair that she was allegedly engaged in with another man.
- [27] It was also argued by Ms Thaiteng that the appellant had also testified that he uttered the words “I am fixing my house” when the intruder entered the fray while he was engaged in a heated argument with the deceased. Moreover, she pointed out that the appellant had also testified that he broke the deceased’s phone. To fortify her argument, Ms Thaiteng submitted that the appellant’s case was riddled with inconsistencies.
- [28] In *S v Sauls and Others* the Appellate Division, as it then was, had occasion to consider the approach to be adopted when dealing with the evidence of a single witness. In developing the common-sense approach, the court held as follows:

*“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy, and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told... The presiding officer when evaluating the evidence of a single witness should not allow the exercise of caution to displace the exercise of common sense.”[3] (Emphasis added)*

- [29] Apart from the appellant, the deceased and M[...], the only other person who was in the house at the time of the murder was E[...], the appellant and deceased’s two-year-old daughter. It stands to reason that the only witnesses who could competently testify on the deceased’s murder are M[...] and the appellant. That notwithstanding, M[...] and the appellant however provided mutually destructive versions relating to the circumstances surrounding the deceased’s murder.
- [30] The trial court observed that the exercise of caution in dealing with a single witness should not displace the exercise of common sense. The trial court correctly accepted M[...]’s version of events and rejected the appellant’s version of events. The trial court’s approach in this regard is consistent with the well-established doctrine which is applied when a court is faced with mutually destructive versions.[4]
- [31] It is indeed true that M[...]’s version was corroborated by the appellant in many respects. For instance, whilst there may be conflicting versions as to why, it is clear from the evidence that at some point M[...] went to the room whereinafter the door was closed. On the appellant’s own version, he closed the door because he didn’t want “to let the child hear what was happening between me and my wife”.
- [32] Furthermore, there is no dispute that a heated exchange erupted between the appellant and the deceased over an extramarital affair that the deceased was accused of being engaged in. Out of frustration at some point during the heated exchange, the appellant threw the deceased’s phone on the floor thereby breaking it.
- [33] It is also not in dispute that the appellant uttered the words that he is “fixing his house” when the intruder entered the fray while he was engaged in a heated argument with the deceased.
- [34] M[...]’s evidence to the effect that the exchange soon evolved into violence, which included the appellant’s merciless stabbing of the deceased to death is corroborated by Bonisile Billy’s statement which stated that he received a call from the appellant who informed him that he killed his wife. Moreover, as testified by M[...], the appellant couldn’t dispute that the deceased’s final words as she succumbed to her stab wounds were “T[...], T[...], T[...], T[...], please. E[...]’s father has finished me.” The only logical conclusion to be drawn is that the deceased uttered these words because the appellant, E[...]’s father, was indeed the perpetrator of the murder.

[35] It is well established that a court of appeal will not overturn a trial court's findings on facts unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.[5] In my judgment, it cannot be said that the trial court misdirected itself. The evidence demonstrates beyond reasonable doubt that the appellant unlawfully and intentionally stabbed the deceased to death.[6] The cause of death and the nature of the injuries sustained illustrate that the accused had the direct intention to kill the deceased.[7]

#### Premeditation

[36] This brings me to whether the State proved beyond reasonable doubt that the appellant premeditated the deceased's murder.

[37] The trial court found that the appellant engaged in planning that was directed towards killing the deceased. In so doing, it was inferred by the trial court that the deceased had the requisite motive. Without more, the trial court inferred that the manner of killing was so particular and exacting that the accused must have intentionally killed the deceased according to a preconceived design.

[38] The court in *S v PM* defined premeditation as something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension.[8] However, there must be evidence that the murder was indeed premeditated. Only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is premeditated.[9]

[39] Whilst I agree with the trial court's conclusion that no direct evidence was led by the State on the appellant's state of mind, I neither agree that any inferences could be drawn to lead to the conclusion that the murder was premeditated nor that the SCA's decision in *Kekana vs State* finds any application in this matter. The inference sought to be drawn by the trial court is not consistent with the proven facts.[10]

[40] In short, there was no evidence before the trial court to prove that the murder of the deceased, gruesome as it was – was premeditated. The State did not lead any evidence to establish premeditation. I am of the respectful view that the trial court

misdirected itself in finding that the murder was premeditated. The appeal is therefore upheld on this aspect.

#### Sentence

[41] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that an appellate court should only alter a sentence if that discretion has not been judicially and properly exercised, namely where the sentence is vitiated by irregularity,

misdirection or is disturbingly inappropriate.[11]

[42] The trial court sentenced the appellant to life imprisonment on the basis that the deceased's murder was premeditated. For the reasons outlined above, this finding was wrong. Consequently, it follows that the life imprisonment sentence falls away. Under such circumstances this court must consider the sentence afresh.[12]

[43] Section 51 (2) of the CLAA prescribes a minimum sentence of 15 years imprisonment for murder, unless there are substantial and compelling circumstances justifying a departure from the prescribed sentence.

[44] In *S v Malgas* the SCA held that all considerations traditionally relevant to the sentencing stage should be taken into account in order to determine

the existence of substantial and compelling circumstances which warrant a deviation from the prescribed sentence.[13] These considerations are known as the Zinn triad, namely the crime, the offender, and the interests of society.[14]

[45] The deceased was brutally and mercilessly murdered by the appellant owing to unsubstantiated allegations that she was engaged in an extramarital affair. According to the Post Mortem Report, which was admitted into evidence by the trial court, the deceased sustained no less than 25 stab wounds predominantly to the neck, chest and back. The stab wound tracks were followed into the deceased's lungs, heart and liver. The Post Mortem Report concluded that the deceased died of unnatural causes due to multiple stab wounds to the chest, neck and back. To make matters worse, the murder was committed in the presence of two minor children. There cannot be any doubt that the appellant committed a serious offence.

[46] On the other hand, the appellant is a first offender 42-year-old man who has since remarried. He married Babalwa Billy whom he has been in a relationship with since 2003. Ironically, whilst the appellant murdered the deceased over unfounded allegations that she was engaged in an extramarital affair, it is abundantly clear from the evidence that the romantic relationship between him and his current wife, overlapped with his marriage with the deceased.

[47] The appellant plies his trade as security officer, he is the breadwinner and has 6 children, aged between 3 and 14. The child born from his marriage to the deceased suffers from autism, a neurodevelopmental disorder.

[48] Having considered all the relevant facts and circumstances, I find that a 15-year minimum prison sentence would be inappropriate in the circumstances of this case. As found by the SCA in *Rohde v State*, the sentence of this court must reflect society's abhorrence of violence against women.[15]

[49] Considering the cruelty with which the crime was committed together with the need to deter society against the senseless killing of women, I am of the view that the appropriate sentence to be imposed in the circumstances of this case is 20 years imprisonment. This sentence takes into account the crime, the personal circumstances of the appellant, and the interests of society.

[50] In the result, I would propose the following order:

1 The appeal on the murder conviction is dismissed.

2 The appeal against sentence is upheld and the sentence imposed is replaced with the following sentence:

- a. Twenty (20) years imprisonment.
- b. The sentence is antedated to 19 May 2023 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

LK SIYO, AJ

I agree and it is so ordered.

M FRANCIS, J

APPEARANCES

Counsel for the appellant:

Mr A Paries

Instructed by:

R Davies Attorneys

Counsel for the Respondents:

Ms PA Thaiteng

Instructed by:

Director of Public Prosecutions

Cape Town

[1] S v Dube 2023 (1) SACR 513 (MM) para 15; S v Ratau 2023 (2) SACR 40 (MM) para 47.

[2] Kekana v The State (629/2013) [2014] ZASCA 158.

[3] S v Sauls and Others 1981

(3) SA 172 (A) at 180 E.

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- [4] Stellenbosch Farmers' Winery Group Ltd & Another v Martell & Cie SA and Others 2003 (1) SA 11 (SCA) para 5.
- [5] S v Francis 1991
- (1) SACR 198 (A) at 204 C-E.
- [6] Rex vs Ndhlovu 1945 AD 369 373.
- [7] Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 (SCA) para 25.
- [8] S v PM 2014
- (2) SACR 481 (GP) para 36.
- [9] Raath v S 2009 (2) SACR 46 (C) para 16. Raath was quoted with approval by the Supreme Court of Appeal in Kekana v The State (629/2013)
- [2014] ZASCA 158.
- [10] R v Blom 1939 AD 188 at 302 – 303.
- [11] S v Holder 1979 (2) SA 70 (A) at 75A.
- [12] Rohde v S 2021 (2) SACR 565 (SCA) para 89.
- [13] S v Malgas 2001 (1) SACR 469 (SCA) para's 9, 25 (F) & (G).
- [14] S v Zinn 1969 (2) SA 537 (A) at 540G.
- [15] Rohde supra para 92.
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