

SOUTH AFRICA / JUDGMENT

Binjane v S (A131/2020) [2021] ZAGPPHC 529 (12 August 2021)

[2021] ZAGPPHC 529

COURT

North Gauteng High Court, Pretoria

BEFORE

Meersingh, Khumalo

CASE / FILE NUMBER

A131/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEAL

CASE NUMBER: A131/2020

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE: 12 AUGUST 2021

In

the matter between:

GCOBANI

BINJANE

Appellant

and

THE

STATE Respondent

Delivered.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 12 August 2021.

JUDGMENT

MEERSINGH AJ

Introduction

- [1] This is an appeal against both the conviction and sentence of the appellant Mr Gcobani Binjane. The Appellant was convicted of one count of murder and sentenced to life imprisonment. The Appellant was legally represented in the court a quo. The Appellant has an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment 42 of 2013.
- [2] The appeal is brought on the basis that the court misdirected itself in convicting the Appellant of murder read with the provisions of section 51(1) of Act 105 of 1977 in that the state failed to prove murder was pre-planned and/or pre-meditated.
- [3] The Appellant in the court a quo pleaded self-defense and made certain admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977, admitting the post mortem report and the photos of the scene.
- [4] The state called five witnesses to give evidence:

4.1 Mr Thapelo Thupeng (the first state witness) confirmed that he was in a relationship with the deceased, Ntebaleng Tsoeliane, for a period of 2-3 weeks prior to the incident. He also confirmed that he knew the Appellant Mr Binjane, by sight and as the ex-boyfriend of the deceased. On the day in question, he was with the deceased at her place of residence when he heard the appellant knocking aggressively at the door. The Appellant sounded drunk and angry. The deceased opened the door to the Appellant, who pointed a firearm at the deceased. Mr Thupeng realised that the Appellant wanted to fight so he ran away. Whilst running away he heard the deceased screaming. The next morning, he tried to contact the deceased on her cell phone to no avail. The deceased's sister enquired after the whereabouts of the deceased. He advised her of what had transpired and that he had left the deceased with the Appellant. Both, Mr Thupeng and the sister went looking for the deceased and then reported her missing at the police station. Mr Thupeng was detained by the police on his arrival because the Appellant had opened a charge of assault against him.

4.2 The second state witness, Mr Tsholo Tipane testified that he was the neighbour of the deceased and that on the night in question he heard the- Appellant shouting out to the deceased to open the door. A few minutes later he heard people shouting and fighting and he heard the deceased calling his name. He went to the deceased's place and saw an unknown man standing outside who advised him that the deceased and the Appellant were resolving their issues. He went inside and he found the Appellant on top of the deceased assaulting the deceased. A tussle ensued between him and the Appellant but the Appellant was stronger than him and he was unable to stop the Appellant from assaulting the deceased. He then threatened to call the police if the Appellant did not stop. The Appellant then grabbed the deceased and pulled her to the

bedroom saying that “because you have slept with that man I am going to sleep with you.” Mr Tipane also confirmed that at that time the deceased was in her pyjamas. Mr Tipane then left the Appellant with the deceased in her house and went back to his place of residence. He could still hear them arguing until he fell asleep. The next morning, he called out to the deceased but she did not answer. When the deceased’s family asked him about the whereabouts of the deceased, he then advised them about the Appellant assaulting the deceased in the house. He accompanied the family in search of the deceased. He testified that they also went to the Appellant’s workplace where they received certain information which assisted them in finding the deceased’s body.

4.3 the third state witness was one Ms Dineo Lesekele a friend, who regarded the deceased as a sister. She also knew the Appellant as having been in a relationship with the deceased. She testified that they did not have a good relationship because they were always fighting. She was advised by one Matshediso that the deceased was missing and that her place of residence was upside down with blood on the floor. She accompanied the deceased’s sister in search for the deceased. They eventually found the deceased lying naked on the ground amongst the bushes some distance away from the deceased house. The police were advised.

4.4 The fourth state witness, Ms Nthatise Tswediane, the deceased’s older sister was informed by the police that the deceased was missing. She was advised by the neighbour, the second state witness Mr Thupeng, that he last saw the deceased with the Appellant. She corroborated the other witnesses’ evidence regarding the condition of the deceased’s place of residence, the search for the deceased and having received information at the Appellant’s workplace which led to the discovery of the deceased’s body.

4.5 The fifth state witness, warrant officer Peter Martins, confirmed that he received a complaint that the deceased was missing and that he took the statement from Mr Thupeng. He corroborated the evidence of the fourth state witness regarding the condition of the residence of the deceased. He added that he had found an iron bar and a cell phone covered in blood. He further testified that there was a strong smell of petrol inside the house. He also confirmed that he went to the place where the deceased’s body was discovered and that she had an open wound on the head and injuries all over her body. He arrested the Appellant on the 11th August 2016, a month and nine days after the date of the incident.

[5] The Appellant testified in his own defense. He did not call any witnesses. He confirmed that he was in a relationship with the deceased from 2011 and that they had had a volatile relationship which resulted in the deceased obtaining a protection order against him. He testified that on the day of the incident the deceased phoned him on several occasions asking him to come to her home. He went to the deceased’s home after having consumed alcohol with his friends. He knocked on the door and the deceased opened the door to him. She pulled him into the house and Mr Thupeng, the first state witness, pulled a firearm on him. He fought with Mr Thupeng and the deceased and he used any object he could find to defend himself. It is his further evidence that both the deceased and Mr Thupeng ran out of the house and that he also ran out of the house. They continued

fighting outside the house and that was when he saw Mr Tipane, the neighbour outside the house not inside the house. His further

evidence was that both the deceased and Mr Tupeng ran away and he did the same. He reported the incident to the police the following day and charged Mr Thupeng for assault. His evidence is that he assaulted the deceased in self-defence and he denied killing her.

[6] The court a quo found that the state had proved its case beyond a reasonable doubt and that the accused was guilty of murder read with the provisions of section 51(1) of Act 105 of 1997 in that the appellant was guilty of pre-planned and or premeditated murder.

[7] The Appellant accepts that he is guilty of murder in that he should have seen that by assaulting the deceased in the manner he did she will die because of his actions. The only question before this court is whether or not the Appellant should have been convicted of murder read with the provisions of section 51(2) and not section 51(1) of Act 105 of 1997. Accordingly, the evidence to be analyzed is whether or not the court a quo properly evaluated the evidence in arriving at its conclusion that the accused's murder of the deceased was pre-planned and/or premeditated.

[8] In *Aliko v The State* (552/2018) [2019] ZASCA 31 (28 March

2019) the court held that:

“premeditation is not an element of the offense of murder. It is a factor in the assessment of the sentence to be imposed. As this court has previously held in S v Legoa 2003

(1) SACR 13 (SCA) para 18: “... in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature did not create a new type of offence. The robbery with aggravating circumstances is not a new offence. The offences scheduled in the minimum sentencing legislature are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the schedule, the sentencing court acquires an enhanced penalty jurisdiction, however,

only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence and the trial court finds that all the elements specified in the Schedule are present. In relation to this case therefore, the legislature did not create an offence of premeditated murder. The expression is merely used in section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) to communicate the basis for the enhanced sentencing regime in a particular case.”

[9] This is so in relation to the case before this court.

[10] Section 51(1) of Act 105 of 1997 reads as follows:

‘Minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to subsections (3) and

- (6) a High Court shall if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to

imprisonment for life.

- (2) Notwithstanding any other law but subject to subsections (3) and (6) a regional court or a High Court shall—

- (a) If it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of—

- (i) a first offender to imprisonment for a period not less than 15 years;

- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

- (b) If it has convicted a person of an offence referred to in Part III of Schedule 2 sentence the person in the case of—

- (i) a first offender to imprisonment for a period not less than 10 years;

- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

- (c) If it has convicted a person of an offence referred to in Part IV of Schedule 2 sentence the person in the case of—

- (i) a first offender to imprisonment for a period not less than 5 years;

- (ii) a second offender of any such offence to imprisonment for a period not less than 7 years; and

- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3)

- (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

- (b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older but under the age of 18 years. at the time of the commission of the act which constituted the offence in question. it shall enter the reasons for its decision on the record of the proceedings.
- (4) Any sentence contemplated in this section shall be calculated from the date of sentence.
- (5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act. 1977 (Act No. 51 of 1977).
- (6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.
- (7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.
- (8) For the purposes of this section and Schedule 2. “law enforcement officer” includes—
 - (a) a member of the National Intelligence Agency or the South African Secret Service established under the Intelligence Services Act. 1994 (Act No. 38 of 1994): and
 - (b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1959 (Act No. 8 of 1959).’

[11] Section 51(2) of Act 105 of 1997 reads as follows:

‘Committal of accused for sentence by High Court after plea of guilty or trial in regional court
52.

- (1) If a regional court, after it has convicted an accused of an offence referred to in Schedule 2 following on—
 - (a) a plea of guilty; or
 - (b) a plea of not guilty,

But before sentence is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

(2)

- (a) Where an accused is committed under subsection(1)(a) for sentence by a High Court. the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court. and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the Court that such plea or such admission was incorrectly recorded.
 - (b) Unless the High Court in question—
 - (i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or
 - (ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51.
 - (c) If the Court is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded, or if the Court is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge. the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.
 - (d) The provisions of section 112(3) of the Criminal Procedure Act, 1977 (Act No.51 of 1977) shall apply with reference to the proceedings under this subsection.
- (3)
- (a) Where an accused is committed under subsection(1)(b) for sentence by a High Court. the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.
 - (b) The High Court shall. after considering the record of the proceedings in the regional court. sentence the accused, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in section 51: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice. he or she shall. without sentencing the accused. obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.
 - (c) If a judge acts under the proviso to paragraph (b) he or she shall inform the accused accordingly and postpone the case for judgment and if the accused is in custody, the judge may make-such order with regard to the detention or release of the accused as he or she may deem fit.

- (d) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce a document or other article.
- (e) Such Court whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (b,). may— (i) confirm the conviction and thereupon impose a sentence as contemplated in section 51;
- (ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51;
- (iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;
- (iv) set aside the conviction:
- (v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit: or (vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice.’

[12] In evaluating the evidence in respect of premeditation note must be had of the following:-

12.1 The Appellant came to the house of the deceased and knocked aggressively demanding to be let in.

12.2 The Appellant was alleged to have been carrying a firearm and pointed same at the deceased.

12.3 He was accompanied by a male person who stood outside the door of the residence of the deceased to ensure that the Appellant was uninterrupted in his intentions.

12.4 The neighbour, Mr Tipane tried to stop the Appellant from assaulting the deceased. He even advised the Appellant that he would be calling the police.

12.5 The evidence of the deceased’s older sister, Ms N Tswediane is that there was a history of a turbulent abusive relationship between the Appellant and the deceased.

12.6 The Appellant had previously threatened to kill the deceased.

12.7 The deceased had attempted to commit suicide by drinking paraffin or petrol due to the Appellant’s abusive behaviour towards her.

12.8 The deceased had obtained a protection order against the Appellant some five months earlier than the date of her death.

[13] In *S v Kekana* 2014 ZACSA 158 at para 13, it was held that:

“that premeditation does not necessarily entail that the accused should have thought or planned his or her action for a long period of time in advance before carrying out his or her plan. This is because ‘even a few minutes’ are enough to carry out a premediated action.”

[14] In *S vs Taunyane* 2018 (1) SARC 163 (GJ) at paras 27 and 28 in which *S v Raath* 2009 (2) SACR 46 (C), *S v PM* 2014 (2) SACR 481 (GP) at (36) and *S v Kekana* supra was approved and followed found that:

‘...premeditation referring ‘to 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’ while planning refers to “a scheme, design or method of action, doing, proceeding or making which is developed in advance as a process, calculated to optimally achieve a goal. The period of time which may elapse between a perpetrator forming an intention to commit the murder and carrying out such murder is of importance but does not, and was said in *Raath*, “prove a readymade answer to the question of whether the murder was planned or premeditated” or, as was said in *Kekana* supra, “time is not the only consideration.”’

[15] Note must be had of the opportunities that the Appellant had to have reconsidered his actions, however the evidence before this court is that he continued his brutal assault on a defenceless woman and remained undeterred. The deceased called for help to her neighbour to save her. The neighbour attempted to stop the Appellant, the Appellant continued unabated with his murderous intent of brutally torturing and killing the deceased. This is so in the face of the history of abuse, the deceased threatening to commit suicide, in order to get away from him and having a protection order taken out against him. This court finds that the Appellant in this matter acted in a manner that was calculated to optimally achieve his goal of murdering the deceased.

[16] This court also finds that there is no doubt that the actions of the Appellant as follows was done to evade detection or apprehension; The Appellant locked the house of the deceased, dragged her body and hid it naked in some bushes. He thereafter laid a false charge of assault against Mr Thupeng, the first state witness. He further left his place of employment and residence and ran away to his hometown in the Eastern Cape which is in another province and where he was finally

arrested.

[17] This court finds that the court a quo properly considered the conspectus of the evidence in a judicious manner whilst having regard to the cautionary rules applicable.

[18] In *S v Artman* 1968 (3) SA 339 (A) at 341C Holmes JA held that “... while there is always need for caution in such cases, the ultimate requirements is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense....”

[19] In *S v Leve* 2011(1) SACR 87 (ECG) at (8) Jones J pointed out that if a trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but instead demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions. An Appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are

presumed to be correct and will only be disregarded if the recorded evidence shows then to be clearly wrong.

[20] Accordingly this court finds that the Appellant was correctly convicted of murder read with the provisions of section 51(1) of Act 105 of 1997.

[21] In regard to sentence the issue before this court is whether there are substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[22] In *S v Malgas* 2001 (1) SACR 469 (SCA) what constitutes substantial and compelling circumstances is clearly set out as a guideline in particular.

22.1 Courts are required to approach the imposition of the sentence conscious that Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

22.2 Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

22.3 The specified sentences are not to be departed from lightly and for flimsy reasons.

[23] The court a quo had regard to the pre-sentencing reports and did consider the personal circumstances of the Appellant, the interest of justice and the seriousness of the offence. Having considered same the court a quo found that there are no substantial and compelling circumstances to deviate from the minimum sentence. This court is in agreement with same. Further the court a quo, in considering its sentence found aggravating circumstances which includes the fact that the Appellant had contravened a protection

order and that the Appellant brutally raped the deceased with an iron pipe and tortured her to death. The Appellant had robbed the deceased, Ntabaleng Tsoeliane, a young woman and mother of her life simply because she chose not to be in a relationship with him. The deceased had sought the assistance of her family, friends and neighbour to no avail. The deceased also sought the protection of the law which too also failed her.

[24] The fact that the Appellant was under the influence of alcohol cannot be found to be a substantial ground to deviate from the sentence. It ought to be found to be an aggravating factor. This is clearly set out in *Director of Public Prosecution, Grahamstown v TM* 2020 JDR 0652 (SCA).

- [25] In *S v Matyityi* (2010) ZASCA 127; 2011 (1) SACR 40 (SCA); (2010) 2 ALL SA 424 (SCA) the court stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored.
- [26] In *Aliko v The State* (552/2018) [2019] ZASCA 31 (28 March 2019) it was held, "that pre-meditation is not an essential requirement for sentence of life imprisonment. The court exercises inherent discretion in determining suitable sentence. Life imprisonment is justified for the brutal murder of a defenseless victim."
- [27] The court a quo properly considered the aims of punishment which include retribution and deterrence. In the particular instant the aggravating factors in the crime committed by the Appellant together with the interest of society, the impact on the victim's family, in particular the victim's daughter, far outweigh the Appellant's personal circumstances.
- [28] This court finds that the Appellant perpetrated unspeakable acts of brutality on the deceased calculated to torture and rob her of her life. Also that the Appellants action after killing the deceased was to manipulate the law in order to evade detection and apprehension. The evidence before this court is that the Appellant has no respect for the law and has shown the Appellant to be a cold - blooded brutal murderer who has shown no remorse whatsoever. This court is the last 'port of call' for the deceased, the victim's family and society at large.
- [29] This court, in weighing the interest of the Appellant, justice and the interest of society finds that the sentence imposed is not shockingly inappropriate to the crime committed especially in view of the prevailing circumstance surrounding the commission of this crime.
- [31] Accordingly, this court is satisfied that the trial court properly exercised its discretion in imposing a life sentence.
- [32] The appeal is dismissed in its entirety both on conviction and sentence.

MEERSINGH AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

I agree and it is ordered.

KHUMALO J

Judge of the High Court

Date of hearing:

19 May 2021

Date of

judgment:

12 August 2021

Appearances:

For Appellant:

Ms M.B Moloi

Instructed by Legal Aid

317 Francis Baard Street

4th Floor, Locarno House

Pretoria

For Respondent:

Adv M Marriott

Instructed by The Director of Public Prosecutions, Gauteng Division

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2021/529.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/binjane-v-s-unknown-topic-agpphc-2021>

Prepared on 23 October 2026 · Esheria