
SOUTH AFRICA / JUDGMENT

De Besch v S (CA&R31/04) [2018] ZANCHC 22; 2018 (2) SACR 22 (NCK) (30 April 2018) [2018] ZANCHC 22

COURT

Northern Cape High Court, Kimberley

BEFORE

Tlaletsi JP, Williams J, Phatshoane J

CASE / FILE NUMBER

CA&R31/04

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HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE CA&R 31/04

In the matter between:

JOHN HENRY DE BESCH

Appellant

v

THE STATE

Respondent

Judgment:

Tlaletsi JP

Heard on: 12 March 2018

Decided on: 30 April 2018

Coram: Tlaletsi JP, Williams J, Phatshoane J,

ORDER

1. The appeal against sentence succeeds and the sentence of Life Imprisonment imposed on 06 May 2004 is set aside and replaced with

the sentence of 23 years imprisonment.

2. The sentence of 23 years imprisonment is antedated to 06 May 2004.

FULL BENCH APPEAL JUDGMENT

TLALETSI JP (Williams J and Phatshoane J concurring)

- [1] This is an appeal with leave of the Supreme Court of Appeal, which was granted on 10 January 2008, against a sentence of life

imprisonment imposed on the appellant on 06 May 2004 following his conviction on a charge of murder by this Court.

- [2] The appeal process has been delayed by the inability of the appellant and the Registrar to produce a complete record of the trial proceedings. Counsel for the appellant, Mr Steynberg, initially urged that the sentence be set aside and the matter be remitted to the trial court for sentencing the appellant afresh because of the incomplete record. He however reconsidered his position when the appeal was heard and aligned himself with the submissions by Ms Van Heerden, counsel for respondent, that the record as it stood was sufficient for purposes of disposing of the appeal in that it consisted of the trial Court's comprehensive judgments on the merits, reasons for sentence and a reasoned ruling on the application for leave to appeal. In my view, based on the grounds of appeal and the central issue to be determined, the submission is well founded.

- [3] The factual background leading to the death of the deceased is uncomplicated. The appellant had a quarrel with the deceased.

The deceased, who the appellant claimed to be his girlfriend, was holding a three year old child in her arms when he stabbed her

several times with his knife on the upper part of the body. He alleged that the deceased voluntarily handed the knife to him, whereas the eye witness testified that he got the knife from her son who was standing with them when he summoned the eye witness to the scene during their brawl.

- [4] The deceased sustained the following injuries as depicted in the post-mortem report: superficial scratch over centre of neck; 4 cm wound above clavicle, 1cm wound above 2nd rib – 2 cm from midline; 0,25 cm cut at base of 5th right finger (this wound was described as a defensive wound); 3 cm at back of neck; and her epidermis was stripped off on her elbow. There was extensive bleeding from the neck tissue with the left carotid severed. Both lungs were collapsed but had not sustained tissue injuries. The cause of death was described as “Hypovolemia – stab wound”.
- [5] The knife used to kill the deceased had a 20 cm blade and an 18 cm handle. The trial court found that the appellant had direct intent to kill the deceased.
- [6] The appellant was 35 years old and unmarried at the time of sentencing. He was intoxicated at the time of the commission of the offence. He was not a first offender and has a long list of previous convictions of a violent nature. In October 1982 he was sentenced to R200-00 fine or six months imprisonment for Assault with Intent to do Grievous Bodily Harm (Assault GBH); In January 1987 he was sentenced to 12 months imprisonment wholly suspended for five years with some conditions, for Assault GBH. On 6 March 1987 he was convicted of Assault GBH and sentenced to corporal punishment of seven strokes with a light cane; He was on the same date sentenced to three months imprisonment wholly suspended for five years with some conditions attached to the suspension. On 3 March 1987 he was convicted of Assault GBH and sentenced to three months imprisonment, wholly suspended on some conditions. On 3 June 1988 the appellant was convicted of Robbery read with the provisions of s 294 of Act, 51 of 1977, and sentenced to six strokes with a light care. During January 1989 he was convicted of Assault GBH and sentenced to three months imprisonment. During March 1991 he was convicted of Assault GBH and sentenced to R400-00 or four months imprisonment and a further eight months imprisonment which was suspended on specified conditions. During May 1991 he was convicted of Indecent Assault of a mentally retarded person and sentenced to three months imprisonment. During December 1991 he was sentenced to R100-00 or 50 days imprisonment for failure to appear in court. On or during March 1995 he was sentenced to R300-00 or 73 days imprisonment for theft. In 1996 he was convicted of Malicious Damage to Property and sentenced to R100-00 or 25 days imprisonment and a further 3 months imprisonment suspended on certain conditions. During September 1998 the appellant was once again convicted of Assault GBH and was sentenced to 18 months imprisonment.
- [7] In passing sentence, the trial court relevant to this appeal, held inter alia, that this is not a case where the appellant “suddenly” (“skielik”) grabbed a knife and stabbed the deceased; that even though the appellant claimed that the deceased’s alleged lover, one Bennett Taylor, who was at the time serving a term of imprisonment threatened the appellant, it was not the deceased who threatened him; and that the reason the deceased was killed is that if the appellant could not have her as his girlfriend, then Bennett Taylor would also not have her.

[8] The trial court held further that although jealousy is a mitigating factor, in this case it could not be regarded as substantial and compelling circumstance; that had the appellant only made himself guilty of attempted murder or assault and not murder, a sentence less than 15 years imprisonment would still not have been appropriate in view of the appellant's previous convictions which demonstrated that he is a habitual criminal; further that even if the provisions of Criminal Law Amendment Act[1] (the minimum sentence regime) were not applicable, life imprisonment would still have been the appropriate sentence in the circumstances

of this case.

[9] The grounds upon which the sentence is challenged are mainly that the trial court erred: in not handing down a balanced sentence; erred in not finding that the murder was committed on the spur of the moment; misdirected itself by not finding compelling and substantial circumstances; and, that the circumstances of the case do not justify the imposition of life imprisonment.

[10] It remains to be considered in this appeal, firstly, whether the trial court found that the murder was premeditated. Secondly, if the trial court did not make a finding that the murder was premeditated, whether the offence of murder fell within the ambit of the Act (minimum sentence regime) insofar as life imprisonment is a mandatory sentence unless the court finds that there are substantial and compelling circumstances justifying a departure from the imposition of that mandatory sentence.

[11] It is common cause that trial court, in convicting the appellant, pronounced that the appellant is guilty of murder with *dolus directus* as a form of intent. The trial court did not pronounce that the murder was premeditated in the judgment on the verdict.

[12] For purposes of the Act, there is a distinction between murder committed with *dolus directus*, *dolus indirectus* and *dolus eventualis* on the one hand, and murder which is planned or premeditated on the other hand. The reason for the distinction is that the Act prescribes different sentences for murder committed in any of the circumstances described in the Act. The position was aptly explained by Satchwell J in *Taunyane v S*[2] as follows:-

"[10] Section 51(1) requires the court to have "convicted of an offence referred to in Part 1 of Schedule 1". It is prior to the conviction stage that the matter must have been fully ventilated, argued and considered. Only then can the necessary finding be made. It is only when such a conviction is determined and full reasons given in respect of an identified offence 'referred to in Part 1 of Schedule 1', that an appropriate sentence can be handed down.

[11] That a conviction of murder must be identified as being 'planned or premeditated'

at the conviction stage indicates the standard of the burden of proof which applies to the description of or the circumstances

of the murder of which an accused is convicted.

[12] I do not suggest that a new class of ‘murder’ (other than those identified as murder committed

with ‘dolus directus’, ‘dolus indirectus’, or, ‘dolus eventualis’) has been created in Act, 105 of

1997. I understand that the court has always been required to indicate at the time of conviction the class of intention with which an accused acted and is also now required to indicate whether or not such murder was committed within any one of the circumstances set out in Part 1 of Schedule 2.

[13] For this particular appeal, the relevance of this consideration is the nature of the burden of proof which applies to a finding of the circumstances set out in Part 1 of Schedule 2. For a court to convict of murder which was ‘planned or premeditated’ it certainly seems that the usual standard of ‘proof beyond reasonable doubt’ must be applied at the conviction stage as to the existence or otherwise of planning or premeditation.”

[13] Murder committed with dolus directus as a form of intent attracts a different minimum sentence as compared to the same murder but planned or premeditated. It is therefore imperative that during the verdict a court should specify whether the murder the accused person is found guilty of was planned or premeditated. Dolus directus does not necessarily mean that premeditation was present.[3] In this matter since the trial court did not specify during verdict that the murder was planned or premeditated, it follows that the applicable provision for purposes of sentence is s 51(2) of the Act and the prescribed minimum sentence is 15 years imprisonment.[4]

[14] Sentencing an accused person on the basis that the prescribed sentence of life imprisonment is applicable if there are no substantial and compelling circumstances without having found that the murder was planned or premeditated during verdict, amounts to a misdirection warranting interference by the appellate court. I am mindful of the fact that the trial court did indicate that it would still have imposed the same sentence if the provisions of the Act were not applicable. It is reasonable to infer that the appellant may not have conducted his case on the basis that he was facing possible mandatory life imprisonment as prescribed by the in the Act.

[15] Having found that the trial court misdirected itself, the next inquiry is whether the matter should be referred to the trial court for reconsideration of an appropriate sentence; or whether this Court should exercise such discretion. Section 322(2) of the Criminal Procedure Act[5] empowers the court of appeal to amend or set aside the sentence of the trial court and impose punishment that should have been imposed by the trial court.

[16] As already alluded to, there has been a considerable delay from the date the appellant was sentenced to life imprisonment to date when this appeal was heard. The judgment of the court a quo sets out in great detail the factual background relating to the commission of the offence. The personal circumstances of the appellant are also traversed at length in the reasons for sentence. Furthermore, it is not the appellant’s contention that the trial court

omitted or disregarded any of his personal circumstances in its reasons for sentence. His contention is that the trial court in its consideration of all relevant factors and evidence regarding sentence, accentuated the gravity of the offence and the interests of the society and failed to attach sufficient weight to his personal circumstance. This Court therefore, is in as good a position as the trial court to consider the sentence afresh. To my mind, this approach is in the interests of justice.

- [17] To recap, the personal circumstances of the appellant are that he was 35 years old when the trial court imposed sentence. He is not married. He was intoxicated at the time of the commission of the offence and there is nothing to gainsay his contention that the incident stems from a love triangle. The appellant has a plethora of previous convictions involving the grievous bodily harm to other persons. As the trial court pointed out he is a violent person and poses a serious threat to other persons.
- [18] Regarding the offence itself: the appellant viciously attacked a defenceless woman carrying a three year old child in full view of her other child. There can be no doubt that the incident on its own was traumatic to the children who are now left without a mother. The effect of trauma on her children and extended family is permanent. Neither the deceased nor Bennett Taylor posed any danger to the appellant. The appellant has shown no remorse. Despite overwhelming direct evidence against him he pleaded not guilty and offered an illogical defence that all that he remembered is that he only aimed the knife at the deceased and thereafter walked away with that weapon.
- [19] In my view the appellant's personal circumstances and any mitigating factors that may exist are by far outweighed by the aggravating features of the case. I am unable to find any factors that could be said to amount to substantial and compelling

circumstances justifying any sentence short of the prescribed minimum sentence of 15 years imprisonment. I am also of the view that the minimum sentence of 15 years imprisonment will be wholly inadequate to address the seriousness of the offence, appellant's long list of violent previous convictions and the interests of the community. Such a sentence would send a wrong message and cause public outcry. The appellant has on previous occasions been given short imprisonment terms which appear to have failed to rehabilitate him. From a penology point of view, this is a text book case that shows that short terms of imprisonment are not always beneficial and may not have any rehabilitative effect. On the contrary in this case the short terms of imprisonment seem to have turned the appellant into a hardened criminal. The many incidents of violence should have warned the previous sentencing courts that the appellant would one day cause the death of a human being. The remark by the trial court that he should have been declared a habitual criminal is not farfetched. A lengthy jail term would, in my view, be appropriate in the circumstances of this case. Such a sentence would cater for the deterrent, preventative, retributive and to some extent, rehabilitative purposes of punishment.

- [20] In the result the following order is made:

- a) The appeal against sentence succeeds and the sentence of Life Imprisonment imposed on 06 May 2004 is set aside and substituted with

the following:

“The accused is sentenced to 23 years imprisonment.”

- b) The sentence of 23 years imprisonment is antedated to 06 May 2004.

LP Tlaletsi

Judge President.

Williams J and Phatshoane J concur in the judgment of Tlaletsi JP.

APPEARANCES:

For the Appellant: H Steynberg

Legal Aid South Africa

For the Respondent: A H van Heerden

Director of Public Prosecutions

Kimberley.

[1] 105 of 1997

[2] 2018 (1) SACR 163 (GJ).

[3] S v Raath 2009 (2) SACR 46 (C) para 23.

[4] S v Smous 2018(1) SACR 108 (NCK).

[5] 51 of 1977 which provides “322 Powers of court of appeal(1)

- (2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial”

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- (2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial”

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