

SOUTH AFRICA / JUDGMENT

Dlamini v S (A23/2024) [2024] ZAGPPHC 1262 (4 December 2024)

[2024] ZAGPPHC 1262

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel, Retief, Hassim

CASE / FILE NUMBER

A23/2024

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case number: A23/2024

Date of hearing: 11

November 2024

Date delivered: 4

December 2024

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

DATE: 4/12/24

SIGNATURE

In

the application of: LUNJU
LEWIS
DLAMINI
Appellant
and
THE
STATE
Respondent

JUDGMENT

SWANEPOEL J: (RETIEF J AND HASSIM J CONCURRING)

- [1] The appellant was charged in the High Court with one count of murder, read with the provisions of section 51 (1) of the Criminal Law Amendment Act, 105 of 1997 (“the Act”). He was convicted of murder on 4 November 2020. However, the court a quo could not find that the murder had been premeditated, and consequently, it convicted the appellant in terms of the provisions of section 51 (2) of the Act. Notwithstanding that the minimum sentence prescribed by section 51 (2) of the Act, read with Part II of Schedule 2 is 15 years’ imprisonment, the court a quo sentenced the appellant to life imprisonment. This is an automatic appeal against the life sentence.
- [2] This murder was a particularly strange, inexplicable and cruel one. The appellant, now 54 years old, is an unmarried man with no previous convictions, and with two adult children. At the time of the murder, the appellant was gainfully employed.
- [3] On the day of the murder the appellant was drinking at a shebeen. He was accompanied by his girlfriend Lydia M[...]. Also at the shebeen was the deceased, then a 7 month-old girl, and the deceased’s grandmother, Ms. M[...] M[...].
- [4] The appellant said that he drank a substantial amount of alcohol, and that he was under the influence of alcohol, but the evidence established otherwise. At some point the child became upset and started crying. Ms. M[...] tried to settle the child down but later on she decided to take her home. As she was preparing juice for the child at her home the appellant walked into the house. Ms. M[...] had intended to attend a meeting, and she was going to take the deceased with her. As she was about to leave the appellant urged her to leave the child with him. At the appellant’s insistence, Ms. M[...] left the deceased in his care.
- [5] Ms. M[...] soon abandoned her decision to go to the meeting, and after reaching the third house from her own she turned back. When she arrived back at home she came across a horrific scene. The child was lying on the floor, covered in blood. The appellant was in possession of a garden hoe with which he had apparently hacked the child to death. When Ms. M[...] asked the appellant why he had killed the child, he said it was not a child but Satanism.

- [6] The child had died from blunt force trauma to the head. She had multiple injuries, not only to her head, but also to her torso and arms. Two ribs were fractured. She had contusions of the lung and liver. The child had clearly died a most painful death.
- [7] In court the appellant insisted that he had been intoxicated on the day in question, and that he could not remember anything about the attack on the child. The appellant never accepted responsibility for the attack, nor did he provide any explanation for his conduct. There is nothing to suggest that the appellant has any remorse for his actions. The appellant's counsel went as far as to place on record that he had urged the appellant to tell the court what had transpired, but that the appellant refused to speak.
- [8] The personal circumstances of the appellant were quite sparse. All one knows is that at the time of sentencing the appellant was 50 years of age. He was unmarried, but he had two adult children then aged 28 and 24 respectively. His son was seeking employment and his daughter was studying at university. The appellant worked as a tiling and plumbing assistant earning R 750 per week. He had never before clashed with the law.
- [9] Section 51 (1) of the Act, read with Part I of Schedule 2 provides for a minimum sentence of life imprisonment for:
- [9.1] Premeditated murder;
- [9.2] Murder of a law enforcement officer or material witness in a case;
- [9.3] Where the murder was committed during the perpetration of rape or robbery;
- [9.4] Where the murder is committed by a group of persons in furtherance of a conspiracy or common purpose;
- [9.5] Where the murder was committed in the course of removing a body part of the deceased;
- [9.6] Where the murder was connected to witchcraft.
- [10] Section 51 (2) (a) of the Act provides as follows (in part):
- “(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-*
- (a) Part II of Schedule 2, in the case of-
- (i) A first offender, to imprisonment for a period not less than 15 years;
- [11] This offence resorts under Part II of Schedule 2 that refers to “murder in circumstances other than those referred to in Part I”. It therefore attracts a minimum sentence of 15 years’ imprisonment. Although a regional court is empowered to impose a further five years’ imprisonment if the aggravating circumstances justify a longer sentence than the minimum, a High Court is not equally limited, and may impose any sentence that it may deem to be appropriate, including life imprisonment.

[12] The appellant submitted that the court a quo had not given the appellant's counsel an opportunity to address it on the appropriateness of imposing life imprisonment. That is not so. During its address on sentence, the State argued that the prescribed minimum sentence was disproportionate to the severity of the offence, and it sought a sentence of life imprisonment.[1] It did so on the basis that the attack was particularly violent and brutal. Furthermore, not only had the appellant shown no remorse, the State submitted, he did not even provide an explanation for his actions. The prosecutor also argued that gender-based violence, and especially violence against children, was extremely prevalent in our society. The State argued that in this particular case,

notwithstanding the minimum sentence of 15 years' imprisonment, the aggravating factors justified life imprisonment.

[13] Having been made aware of the State's plea for life imprisonment, the appellant's counsel had no address, which is not surprising as there is very little to say in favour of the appellant.

[14] The State relied upon the authority of *S v Nyangwa*[2], a matter in which the circumstances were startlingly similar, and in which the High Court (per Goosen J) imposed life imprisonment. In *Nyangwa* a 26 year old man murdered a 14 year old girl at a building site. The attack was particularly brutal. The accused pulled the deceased's

hair from her head in the process of dragging her around, he bludgeoned her with rubble, and while she was lying prone he dropped

a tinderblock on her head. He then set her alight, destroying the lower half of her body. Goosen J described the offence as a "dreadful

crime carried out with shocking violence". The accused refused to testify and never provided any explanation for the murder. The State could not establish premeditation, and thus the minimum sentence of 15 years' imprisonment was applicable. Nonetheless,

the State argued for life imprisonment.

[15] Goosen referred to the judgment in *S v Vilakazi*[3] where Nugent JA had pointed out the anomalies in the minimum sentence regime imposed by the Act in the case of rape:

"[13] What is striking about that regime is the absence of any graduation between ten years' imprisonment and life imprisonment. The minimum sentence of ten years' imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender..."

[18] It is plain from the determinative test laid down by Malgas, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally

permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon the circumstances of the particular case....”

- [16] The same incongruity in the Act exists in respect of murder. For instance, in a case where a person plans to shoot someone, and does so by shooting one shot, life imprisonment is prescribed. However, where a person commits a heinous, vicious, prolonged and bloody attack on someone on the spur of the moment, only fifteen years’ imprisonment is prescribed. The disproportionality between the sentencing in the two scenarios is obvious. One cannot simply say that the minimum sentence is automatically the appropriate sentence. The only manner of bringing proportionality to sentencing is to use the minimum sentence as a starting point, and then to consider all other aggravating and mitigating factors.
- [17] In Nyangwa the Court was of the view, on the basis of proportionality, that the minimum sentence of 15 years would be unduly lenient, and would not reflect the outrage felt by society for the violence that had been inflicted on a child.
- [18] When one considers the aggravating circumstances in this case, it is difficult not to find that life imprisonment is wholly appropriate. In my view, the circumstances of this case are even more heinous than in Nyangwa. Here the victim, a defenceless baby, was utterly helpless and unable to fight back against the appellant. Furthermore, whereas in Nyangwa there was most likely something that had sparked the attack, in this case there could not have been anything motivating the vicious killing of the child. Here the appellant is a mature man who should have been able to control his impulses, as opposed to Nyangwa where the accused was still relatively young.
- [19] Life imprisonment is the harshest sentence that a court can impose, and, as has been emphasized on numerous occasions, it is a sentence that should be imposed only for the most serious offences. In my view, the vicious murder of a defenceless baby, for no discernable reason, is such an offence.
- [20] The test on appeal is not what sentence this court believes would have been appropriate or what sentence it would have imposed. An appellate court will only interfere with a sentence if the court a quo misdirected itself, if it did not exercise its discretion properly, or if the sentence induces a sense of shock.
- [21] The appellant’s only submission was that the sentence was disproportionate to the facts of the case, and that a sentence of 20 years would have been more appropriate. The appellant does not even suggest that the sentence is shockingly inappropriate. In my view, given all of the circumstances of the case, the sentence of life imprisonment is not disproportionate to the offence, and it certainly does not, I believe, induce a sense of shock.
- [22] In the premises, I propose the following order:

[22.1] The appeal against sentence is dismissed.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

I agree:

HASSIM J

RETIEF J

Counsel for the appellant: Ms S Simpson Counsel for the respondent: Adv. JJ Jacobs Date heard:
13 November 2024 Date of judgment: 4 December 2024

[1] Although it was held in *S v Mbatha* 2009 (1) SACR 623(KZP) that an accused must be forewarned of the possibility that a sentence greater than the minimum might be imposed, the Supreme

Court of Appeal in *S v Mthembu* 2012 (1) SACR 517 (SCA) disagreed and held that no such duty existed.

[2] *S v Nyangwa* [2019] ZAECPEHC 47 (2 August 2019)

[3] *S v Vilakazi* 2012 (6) SA 353 (SCA)

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