

SOUTH AFRICA / JUDGMENT

Fish v S (K/S17/2014) [2020] ZANCHC 44 (3 July 2020)

[2020] ZANCHC 44

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S17/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

No: K/S17/2014
Heard

on: 18/06/2020
Delivered
on: 03/07/2020
In

the matter between: ABEL
MBUYISELO FISH
APPLICANT
and
THE
STATE
RESPONDENT

JUDGMENT**MAMOSEBO J**

[1] The relief sought to the Full Bench of the Northern Cape Division, by the applicant, Mr Mbuyiselo Fish, is firstly, condonation for the late filing of the application for leave to appeal and secondly, leave to appeal against his conviction on four counts, namely: assault with intent to cause grievous bodily harm, two counts of rape (vaginally and anally) and murder read with s 51(1) of the Criminal Law Amendment Act[1] on 02 September 2015, and his sentence handed down on 12 November

2015. His application for leave was filed with the Registrar on 05 February 2020.

[2] The test to be applied in determining whether an application for leave to appeal should be granted or not is governed by s 17 of the Superior Courts Act[2] which stipulates:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

(a) (i) the appeal would have reasonable prospects of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[3] The aforementioned test requires a greater measure of certainty envisaging a different outcome on appeal. Bertelsmann J in *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[3] made the following insightful remarks:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The formed test whether appeal should be granted was a reasonable prospect that another court might come to a different conclusion. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

Condonation

[4] A substantive application is important when one seeks condonation. The test in considering condonation applications is trite. Jafta JA remarked as follows in *S v Mantsha*[4] :

"[5] ...As the Appellant was seeking an indulgence, he was required to show good cause for condonation to be granted. Good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal."

[5] In his notice of application for leave to appeal, the applicant contended that being moved from the one prison to the other and his inability to consult with a legal representative prevented him from filing his application for leave to appeal the conviction and sentence timeously. The delay in prosecuting his appeal extended over a period of four years (12 November 2015 to 05 February

2020) and is opposed by the State. A court considering the condonation application must also take into account a range of considerations. However, strong prospects of success may tend to compensate for a long delay. See *Melanie v Santam Insurance Co. Ltd.*[5]

I am not persuaded that the applicant has made out a case for condonation to be granted. Even if I may be wrong in this finding the application on the merits is nevertheless very poor.

Conviction

[6] The applicant raised only one ground in respect of his conviction. Mr Steynberg, appearing for him, submitted that I erred in not ordering that the proceedings start *de novo* before another presiding Judge after Dr Kirimi had informed the court that the applicant was unable to follow the proceedings or to make a proper defence.

[7] Dr Netsa Keith Kirimi, Head of Psychiatry in the Northern Cape and Part- Time Lecturer at the University of the Free State, had conducted an assessment of the applicant before the trial started and opined as follows:

"Criminal Responsibility: Mr Mbuyiselo Abel Fish has normal understanding of right and wrong and can act accordingly.

Ability to follow court proceedings: Mr Mbuyiselo Abel Fish is currently capable of following court proceedings and to put up a proper defence [for] himself.

Recommendations: It is recommended that the law takes its course. He should however be put on treatment for depression as soon as possible."

[8] The applicant was represented from pleading stage and throughout the trial until the close of the State case by Ms Mazubokwane, from the Justice Centre in Kimberley, who later withdrew as his legal representative because of some conflict. Subsequently two other very experienced legal aid counsel consulted with him, but never came on record for reasons upon which the court is not expected to speculate. After the Justice Centre, which must have found him to be implacable, refused to grant the applicant a further legal representative, in theory only, he proceeded unrepresented. I requested the legal aid to make available a legal representative as *amicus curiae*. Mr Van Tonder came on record. He is one of the most senior and experienced practitioners at the Kimberley Justice Centre. The accused raised no

demur. Mr Van Tonder was helpful to the applicant and the Court.

- [9] Before closing argument Dr Kirimi was called as the Court's witness in terms of s 186 of the Criminal Procedure Act (the CPA)[6] to clarify the effects of being bipolar. Of importance in his findings is that bipolar is a mood disorder causing mood fluctuations. Dr Kirimi recommended that the applicant be observed for 30 days before the proceedings continued. I granted the order in terms of s 78(2) and (7) as well as s 79 of the CPA.
- [10] Dr Kirimi was re-called to clarify the reports after the 30-day observation. The applicant was in a hypomanic bipolar mood phase during the 30-day observation. The doctor explained the term "manic phase" to mean an elevated mood. It can also mean extreme irritability which is sometimes associated with aggression or being delusional. A person can relapse because of non-compliance with the intake of the prescribed medication or when experiencing a stressful situation. It is important to note that the applicant experienced the hypomanic phase during the period of observation and not during trial. I had called Dr Kirimi after the applicant had disclosed in his testimony, and on his own accord, that he suffered from being bipolar but nothing untoward was displayed, including aggression or irritability that showed that he was experiencing any form of hypomanic phase that necessitated intervention.
- [11] In responding to the question posed by Ms Mabaso on how the panel arrived at the conclusion that the accused knew the wrongfulness of his actions, Dr Kirimi said they looked at two aspects, namely, (i) his current accountability (whether he could distinguish between right and wrong) and (ii) the circumstances prevailing at the time the crime was committed. The panel opined that even after considering whether he should be admitted as a state witness, they rather opted, based on the applicant's cognitive functioning which was quite intact, to stabilise him in a short period of time in order for him to stand trial.
- [12] There is therefore no merit in the submission that after Dr Kirimi's testimony the trial should have started de novo. I have not found any evidence to substantiate the submission that there are reasonable prospects of success on appeal against conviction. In actual fact, all safeguards were put in place, including appointing an amicus curiae as well as calling Dr Kirimi as the court's witness, to ensure that the applicant received a fair trial.

Sentence

- [13] The following are the grounds relied upon by the applicant with regard to his sentence: that sentences of life imprisonment for the two counts of rape and murder are shockingly harsh and inappropriate. That I erred:

13.1 in taking into consideration that the accused was not remorseful throughout the trial and after conviction;

13.2 in not applying the determinative test in *S v Malgas*[7] in order to determine if substantial and compelling circumstances existed to warrant a deviation from the minimum sentence.

[14] The Supreme Court of Appeal dealt fully with remorse in the case of *S v Matyityi*[8]. There was no remorse on the part of the applicant particularly because the deceased was his live-in-partner. Ponnann JA in the *Matyityi* judgment[9] remarked as follows:

"Malgas, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from *Malgas*: The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present."

[15] Mr Steynberg revisited the factors which, in his submission, are compelling and substantial circumstances which make the sentence of life imprisonment disproportionate to the offences committed. All those factors were considered because they were outlined in the pre-sentence report or raised during the discussion with Dr Kirimi. What counsel has overlooked is that Dr Kirimi repeatedly remarked that a combination of medication for bipolar and alcohol or drugs or any dependence-producing substances was not assisting the applicant. Sentencing must also be victim orientated.

[16] The applicant's case is a typical example of a femicide. The nature and seriousness of the injuries inflicted on the deceased even before killing her were atrocious. The medical pathologist who conducted the post mortem felt compelled to reflect the rape itself in the post mortem report. The remarks by the former Chief Justice Mahomed are more relevant now than they were in 1997 in the case of *S v Chapman*[10] The rape and murder of women and children has become a pandemic in this country. It is in instances like these where the personal

circumstances of the applicant must recede to the background. There is nothing disproportionate about imposing life imprisonment where the victim was raped more than once coupled with severe injuries sustained. These fall squarely under Schedule 2 of s 51 of the Criminal Law Amendment Act. A deviation from imposing life imprisonment under these circumstances would have been for flimsy

reasons.

[17] I am satisfied that there are no reasonable prospects of a successful appeal. In the result the application for leave to appeal must fail.

[18] I make the following order:

1. The application to condone the late filing of the application for leave to appeal is refused.
2. The application for leave to appeal against both the conviction and sentence is dismissed.

NORTHERN CAPE DIVISION

For the applicant:

Adv. H. Steynberg

Instructed by:

Justice Centre, Kimberley

For the respondent:

Adv. T.E. Barnard

Instructed by:

The Director Public Prosecutions

[1] 105 of 1997

[2] 10 of 2013

[3] Unreported, LCC case no LCC14R/2014, dated 03 November 2014

[4] 2009 (1) SACR 414 at 417c - d

[5] 1962 (4) SA 531 (A) at 532C - F

[6] 51 of 1977 as amended

[7] 2001 (1) SACR 469 (SCA)

[8] 2011 (1) SACR 40 (SCA) at para 13

[9] At para 11

[10]

[1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A) at para 4

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