

SOUTH AFRICA / JUDGMENT

Maleke v S (A52/2017) [2017] ZAFSHC 231 (7 December 2017)

[2017] ZAFSHC 231

COURT

Free State High Court, Bloemfontein

BEFORE

C. Van Zyl, J.J. Mhlambi

CASE / FILE NUMBER

A52/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable:

NO

Of

interest to other Judges: NO

Circulate

to Magistrates: NO

Appeal

number: A52/2017

In

the appeal between:

POGISHO

JOSEPH

MALEKE Appellant

and

THE

STATE Respondent

CORAM:

VANZYL. J et MHLAMBI, J

JUDGMENT

BY: VANZYL, J

DELIVERED ON: 7 DECEMBER 2017

[1] The appellant pleaded guilty on a charge of murder in the Regional Court, Petrusburg and he was sentenced to 15 (fifteen) years'

imprisonment.

[2] On 13 October 2015 the trial Court granted the appellant leave to appeal against the imposed sentence. The appellant's grounds of appeal can be summarised as follows:

1. The trial Court erred in over-emphasising the interests of society and the seriousness of the offence.
2. The Court a quo erred in not finding that the following are substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence:

2.1 The appellant is a first defender at the age of 36 years.

2.2 The appellant pleaded guilty and had indicated his intention to do so since his first appearance in the Court a quo.

2.3 The appellant is remorseful for what he has done and has been open and honest with the Court.

2.4 The appellant contributed to the family of the deceased for her funeral by giving them a cow as a sign of his remorse, which was accepted by the deceased's family.

3. The Court a quo erred in not taking proper cognisance of the appellant's personal circumstances.
4. The Court a quo erred by not blending the sentence with a measure of mercy.
5. An effective term of 15 (fifteen) years' imprisonment is shockingly severe and inappropriate.

[3] The deceased was the wife of the appellant and they were staying together. In his statement in terms of section 112(2) of the Criminal Procedural Act, 51 of 1977, the appellant, inter alia, stated as follows:

"3.

I hereby plead guilty to the offence of murder. That on or about 12 December 2014 at or near Petrusburg.....I unlawfully and intentionally caused the death of the deceased, namely Natasha Maleke. I intentionally and unlawfully caused the death of the deceased.

4.

On the day of the incident we were at home. My wife the deceased told me that our child is not mine and someone else is the father of our child. I could not believe what she told me and I was angry and we started to fight and it got into a physical fight I assaulted her.

5.

I phoned my father after the assault and informed him that he must come and help. He came and I was informed that my wife is dead.

6.

I therefore confirm the following:

6.1 That due to the assault on the deceased caused by me on 12 December 2014 she died.

6.2 I admit my action was unlawful and it is not justifiable in law.

6.3 I admit that I unlawfully and intentionally caused the death of the deceased by assaulting her.

6.4 I admit the medico-legal post-mortem report as drafted by Vincent de Wet is correct and true and the cause of death is due to head injuries. It will be handed in as exhibit 'B'.

6.5 I admit the identity of the deceased person, Natasha

Maleke.

6.7 I admit that the body of the deceased did not sustain any other injuries after the assault.

7.

I have remorse for my actions and request this Honourable Court to accept my plea of guilty and bestow mercy upon me during

sentencing."

[4] In the aforesaid exhibit "B", the medico-legal post-mortem report, the main post-mortem findings regarding the body of the deceased were noted as follows:

"1. Die liggaam van 'n volwasse swart vrou.

2. Verspreide subarachno'iedale bleeding oor die hele brein.

3. Verspreide kneuswonde oor die liggaam.

4. Toe fraktuur van die regter bobeen.

The cause of death is indicated as "hoofbesering".

[5] The State called the mother of the deceased, Gladys Leboa, as a witness in aggravation of sentence. She, inter alia, testified as follows:

1. The deceased and the appellant were married for ten years, but the deceased left the appellant for a period of three years because of him assaulting her. When asked how she knew about the assault(s) on the deceased, she testified that she received calls from people informing her that the appellant badly assaulted the deceased, once to the extent that she was admitted to hospital.
 2. The deceased previously opened cases against the appellant, but withdrew them later. According to Ms Leboa she did not know why the deceased withdrew the cases, whether it was done out of love for the appellant or whether the appellant threatened the deceased to do so. Ms Leboa also testified that the death of the deceased affected herself and their family very badly and she, herself, was traumatised.
 3. She furthermore testified that whenever the deceased and the appellant had a fight, the deceased came to her parental home and then opened a case against the appellant, which she subsequently withdrew. When Ms Leboa enquired from her why she did not rather divorce the appellant, the deceased responded by saying that she loved the appellant.
 4. During cross-examination she testified that she did not know why the deceased kept on going back to the appellant.
 5. In cross-examination she also testified that they spoke to the appellant's father about a cow as contribution for the funeral, but that the appellant was not present. She, however, confirmed that they indeed received the cow and that the deceased's family accepted the cow.
 6. It was also evident from her evidence that the child relevant to this matter was at the time seven years of age. According to her knowledge the appellant was indeed the father of the child and she cannot understand why, after seven years, it would have been said that the child is not the appellant's child.
- [6] Although Mr Nel of the Bloemfontein Justice Centre (Legal Aid SA) appeared on behalf of the appellant during the hearing of the appeal, Mr Reyneke, also attached to the Bloemfontein Justice Centre, drafted the heads of argument on behalf of the appellant. Mr Nel indicated during his argument that he relied on the arguments advanced by Mr Reyneke in the appellant's heads of argument. One of the said arguments is that in the judgment on sentence, certain errors and/or misdirections occurred. I agree with this line of argument, specifically in the following respects:
1. The Court a quo found that the seriousness of the offence is aggravated by the manner in which it was carried out, in that:
 - 1.1 The appellant killed the deceased with his bare hands.
 - 1.2 The killing was not done in a short period of time.

1.3 The assault on the deceased could not have been a mere mistake by the appellant, "... as it is clear that it endured for some time. When one is in the middle of doing something wrong he would retreat and tell himself what I am doing is wrong especially when that incident did not take a spur of a moment because by looking at the injuries of the deceased one could see that took a long time. The accused had ample opportunity to stop himself from inflicting more and more injuries on the defenceless woman."

No evidence was however placed before the Court a quo in support of the aforesaid findings. There was consequently no basis upon which the aforesaid findings could have been made.

Mr Bontes, appearing on behalf of the State, made the following submission in paragraph 5.1 of his heads of argument:

"It is submitted that Section 112(2) submitted by the defence on behalf of the appellant is in itself vague and lacks in details. The factual matrix provided by defence and accepted by the State does not disclose the nature and the manner in which the deceased was assaulted. The plea of guilty in paragraph 4 states that both the appellant and deceased fought and he assaulted her.

It is submitted that the mere repetition of the allegation in the charge sheet is not enough; the plea of guilty must give details of the facts on which the accused pleads guilty on."

Mr Bontes relied on the judgment in S v B 1991 (1)

SACR 405 (N) in this regard.

Although the correctness of the aforesaid principle cannot be disputed, the fact of the matter is that the plea of guilty in the present matter was accepted by the State and consequently the State is bound by and restricted to the contents thereof. See S v Jansen 1999

(2) SACR 368 (C).

2. The Court a quo found that from the evidence of the deceased's mother it is to be accepted that there was some domestic violence within their marriage prior to the incident relevant to this case. The Court a quo stated that as this evidence was presented in aggravation of sentence, the allegations need not be proved beyond reasonable doubt.

The evidence of Ms Leboa regarding the alleged previous incidents of domestic violence, however, in my view, constituted hearsay

evidence and consequently inadmissible evidence which should not have been taken into consideration in determining an appropriate sentence.

3. The Court a quo seemingly found that the appellant cannot be considered to be remorseful.

I, however, have to agree with the defence's contention that considering the appellant's allegation of remorse in paragraph 7 of the section 112(2) statement, the State is bound by it. See S v Jansen, supra. The Court a quo could therefore not have made a finding that contradicted the appellant's allegation of remorse.

4. The Court a quo found that "this type of an offence is rife in Petrusburg where men would kill their lovers or wives."

In the absence of any explanation or basis for the aforesaid finding, such a finding could not have been made.

[7] In addition to the aforesaid misdirections, the Court a quo

completely failed to refer to and take into consideration the circumstances that led to the appellant's assault of the deceased. In this regard it is evident from paragraph 4 of

the section 112(2) statement that the revelation by the deceased was what caused the appellant to become angry, as a result of which the appellant assaulted the deceased after a fight ensued between them. In *S v Mandela* 1992 (1) SACR 661 (A) at 664 I - 665 C the Court, inter alia, found as follows:

"In die algemeen gesproke impliseer provokasie in die geval van 'n geweldsmisdaad dat die slagoffer se eie

voorafgaande optrede by sy aanrander een of ander heftige gemoedsaandoening ontlok as gevolg waarvan die aanrander

die slagoffer te lyf gaan. ... Wesenskenmerk van provokasie as versagtende faktor is die onmiddellikheid van die boosdoener se

reaksie op die slagoffer se toornverwekkende handeling. Die boosdoener meet onverwyld en in die hitte van die oomblik tot

sy geweldsdaad oorgaan.... daardie momentele verlies aan of inkorting van selfbeheersing wat die waarmerk van provokasie dra. ... Daarbenewens kan toom aan die kant van 'n beskuldigde strafversagtend inwerk slegs indien die slagoffer se toornverwekkende daad sodanig is dat die gemoedsopswelling wat dit by die beskuldigde ontlok na die oordeel van die gewone redelike mens gebillik is."

Also see *S v Goitsema* 1997 (1) SACR 99 (O) and *S v Aspel* 1998 (1) SACR 561 (C).

Although the deceased's revelation can never be considered to have justified any assault on her by the appellant, it clearly, and understandably so, provoked him. In this regard one has to be mindful that her revelation not only constituted an admission of infidelity on her side, but it also caused the appellant's shocking realization that the child whom he for seven years believed to be his child, was in fact not.

[8] The nature and seriousness of the aforesaid misdirections, in my view, caused the Court a quo not to exercise its discretion in determining an appropriate sentence, properly and reasonably. See *S v Kibido* 1998

(2) SACR 207 (SCA) at 216 1-J.

- [9] In the circumstances we are to consider an appropriate sentence afresh.
- [10] I completely agree with the submission of Mr Bontes that domestic violence is to be considered in a very serious light, moreover so when it resulted in the victim's death. Mr Nel did not argue the contrary, correctly so. In the unreported case of *Mudau v The State*, (547/13) [2014] ZASCA 43 (31 March 2014) the following was stated regarding domestic violence in paragraph 6 of the

judgment:

"Domestic violence has become scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live constant in fear. This is in some respects a negation of many of the fundamental rights such as equality, human dignity and bodily integrity."

- [11] In addition to the aforesaid, it is evident from the contents of the post-mortem report, as well as from the photos of the deceased and the crime scene, that this was in fact a very serious and brutal assault on the deceased.
- [12] An appropriate sentence is one which will also serve the interests of society. Considering the facts of this matter, it is my view that an appropriate sentence would be one that not only deters other potential offenders, but which can also assist in reforming the appellant. In view of the fact that the appellant is a first offender and considering the circumstances that led to the appellant murdering the deceased, I do not consider this case to be one where deterring the appellant or protecting the society from the appellant are applicable factors in determining an appropriate sentence which will serve the interests of society.
- [13] The personal circumstances of the appellant relevant to the issue of sentence, are the following:
1. The appellant was 36 years old at the time of sentencing. He completed Grade 12 at school.
 2. At the time of sentencing the appellant was employed at Petrusburg Stene and he received a monthly salary of R1 040.00.
 3. The appellant does not have access to the 7-year old child, who is staying with the family of the deceased, as he is not allowed to see the child.
 4. The appellant is a first offender.
- [14] In addition to the aforesaid personal circumstances of the appellant, the following mitigating factors are present and applicable in determining an appropriate sentence:
1. The appellant pleaded guilty. In fact, the appellant indicated since his first appearance in Court that he wished to plead guilty. In my view his plea of guilty is indicative that he takes responsibility

for his actions. This fact, in return, increases the appellant's rehabilitation prospects.

2. The appellant is remorseful about the crime he committed. I have already dealt with this finding earlier in this judgment.
3. The appellant acted on the spur of the moment in reaction to the provocative revelation by the deceased regarding the paternity of "their" 7-year old child. This factor diminishes the appellant's moral blameworthiness.

[15] In my view the abovementioned personal circumstances of the appellant, together with the aforesaid mitigating factors, cumulatively constitute substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed minimum of 15 years' imprisonment.

[16] After a balanced consideration of all the facts and principles relevant to this matter, I deem a sentence of 10 years' imprisonment

to be an appropriate sentence.

[17] I consequently make the following order:

1. The appellant's appeal against his sentence, is upheld.
2. The sentence of 15 years' imprisonment is set aside and substituted with a sentence of 10 years' imprisonment, which sentence is to be considered to have been imposed on 16 September 2015.

C. VAN ZYL, J

I concur:

J.J. MHLAMBI, J

On behalf of appellant: Adv. P. Nel

Instructed by:

Bloemfontein Justice Centre

Legal Aid SA

BLOEMFONTEIN

On behalf of respondent: Adv. D. W. Bontes

Office of the Director:

Public Prosecutions

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