

SOUTH AFRICA / JUDGMENT

# Mamombe v S (A324/2012) [2012] ZAWCHC 300 (31 August 2012)

[2012] ZAWCHC 300

## COURT

Western Cape High Court, Cape Town

## BEFORE

Davis, Stelzner

## CASE / FILE NUMBER

A324/2012

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## JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A324/2012

DATE: 31 AUGUST 2012

In the matter between:

JAMES MAMOMBE .....Appellant

and

THE STATE .....Respondent

## JUDGMENT

DAVIS, J The appellant was charged with a count of murder in terms of events which occurred on 30 May 2010. On 15 September 2010, he pleaded guilty as charged, having been legally represented and was sentenced to a term of imprisonment of 20 years of which two years were suspended for a period of five years on condition that he was not convicted for a convicted for a crime of which violence against another was an element. The nature of the crime is somewhat difficult to divine from the facts. In his plea the appellant said the following: (I should add that the transcribed record is hardly a model of clarity): "I admit that on 30 May 2010 at Salt River Circle, Salt River in the Regional Division of the Western Cape, I unlawfully and intentionally killed Jonathan Atherston ... the deceased ... consumed alcohol and ... and afterwards when I had to use his bank card it declined: insufficient funds. The deceased was very upset. I then handed my key, my vehicle keys to him and my two cell phones due my bank card not working. The deceased was still upset and he now heard me speaking over his phone to his friends which made

him a bit scared. I then decided to walk away from the deceased. The deceased then followed me. However I ... grabbed by my chest. After we had an argument I then removed my knife from my pocket. It was attached to my vehicle keys. I then stabbed the deceased several times, but I cannot remember how many times. I then ran away with the knife in my possession until I was arrested by the police. I admitted that I had stabbed the deceased several times with my knife, but I cannot remember exactly how many times. I admit that I intended to kill the deceased by trying to stab him with a knife." This is a very illuminating passage of evidence because it indicates that the appellant, who was an educated person, somehow lost complete control and persistently stabbed the deceased, 11 or 12 times causing his death in circumstances where unquestionably the conviction of murder was justified under the circumstances. The Magistrate in passing sentence reasoned as follows: "What strikes me is the total absence of reason. Why did this have to happen? Even if one accepts that drugs and alcohol played a part, it is not really relevant. Relatively speaking it played a part at the end of the day. How do you turn around and for an argument of the payment of the bill stabbed somebody 11 times? And that is the bit of the nonsensical part of your version of what happened there. Is that you were not the aggressor. According to you it was not ... not that the deceased was aggressive on the aggressor. He was the one that was trying to stop you and not impressed with the fact that you could not pay and then suddenly you become the attacker for, as I say, what reason? Again also if one looks at the post mortem, not only to this indespicable(sic) number of times that you stabbed, it also say at least three of them were potentially fatal and two of those were from the back. So there is no question about the deceased posing any threats to you while you stabbed him. You were the attacker, you were the aggressor and he was trying to evade. There is also mentioned the possible defence wound on his hand in the post mortem. Again I ask why?" The latter is a particularly pertinent question in this case for as I have already indicated, from a brief reference of the appellant's plea statement, it appears to have been an inexplicable but brutally violent crime which caused the death of another. The Magistrate therefore concludes: "To attack a friend, to stab him in the back and the shoulder and the heart and the lung and then to walk away and not even try and assist him in any way is not understandable. So the Court is of the opinion not only is there no substantial and compelling circumstances. The Court is of the opinion that this is matter where more than the minimum sentence can be imposed or should be imposed." The effective term of imprisonment, as I have indicated, was 18 years. True, this is more than an indicated minimum, but as is evident from the factual background to which I have made reference, this was a crime of considerable brutality, unprovoked, and without any satisfactory explanation. There are personal circumstances which should be taken into account. Ms Kloppers on behalf of the appellant, submitted that the appellant pleaded guilty and thus showed genuine remorse. Further, the murder happened on the spur of the moment. Liquor may have been a catalyst which caused this violent behaviour towards the deceased. All these factors are correct, but I cannot but agree that in the present case the Magistrate's emphasis on the brutality and the unexplained nature of the murder are factors that exacerbate the crime and trump any of the mitigating factors to which I have made reference, which could be employed as substantial and compelling to the benefit of the appellant. The question which has to be posed in a case such as this, when this Court sits with appellate jurisdiction, is whether the sentence shockingly inappropriate, induce a sense of shock,

is it disproportionate to the crime which would constitute a material misdirection by the Magistrate? In my view, an affirmative agreement is not justified in a case such as the present. In my view, a brutal murder was committed. There is no explanation which allows this Court to contextualise the fashion which would justify the finding of substantial and mitigating circumstances to reduce the sentence. In contrast, the crime was shockingly inappropriate and induced a sense of shock. For all these reasons there is no basis by which this Court can interfere with this sentence. For these reasons I would DISMISS the appeal and confirm the sentence.

DAVIS, J I agree and it is so ordered. STELZNER, AJ

DAVIS, J

The appellant was charged with a count of murder in terms of events which occurred on 30 May 2010. On 15 September 2010, he pleaded guilty as charged, having been legally represented and was sentenced to a term of imprisonment of 20 years of which two years were suspended for a period of five years on condition that he was not convicted for a crime of which violence against another was an element.

The nature of the crime is somewhat difficult to divine from the facts. In his plea the appellant said the following: (I should add that the transcribed record is hardly a model of clarity):

"I admit that on 30 May 2010 at Salt River Circle, Salt River in the Regional Division of the Western Cape, I unlawfully and intentionally killed Jonathan Atherston ... the deceased ... consumed alcohol and ... and afterwards when I had to use his bank card it declined: insufficient funds. The deceased was very upset. I then handed my key, my vehicle keys to him and my two cell phones due my bank card not working. The deceased was still upset and he now heard me speaking over his phone to his friends which made him a bit scared. I then decided to walk away from the deceased. The deceased then followed me. However I ... grabbed by my chest. After we had an argument I then removed my knife from my pocket. It was attached to my vehicle keys. I then stabbed the deceased several times, but I cannot remember how many times. I then ran away with the knife in my possession until I was arrested by the police. I admitted that I had stabbed the deceased several times with my knife, but I cannot remember exactly how many times. I admit that I intended to kill the deceased by trying to stab him with a knife."

This is a very illuminating passage of evidence because it

indicates that the appellant, who was an educated person, somehow lost complete control and persistently stabbed the deceased, 11 or 12 times causing his death in circumstances where unquestionably the conviction of murder was justified under the circumstances.

The Magistrate in passing sentence reasoned as follows:

"What strikes me is the total absence of reason.

Why did this have to happen? Even if one accepts that drugs and alcohol played a part, it is not really relevant. Relatively speaking it played a part at the end of the day. How do you turn around and for an argument of the payment of the bill stabbed somebody 11 times? And that is the bit of

the nonsensical part of your version of what happened there. Is that you were not the aggressor. According to you it was not ... not that the deceased was aggressive on the aggressor. He was the one that was trying to stop you and not impressed with the fact that you could not pay and then suddenly you become the attacker for, as I say, what reason? Again also if one looks at the post mortem, not only to this indespicable(sic) number of times that you stabbed, it also say at

least three of them were potentially fatal and two of those were from the back. So there is no question about the deceased posing any threats to you while you stabbed him. You were the attacker, you were the aggressor and he was trying to evade. There is also mentioned the possible defence wound on his hand in the post mortem. Again I ask why?"

The latter is a particularly pertinent question in this case for as I have already indicated, from a brief reference of the appellant's plea statement, it appears to have been an inexplicable but brutally violent crime which caused the death of another.

The Magistrate therefore concludes:

"To attack a friend, to stab him in the back and the shoulder and the heart and the lung and then to walk away and not even try and assist him in any way is not understandable. So the Court is of the opinion not only is there no substantial and compelling circumstances. The Court is of the opinion that this is matter where more than the minimum sentence can be imposed or should be imposed."

The effective term of imprisonment, as I have indicated, was 18 years. True, this is more than an indicated minimum, but as is evident from the factual background to which I have made reference, this was a crime of considerable brutality, unprovoked, and without any satisfactory explanation.

There are personal circumstances which should be taken into account. Ms Kloppers on behalf of the appellant, submitted that the appellant pleaded guilty and thus showed genuine remorse. Further, the murder happened on the spur of the moment. Liquor may have been a catalyst which caused this violent behaviour towards the deceased.

All these factors are correct, but I cannot but agree that in the present case the Magistrate's emphasis on the brutality and the unexplained nature of the murder are factors that exacerbate the crime and trump any of the mitigating factors to which I have made reference, which could be employed as substantial and compelling to the benefit of the appellant.

The question which has to be posed in a case such as this, when this Court sits with appellate jurisdiction, is whether the sentence shockingly inappropriate, induce a sense of shock, is it disproportionate to the crime which would constitute a material misdirection by the Magistrate? In my view, an affirmative agreement is not justified in a case such as the present.

In my view, a brutal murder was committed. There is no explanation which allows this Court to contextualise the fashion which would justify the finding of substantial and mitigating circumstances to reduce the sentence. In contrast, the crime was shockingly inappropriate and induced a sense of shock. For all these reasons there is no basis by which this Court can interfere with this sentence.

For these reasons I would DISMISS the appeal and confirm the sentence.

DAVIS, J

I agree and it is so ordered.

STELZNER, AJ

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