

SOUTH AFRICA / JUDGMENT

Marx v S - Appeal (CA 398/2008) [2009] ZAECHGC 32; 2009 (2) SACR 562 (ECG) (22 May 2009) [2009] ZAECHGC 32

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering, Nepgen, Revelas

CASE / FILE NUMBER

CA 398/2008

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FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT

PARTIES: JAN WILHELM MARX VS THE STATE 2. Registrar: CASE NO: CA 398/2008 Magistrate:
High Court: EASTERN CAPE HIGH COURT, GRAHAMSTOWN DATE HEARD: 18 May 2009 DATE
DELIVERED: 22 May 2009 JUDGE(S): PICKERING NEPGEN and REVELAS JJ LEGAL
REPRESENTATIVES – Appearances: for the Appellant(s): Adv. T. Price for the Respondent(s): Adv.
N. Henning Instructing attorneys: Appellant(s): Dorfling Attorneys Respondent(s): Director of
Public Prosecutions CASE INFORMATION – 1. Nature of proceedings : Appeal against sentence

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA 398/2008

In the matter between

JAN WILHELM MARX

VS

THE STATE

APPEAL JUDGMENT

PICKERING J:

The appellant, a 41 year old man, appeared in the High Court, Grahamstown, before Sangoni J, charged with murder, it being alleged that on 3 May 2007 he killed his wife, Marietta Marx, by shooting her with a .38 special calibre revolver. To this charge he pleaded guilty. In a lengthy written plea explanation submitted by him in terms of section 115 of Act 51 of 1977 he averred, however, that at the time of the shooting he was suffering from “serious diminished responsibility”.

Mr. Henning, who appeared for the State at the trial, thereafter indicated that the State was not prepared to accept the plea on the basis as tendered save for two paragraphs thereof, namely paragraphs 31 and 32. These paragraphs read as follows:

“31. I accept that when I fired three shots at my wife the deceased I must have known what I was doing and I accept that I knew what I was doing. Any vagueness is probably because of the nature of the crime I committed and is attributed to post trauma memory loss.

32. I admit therefore that on the day named in the charge sheet and at the place named in the charge sheet I shot my wife Marietta Marx an adult female person three times. I admit the correctness of the post-mortem report and admit that the shots that I fired led to her death.”

Although the basis of the plea as tendered, namely diminished responsibility, is “not a defence but is relevant to sentence because it reduces culpability” (see Director of Public Prosecutions, Transvaal v Venter [2008] ZASCA 76; 2009

(1) SACR 165 (SCA) at 182f) a plea of not guilty was thereafter entered on appellant’s behalf in terms of s 113 of Act 51 of 1977.

At the conclusion of the defence case there was, however, a change of tack, it now being submitted on behalf of appellant that the State had failed to prove its case beyond reasonable doubt and that the evidence disclosed that at the critical time the appellant had been acting in a state of automatism attributable to a cause other than mental pathology, in other words, in a state of sane automatism excluding culpability. This defence was rejected by Sangoni J and appellant was convicted of murder as charged. He was thereafter sentenced to undergo 10 years imprisonment of which 5 years were suspended on certain conditions.

Appellant appeals now with the leave of the court a quo against both his conviction and sentence.

As appears from what is set out above it was not in issue at the trial that deceased had died on 3 May 2007 in consequence of the three gunshots fired at her by appellant, two of which shots struck her on the right cheek and one on the posterior thorax.

At the time of her death deceased was 38 years of age. She and appellant had been married to each other for approximately 19 years. Four daughters, now aged 19, 18, 9 and 3 years respectively were born of the marriage.

It appears from the testimony led at the trial that the relationship between the appellant and deceased had deteriorated markedly during the course of their marriage. According to appellant his love for deceased had remained constant throughout the marriage but deceased's feelings for him had changed. She became verbally abusive and aggressive towards him and humiliated him in public by, inter alia, calling him a "kruppel gat". It is common cause in this regard that appellant had injured his hip in a motor vehicle accident leaving him with a permanent limp.

Deceased eventually instituted proceedings for divorce against appellant. The summons was served on him on 18 April 2007. Prior thereto appellant had begun to suspect that deceased was involved in an unduly intimate relationship with other men, including a much younger man, Basson. Appellant was frequently told by his mother and sister of allegations in the community concerning deceased's infidelity but he closed his mind to these allegations, not wishing to believe them. He did not raise his concerns about the gossip with deceased for fear that doing so would precipitate an intense emotional confrontation. It appears from the evidence that his fears concerning deceased's infidelity were not groundless.

A certain Mr. Alberts who resided with appellant and deceased in their home at Steytlerville during 2006 testified that he and deceased had had a sexual relationship with each other throughout the time that he lived with them. Appellant, however, was unaware thereof, whatever his suspicions may have been. Alberts also testified that the aforementioned Basson used to visit deceased regularly, sometimes at the house until past midnight. He confirmed too that deceased was publicly verbally abusive towards appellant, calling him a "kruppel gat" and expressing the hope that he would die. Mrs. Malgas, the housekeeper who worked for the Marx family, confirmed that deceased and Basson would meet at the house when appellant visited the doctor.

Basson himself testified at the trial and denied that he and deceased had had anything more than a friendly relationship with each other. It is not necessary to determine whether or not deceased was actually involved in a sexual relationship with Basson. What does emerge from the evidence of, in particular, Basson himself, is that certain of her behaviour with Basson was inappropriate and suggestive of a more intimate relationship than would be proper for a married woman in ordinary circumstances. It is clear, in my view, that whatever the true nature of Basson's relationship with deceased may have been, the appellant subjectively believed, on not unreasonable grounds, that deceased and Basson were romantically involved with each other. This caused him considerable emotional anguish. Despite this he nursed the hope and belief that his marriage could be saved. The harder he tried to convince deceased not to proceed with the divorce, however, the more aggressive, rude and taunting she became towards him. The several sms messages sent to her by appellant bear testimony to his state of mind during this period. It is further not in dispute that his health deteriorated to the extent that his weight dropped from above 90kg to under 60kg at the time of the incident.

A week or two prior to the incident deceased left the common bedroom and moved into the spare bedroom together with two of the children.

Matters eventually came to a head on 2 May 2007. On that day deceased returned from work between 5pm and 6pm in an aggressive mood. She swore at appellant and informed him in crude terms that Basson had given her the best sex of her life. According to appellant this affected him tremendously and caused him to think seriously about committing suicide.

During the course of the evening various confrontations took place between deceased and appellant in the course of which deceased told appellant that she was going to divorce him and repeatedly taunted him about her wonderful relationship with Basson. When appellant broke down and started crying and begging her to return to him and save the marriage she laughed at him and exhorted him to get on with committing suicide by either shooting himself or taking poison. He thereafter went to his store where he kept a pesticide called Temic and swallowed a small amount thereof. This drinking of poison is described by Mr. Meyer, a psychologist who testified on behalf of appellant, as being a “para-suicide attempt”.

When the deceased realised that appellant had consumed poison she telephoned a neighbour who came to appellant’s assistance.

Thereafter appellant, despite feeling drowsy, retired to his bedroom but decided to remain awake in order to observe whether or not deceased left the home during the course of the night. Thereafter he went at some stage to the spare bedroom to speak to deceased. Deceased again swore at him and told him to leave her alone. He then sent various “sms” messages over his cell phone to her. On three further occasions he returned to deceased’s room but on each occasion his approaches were rejected. After this he remembered seeing his revolver lying on his bed and he wanted to commit suicide. He returned to deceased’s bedroom with the revolver. According to appellant he remembered kneeling on the floor at the end of her bed with the revolver in his hand. Deceased, however, encouraged him to shoot himself. Thereafter his memory was interrupted. The next thing that he remembered was a vague recollection of feeling as if someone was pulling the revolver from his head. He understood this as a sign that God was stopping him from committing suicide. His following memory was of himself standing at the left hand side of the bed and seeing his two daughters, one sleeping next to deceased and the other in her cot. His last memory was seeing a flash from the gun and hearing a shot. He was unable to remember having fired the other two shots. He next remembered that the children had woken up and had asked him what had happened. Although he saw blood on the body of his wife he told them that he did not know. He took both the children to the furthest room of the house where they went back to sleep. He tried unsuccessfully to telephone a certain Mr. Deysel to have him fetch the children so that they would

not be present when the police arrived. Mr. Deysel apparently did not hear his telephone ringing. Appellant then walked to the house of his mother and his stepfather, Mr. Senekal, because he did not have transport. He told them that he was certain that he had shot his wife and that she was dead. He asked his stepfather to take him to the police. He first, however, wished to make a detour to the farm of Mr. Deysel to arrange with him to look after the children. On the way to the farm with Mr. Senekal he once again drank Temic poison and became nauseous. He was taken by Mr. Senekal to Willowmore Hospital. Asked under cross-examination as to how he remembered

all the events after the shooting he replied that “ek dank die Vader daarvoor dat ek net weer my bewussyn herwin het redelik na hierdie skiet voorval.”

The aforementioned Mr. Meyer filed a voluminous report in respect of his psychological assessment of appellant and also testified at the trial. With reference to the events leading up to the shooting of the deceased Mr. Meyer stated that the appellant had probably experienced severely diminished impulse control. His inability to resolve his problems with the deceased or to extricate himself from their relationship, which had become emotionally abusive, led to him feeling a profound sense of helplessness, intense apprehension and pervasive suspicion with regard to deceased and her behaviour. In the two week period prior to the incident he felt increasingly alienated, helpless and was obsessed with his relationship with deceased, her infidelity and the impending divorce. On the night of the incident deceased again taunted appellant with her relationship with Basson, saying crudely that he had given her the best sex of her life. This humiliating taunt coupled with the fact that appellant and deceased had not had a sexual relationship for many months as well as the fact of the impending divorce acted, according to Mr. Meyer, as a trigger for appellant’s subsequent behaviour that night. Mr. Meyer then states as follows:

“On the day of the incident the synergistic interaction between the accused’s over controlled personality, physiological arousal,

cognitive and affective components, resulted in him suddenly acting out against the deceased in a manner which was probably unpremeditated, but under acute emotional distress and subjective provocation. Subjectively the accused felt rejected, humiliated and powerless to re-integrate his family, prior to final subjective provocation in the form of devastating rejection.”

Mr. Meyer stated that in these circumstances it appeared probable that appellant’s judgment was impaired. He was of the opinion that the appellant was probably able to act with intent and to distinguish between right and wrong although his ability to act in accordance therewith was probably diminished to a significant extent “owing to the synergistic interaction of internal and external forces.”

He stated that appellant had a deep sense of vulnerability and inadequacy and was “a very dependant personality with somewhat narcissistic traits and that it was unthinkable for him to lose the only woman with whom he had ever been involved”.

In his evidence Mr. Meyer stated that shortly before the incident appellant would have struggled “to resist acting out in his state of rage despite in my opinion being able to distinguish between right and wrong certainly immediately before this.” He described appellant as having been in a “very compromised mental state” at the time of the shooting. With regard to appellant’s inability to recall what had happened at the time of the shooting he stated that “there may be some amnesia there, it may also be a denial of the horror of this.”

In S v Henry 1999

- (1) SACR 13 (SCA) the following was stated by Scott JA at 19 h – 20 b with regard to the defence of sane automatism:

“It is apparent from the foregoing that the basis upon which the appellant sought to avoid criminal responsibility was not lack of capacity in the sense that he could not distinguish between right and wrong or, if he could, that he was incapable of acting accordingly (cf S v Campher 1987 (1) SA 940 (A) at 966F-I) but that at the critical time he was ‘acting’ in a state of automatism attributable to a cause other than mental pathology. It is trite law that a cognitive or voluntary act is an essential element of criminal responsibility.

It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the State to establish this element beyond reasonable doubt.

(See eg S v Kalogoropoulos 1993 (1) SACR 12 (A); S v Potgieter 1994 (1) SACR 61 (A); S v Kensley 1995 (1) SACR 646 (A); S v Cunningham 1996 (1) SACR 631 (A).) As was pointed out in the Cunningham case at 635j – 636b, however, the State, in discharging this onus, ‘is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, that this was attributable to some cause other than mental pathology.’”

In S v Cunningham, supra, Scott JA, stated at 636 b-c that it follows that “in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned. But ultimately it is for the court to decide the issue of the voluntary nature or otherwise of the alleged act and indeed the accused’s criminal responsibility for his actions. In doing so it will have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused’s actions during the relevant period.”

The learned Judge further pointed out at 20c that “it has been repeatedly emphasised in the past that defences such as non-pathological automatism require to be carefully scrutinised. (See eg S v Potgieter (supra) at 73c.)”

It is not necessary to deal in any detail with appellant’s belatedly raised defence in this regard because, at the hearing of the appeal, Mr. Price for the appellant conceded that appellant had indeed been correctly convicted of murder. When regard is had to the contents of paragraphs 31 and 32 of the plea explanation and to the totality of the evidence, especially that of Mr. Meyer and the evidence relating to appellant’s rational behaviour immediately after the shooting of deceased, then it is quite clear that Mr. Price’s concession was properly and correctly made.

There is in all the circumstances no merit in the appeal against conviction. I turn therefore to consider the appeal against sentence.

I have set out above the events leading up to the death of deceased. It is not necessary to repeat them here. In sentencing appellant Sangoni J took into account that he was a 41 year old first offender who at the time of the commission of the offence had acted under circumstances of diminished responsibility. He found that appellant's belief that deceased had had an affair with Basson "with all the hurting episodes that followed" constituted substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of 15 years imprisonment. He stated further that he had considered correctional supervision but that he agreed with the conclusions of a social worker, Mr. Baloti, who had stated that this was not appropriate chiefly because appellant had, according to Mr. Baloti, maintained his innocence and had refused to take responsibility for his actions. The learned Judge found further that a sentence of correctional supervision would, in any event, be inappropriate in the circumstances of this case where, in his view, a custodial sentence in excess of that prescribed in either section 276 (1)(h) or (i) of Act 51 of 1977 was called for.

Mr. Price has submitted that the learned Judge failed to accord sufficient weight to the evidence, especially that of Mr. Meyer, dealing with the degree of appellant's diminished responsibility. As will have appeared from the exposition of Mr. Meyer's evidence set out above, he was of the opinion that at the time of the commission of the offence appellant was acting under circumstances of severely diminished responsibility. His evidence, as well as that of appellant as to his state of mind, could not be gainsaid by the State and Mr. Henning conceded that appellant fell to be sentenced on the basis thereof.

In my view, with great respect to the learned Judge, this submission is not without merit. As was submitted by Mr. Price, the learned Judge made no more than a passing reference to the evidence of Mr. Meyer and referred in only two sentences to the "emotional stress" suffered by appellant in consequence of his belief that Basson and deceased were having an affair. He then proceeded to state, however, as follows:

"To shoot and kill a woman no less than 3 times while she is in bed with her daughters makes the offence more tragic, only to tell the children afterwards, when enquiring what was happening, an untruth in a rational way."

In my view the interests of society far outweigh those of the accused."

It seems to me, with respect, that the horrific circumstances of the murder caused the learned Judge to lose sight to some extent of the mental state of the appellant at the time. In this regard what was said in *S v Shapiro* 1994 (1) SACR 112 (A) at 123 c-f is apposite, namely:

"[Counsel for the State's] main argument was that although he did not dispute [the psychologist called for the defence's] opinion, this Court should not lose sight of the unchallenged evidence of independent by-standers, that Shapiro's actions appeared to be cool, calm and calculated. Outwardly he gave no sign of emotional confusion. Moreover, the provocation he experienced was limited. He brutally executed a man who was helpless and dying. He acted without compunction, and thereafter showed a callous indifference to what he had done."

The assumption underlying this argument is that the conduct of a person who has been found to have diminished criminal responsibility is to be measured by the same yardstick as the conduct of a person with undiminished criminal responsibility. Such an assumption is fallacious, for a person who has diminished criminal responsibility is by definition a person with a diminished capacity to appreciate the wrongfulness of his act, or to act in accordance with an appreciation of its wrongfulness.”

Even were I to be wrong in this regard I am in any event of the view that this Court, had it been sitting as a Court of first instance, would have imposed a sentence strikingly different from the sentence imposed by the learned Judge. I am of the view that in the circumstances of this case, having regard to the extent of appellant’s emotional disintegration and the fact that he was acting at the time under circumstances of severely diminished responsibility, a sentence of correctional supervision would be appropriate.

In *S v R* 1993 (1) SA 476 (A) Kriegler AJA pointed out at 488G that the Legislature, by the introduction of the sentencing option of correctional supervision, has sought to distinguish between two types of offenders, namely those who ought to be removed from society and imprisoned and those who, although deserving of punishment, should not be so removed. In *S v D* 1995 (1) SACR 259 (A) the following was stated by Nicholas AJA at 266 d:

“In its nature a sentence of correctional supervision is not denunciatory. It does not follow, however, that such a sentence

is necessarily inappropriate because the case is one which excites the moral indignation of the community. The question to be answered is a wider one: whether the particular offender should, having regard to his personal circumstances, the nature of his crime and the interests of society, be removed from the community.”

See too *S v Aspeling* 1998 (1) SACR 561 (C).

In *S v Shapiro* supra AJA stated further at 124b-d:

“I do not think that in the light of the finding of diminished responsibility this case is one which is clamant for retribution.

It does not appear from the evidence that Shapiro is likely to again commit a violent crime. He has no previous convictions relevant to show propensity for violence. It does not seem that he is a danger to society which would call for a separation from the community for a long time. In regard to the deterrence of others it does not seem to me that in the present case a long prison sentence is called for. The concatenation of circumstances was highly unusual and is unlikely to occur again.”

In *S v Ingram* 1995

- (1) SACR 1 (A) the appellant shot and killed his wife. On appeal a sentence of 8 years imprisonment was set aside by reason of a misdirection by the trial court and the matter was remitted to the trial court to consider correctional supervision in terms of s 276(1)(h) of the Act. At 8j - 9b Smalberger JA stated as follows:

“Murder, in any form, remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence; but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment. In this respect the trial Judge held, in my view correctly, that the deterrent aspect of punishment does not play a major role in the present instance. The appellant is not ever likely to repeat what he did. Deterrence is therefore only relevant in the context of the effect any sentence may have on prospective offenders. A suspended period of imprisonment is accordingly rendered largely superfluous.”

In *Director of Public Prosecutions, Transvaal v Venter* supra Cloete JA had the following to say at 190 b – e concerning deterrence in a case such as the present:

*“So far as the deterrence is concerned, the respondent is a first offender; there is no suggestion that he is a violent person - indeed the panel of psychiatrists found that his amnesia was in keeping with a suppression of events which were 'out of character with his personality'; and it does not seem that the respondent is a danger to society at large, so his removal from the community for a long time is not necessary for that reason. In such circumstances, this court has repeatedly held that deterrence of a person who commits murder acting with diminished responsibility, is not an important factor when it comes to punishment: see, for example, *S v Campher*; *S v Smith*; *S v Ingram*; and *S v Shapiro*. Deterrence of others is also not important in a case such as the present. This court held in *S v Shapiro**

‘In regard to the deterrence of others, it does not seem to me that in the present case a long prison sentence is called for. The

concatenation of circumstances was highly unusual and is unlikely to occur again.’

The same applies here. I would merely add that to my mind there would seem to be little purpose in attempting to deter a person not in full control of his or her faculties.”

Although the judgment of Cloete JA was a minority judgment it does not appear that the above dictum is at odds with anything that was stated in the majority judgments.

Having regard to the authorities cited above I am of the view that appellant, although clearly deserving of punishment, is not the type of person who should be removed from society. Appellant is universally regarded by all who know him as being a gentle, unaggressive person who “would not harm a fly.” Indeed, it is common cause that a number of appellant’s friends and acquaintances reacted with utter disbelief to the news that appellant had shot deceased. Appellant is clearly not a danger to society so it is not necessary for that reason to remove him from the community. As was the case in *S v Shapiro*, supra, deterrence of either appellant or others is not an important factor, having regard to the highly unusual concatenation of events

and the extremely remote possibility of a recurrence thereof. Neither is the case one which is clamant for retribution

In his report Mr. Meyer stated that the accused was in his opinion a suitable candidate for a community based sentence. As I have said above, the social worker, Mr. Baloti, was of the opposite view. In my view, however, Mr. Baloti's conclusions concerning the failure of appellant to take responsibility for his actions were in all probability based on a misinterpretation of what appellant told him, as indeed was put to Mr. Baloti by Mr. Price under cross-examination. Appellant's version as related to Mr. Meyer during May 2008 and as repeated in his testimony in Court during June 2008 was consistent throughout. At no stage did he deny that he had fired the shots which had killed deceased. It is, in the circumstances, hardly conceivable that at the late stage of September 2008, when he was interviewed by Mr. Baloti, appellant would have attempted to deny that he had fired such shots and to place the blame upon some third party. In my view, the only reasonable inference to be drawn from Mr. Baloti's evidence is that he misunderstood what the appellant was telling him concerning his actions on the night in question and in particular as to what appellant intended to convey when he stated that he had a vague recollection of feeling "as if some-one was pulling the revolver from his head". I am therefore of the view that a correctional supervision order coupled with stringent conditions would be fair and just. Compare *S v Potgieter* 1994 (1) SACR 61 (A) at 88d. In view of the fact, however, that Mr. Baloti did not recommend correctional supervision as a sentencing option, this Court has insufficient information before it to enable it to formulate such a sentence. It will therefore be necessary

for a fresh report to be obtained. In the light of what I have said above such report must be compiled by a social worker, other than Mr. Baloti.

The following order will therefore issue:

2. The appeal succeeds in part.
3. The conviction is confirmed but the sentence is set aside.
4. The matter is remitted to the trial court to sentence the appellant afresh, after due compliance with the provisions of s 276A (1)(a) of Act 51 of 1977, to correctional supervision in terms of s 276 (1)(h) of that Act.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

J.J. NEPGEN

E. REVELAS

Appearing for Appellant: Adv. T. Price Attorney for Appellant: Dorfling Attorneys Uitenhage

Appearing for Respondent: Adv. N. Henning Director of Public Prosecutions Date heard: 18 May

2009 Date delivered: 22 May 2009

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