

SOUTH AFRICA / JUDGMENT

Mbanga v S (A263/2018) [2019]

ZAGPJHC 333 (12 September 2019)

[2019] ZAGPJHC 333

COURT

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau, R R D Mokgoatlheng, N P Mngqibisa-
Thusi

CASE / FILE NUMBER

A263/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A263/2018

CASE NO: SS102/2016

DPP REF: JPV2016/020

In the matter between:

MBANGA, SYDWELL SIBUSISO APPELLANT

And

THE STATE RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] On 16 November 2016 the appellant was convicted on three charges of murder (counts 1, 2 and 3) as well as arson (count 4) after pleading guilty to all the charges. On 21 November 2016 the appellant was sentenced to a mandatory sentence of life imprisonment in respect of count 1, the trial court having found no substantial and compelling circumstances justifying a departure from the minimum sentence prescribed in section 51 (1) of the Criminal Law Amendment Act.[1] The appellant was sentenced to 12 years' imprisonment each for count 2 and 3. He was sentenced to 8 years' imprisonment for arson. The sentences were ordered to run concurrently. Consequently, the effective sentence was a life term of

imprisonment.

- [2] On 26 June 2017 the trial Judge refused the appellant leave to appeal. On that occasion, the appellant had personally launched an

application for leave to appeal. The record reflects that counsel who represented him during the trial, Adv Kgogane, appeared on his behalf. However, the state was not represented. To compound matters, the special power of attorney^[2] lodged by the appellant, authorising his legal representative to act on his behalf is dated 27 June 2017, which is a day after the order was made. Subsequently and on 31 July 2017 the application for leave to appeal was heard with both parties represented by counsel involved in the trial. Leave to appeal against sentence of life imprisonment only was granted.

- [3] When the appeal was argued, we were urged to ignore the order of 26 June 2017 and proceed on the basis of the 31 July 2017 order. It is apparent that the 26 June 2017 order was irregular in that counsel for the appellant appeared without a proper mandate envisaged in Rule 7 (1) of the Uniform Rules of Court and in the absence of the respondent's counsel. As the court was properly constituted on 31 July 2017 and leave to appeal on sentence granted, it is the latter order which laid the jurisdictional grounds for the full court to entertain this appeal. The 26 June 2017 order would seem to me, to have been a nullity and erroneously given. In my view, nothing turns on this as there is no prejudice to the parties and in particular, the appellant.

- [4] The appellant appeals the sentence of life imprisonment on the ground that the trial Judge erred by failing to find substantial and compelling circumstances which existed to justify a departure from a sentence of life imprisonment. The appellant contended that his guilty plea showed that he was remorseful. In the course of his submissions, counsel for the appellant argued that the appellant believed that the deceased in count 1 was unfaithful. It was argued that the trial Judge did not properly take into consideration all the traditional factors for purposes of sentencing and overlooked the fact that he was a first time offender but over emphasised the seriousness of the offense in count 1 as well as the interests of society.

- [5] Events cannot be isolated from their context. It is necessary to describe the circumstances of the death of the three deceased, albeit very briefly as distilled from the trial Judge's judgment and the appellant's statement of plea. The statement contained a detailed explanation of how and why the offences were committed. The deceased in count 1 was the appellant's wife, having entered into a customary union in 2014 and the deceased in counts 2 and 3 were their minor children. It was the first deceased's second marriage. A week before the incident, the deceased in count 1 and the children had vacated the common residence at an informal settlement in Thokoza, to another in the same area based on unspecified but what he termed "marital conflicts". As a result, he "got angry and decided to kill the deceased".

- [6] The appellant's attempts to reconcile with his wife failed. At about midnight on 16 November 2015, the appellant resolved to buy petrol. He walked for an hour to where the deceased were staying and doused the shack at the door with petrol after which he set it alight. The appellant had satisfied himself that the occupants, the three deceased, at that time were already asleep. Not only did his entire family suffer severe burns from the inferno to which they all succumbed a day later, numerous other shack dwellings, in all 18 shacks, were destroyed as a result of the uncontrollable fire that had spread. Thereafter he fled the scene and went into hiding until he was arrested by the police on 22 November 2015.
- [7] The trial Judge found that the appellant, with premeditation, had removed his own valuable assets from the common home to safety in substantiation of the finding that the crimes were carefully planned long before execution earlier that evening. The Supreme Court of Appeal held in *Kekana v S*[3] that even a few minutes are enough to carry out a premeditated action. The finding in this case that the conduct of the appellant

was premeditated cannot therefore be faulted. This is against the backdrop that the decision was made already when the deceased moved out of the common residence.

- [8] There was no evidence that the appellant's wife was seen in the act of adultery on the fatal night. It was not even suggested that she was found in any compromising situation from which adultery could be inferred. The appellant's suspicion that his wife had an affair with an unknown man since she left the matrimonial home in early November 2015 was found to be without basis. The appellant was apparently unhappy that his wife attended church regularly on Mondays, Wednesdays and Fridays where she played piano and would return home late at night between 21h00 and 23h00. Notwithstanding the facts of the case the appellant maintained that the court misdirected itself by not considering the mitigating circumstances.
- [9] It is trite that the determination of an appropriate sentence in a criminal case is pre-eminently a matter for the discretion of the trial court. A court sitting on appeal will therefore only interfere with a sentence of the trial court only in instances where there is a striking disparity between what it determined as an appropriate sentence and what the court on appeal considers ought to have been an appropriate sentence.[4] Each case must however be decided on its own facts. As Holmes JA held in *S v Rabie*[5] punishment should 'fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.
- [10] The appellant was approximately 27 years of age at the time the offences were committed. His highest level of education is a standard 3 (Grade 5). He was released on bail until his conviction. Accordingly, the appellant was 28 years of age, with two siblings by the time of his sentencing with no record of previous convictions. Both his parents had passed on. The appellant survived on casual jobs. He had expressed remorse for his conduct.

- [11] In the often cited case of *S v Matyityi*[6] the court referred to *S v Mokoena*[7] and other authorities stated therein, stated:

“Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused, rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”

- [12] In *S v Malgas*[8] Marais JA held that when a court imposes sentence in respect of an offence referred to in the Criminal Law Amendment Act 105 of 1997 it is no longer given a ‘clean slate on which to inscribe whatever sentence it thought fit’, instead, it is required ‘to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances’. The emphasis, he held, was on ‘the objective gravity of the type of crime and the public’s need for effective sanctions against it’. The appellant’s crime, premeditated murder attracts a prescribed sentence of life imprisonment in the absence of

substantial and compelling circumstances to justify a less severe sentence. It has often been stated that those guilty of this conduct ‘must face the wrath of the courts’.[9]

- [13] In our law there is nothing more serious than premeditated murder. The killings of one spouse by the other with children are crimes which have increased in frequency despite courts imposing lengthy terms of imprisonment. The Superior Courts, in this country have on numerous occasions and in various judgments expressed disquiet in this regard. The onslaught against women and children which has no place in a modern democracy continues unabated. Not only has it reached unprecedented levels but it is a national crisis. This court can take judicial notice of the fact that women are at a greater risk of being killed by male family members and intimate partners than by strangers, with husbands and boyfriends posing the greatest danger. This is a manifestation of the domination by men over women across the colour lines. Extreme forms of violence against women and children have since become a mundane reality in this country and is deeply entrenched which cannot continue unchallenged.

- [14] By his own version as alluded to in his statement of plea above, his wife had moved out a week before the incident because of marital

problems. The appellant 'got angry and decided to kill her'. The appellant showed his wife and innocent children no iota of mercy. His conduct was not only brazen and heartless but exhibited extreme cruelty. The process of death was agonisingly long, and no doubt painful. The deceased had no chance of escape as the shack was not only locked, but the appellant had started the fire at the door. The appellant had an extended time of deliberation and the trial Judge was correct in his finding that it was pre-planned. Accordingly, there was no loss of self-control at the fatal moment.

[15] Section 12(1) of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right 'to be free from all forms of violence from either public or private sources'. The non-sexist society promised in the foundational clauses of the Constitution and the right to equality and non-discrimination

guaranteed by section 9 are undermined when spouse killers enjoy impunity. In *S v Baloyi*[10] the Constitutional Court reiterated that domestic violence 'reflected and reinforced patriarchal domination, thereby threatening to undermine the non-sexist society promised in the foundational clauses of the Constitution'.

[16] The right to life in the Bill of Rights as provided for in section 11 of our Constitution had been rendered meaningless to the deceased at the hands of the appellant from whom they were entitled to expect refuge. No one is entitled to take the life of another human being outside the ambit of the law. This includes married/unmarried spouses and children. None amongst us can claim ownership of someone else's life and treat it at will, in conflict of the law.

[17] In the case before us, the trial Judge took into consideration all the relevant factors for purpose of sentencing including the fact that the appellant had pleaded guilty. The trial Judge recognised that the facts of this murder were very serious reflecting a high degree of moral culpability. He deliberated the appellant's personal circumstances at length but reached the conclusion that those considerations could not overcome the aggravating factors.

[18] I am not persuaded that in doing so the trial Judge erred in principle or that the sentence is excessive in the circumstances. In my view, the trial Judge properly exercised his discretion in meting out the requisite sentences given the cruelty, inhumanity and callousness of the appellant's conduct in this case. The offences were not only committed against the deceased's loved ones and extended family members but against the greater society. We are not persuaded that the trial court erred in not imposing a shorter period because of the appellant's guilty plea to the offences and expression of hollow remorse. Given my reasons above and in particular the seriousness of murders and the accused's particular circumstances, I am satisfied that the sentence of life imprisonment imposed does not result in a sentence grossly disproportionate to that which might otherwise be imposed upon the appellant.

[19] The sentence imposed by the trial Judge is commensurate with the gravity of the offences committed. It accords with valid correctional goals and sentencing principles. In reaching this conclusion, I have taken into account not only the sentencing principles as set forth in Rabie (above) but anything less than life imprisonment under the circumstances might send a wrong message to the whole of society that our courts do not take this particular kind of conduct seriously.

[20] Accordingly the appeal is dismissed.

T P MUDAU

[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree

R R D MOKGOATLHENG

N P MNGQIBISA-THUSI

Date of Hearing: 2 September 2019

Date of Judgment: 12 September 2019

APPEARANCES

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[1] 105 of 1997

- [2] The purpose of the power of attorney is to establish the mandate of the attorney concerned. See in this regard Erasmus Superior Court Practice RS 5, 2017, D1-93. The power of attorney must be properly constituted: Steyn and others NNO v Blockpave 2011 (3) SA 528 (FB) the special power of attorney was not backed by all the trustees. The resolution taken at the meeting of trustees was therefore invalid and the Trust was found to be not properly before court.
- [3] (629/13)
- [2014] ZASCA 158 (1 October 2014) at para [13]
- [4] S v Matlala 2003
- (1) SACR 80 (SCA) at para [10]; see also S v Pieters 1987 (3) SA 717 (A) at 734F-G
- [5] 1975
- (4) SA 855 (A) at 862G-H
- [6] 2011
- (1) SACR 40 (SCA) at para [13]
- [7] 2009
- (2) SACR 309 (SCA) para [9]
- [8] 2001
- (1) SACR 469 (SCA) para [8]
- [9] S v P 2000 (2) SA 656 (SCA) para [13]
- [10]
- [1999] ZACC 19; 2000
- (1) BCLR 86 (CC) para [12]

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