

SOUTH AFRICA / JUDGMENT

M.L.M v S (CA&R29/16) [2016] ZAECHGC 98 (21 September 2016) [2016] ZAECHGC 98

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, J Roberson

CASE / FILE NUMBER

CA&R 29/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO: CA&R 29/16

Date

Heard: 31 August 2016

Delivered

On: 21 September 2016

In

the matter between:

M.
L. M.
Appellant
and
THE
STATE
Respondent
APPEAL

JUDGMENT**MAKAULA J:**

- [1] The appellant pleaded guilty to and was convicted of culpable homicide. He was sentenced to 10 years imprisonment. The appellant, on petition, was granted leave to appeal against sentence.

Facts:

- [2] The deceased was the girlfriend of the appellant. The statement in terms of Section 112(2) of the Criminal Procedure Act (51 of 1977) reveals that on 25 December 2012, the deceased and the appellant were together at Mountain View Farm drinking liquor. They picked up a quarrel over an SMS message which came through the deceased's cellphone. Prompted by jealousy, the appellant assaulted the deceased severely with fists and a stick, and choked her. He went to fetch a blanket in order to sleep next to her and realised there was something wrong. He went to look for help.
- [3] A pre-sentence report was obtained. It transpires from the report that the appellant had been in a 15 year relationship with the deceased. Children named J. and T. were born out of their relationship. The deceased and the appellant broke up for some time. The deceased got involved in a love relationship with another man. T. was born out of that love relationship.

The appellant on the other hand, during that period of separation, also got a child with a certain Ms M.. The name of that child is J. . In the year 2012, the deceased and the appellant reconciled and moved together in a common home.

- [4] After the death of the deceased, the appellant cohabited with Ms M., who at the time of appellant's conviction was pregnant with their second child. It appears from the pre-sentence report that the appellant is the sole breadwinner of all the children i.e. J., T., J. and Ms M..
- [5] The pre-sentence report is silent on whether the appellant is a primary care giver of all the three children. That aspect is crucial in the determination of an appropriate sentence the appellant should face. The court a quo did not raise that nor was it raised in the grounds of appeal and before us.
- [6] In *S v M (Centre For Child Law as Amicus Curiae)*[1] Sachs J; dealing with what has to be taken into account when sentencing a person who is a primary caregiver, set the following guidelines.

"There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the

information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interest of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

- (c) If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
 - (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
 - (e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."
- [7] Both counsel conceded that the lack of sufficient information in the pre-sentence report about whether the appellant is a primary

caregiver has an effect of vitiating the sentence imposed by the court a quo. I am of the view that, had the court a quo had the benefit of knowing whether the appellant is a primary caregiver or not, it would have been in a better position to determine properly which sentence is appropriate.

Consequently, I am of the view that the following order is appropriate.

1. The sentence is set aside;
 2. The matter is remitted to the court a quo with directions that a pre-sentence report dealing with the aspect of whether the appellant
- is a primary caregiver of his and the deceased's children; and
3. Thereafter, the court a quo should sentence the appellant afresh.

M MAKAULA

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

J ROBERSON

Appearances:

Appellant: Mr Charles instructed by
Justice Centre

GRAHAMSTOWN

Respondent: Mr Els instructed by
The Director of Public Prosecutions

[1]

[2007] ZACC 18; 2008 (3) SA 232 (CC) at para 36

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Prepared on 13 October 2026 · Esheria