

SOUTH AFRICA / JUDGMENT

S v Bamberg (Sentence) (K/S 01/2024) [2024] ZANCHC 127 (13 November 2024)

[2024] ZANCHC 127

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S01/2024

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IN THE HIGH COURT OF SOUTH AFRICA

KAROO LOCAL CIRCUIT DIVISION, DE AAR

Case No: K/S01/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

FHERAL BENADICTUS BAMBERG

ACCUSED

Heard on:

11/11/2024

Delivered on: 13/11/2024

Summary: Sentencing. Accused convicted of murder (dolus directus) read with s51(1) of the Criminal Law Amendment Act 105 of 1997. Premeditation not an essential requirement for sentence of life imprisonment. Domestic relationship exists. Gender-based violence. No substantial and compelling circumstances. Court has inherent discretion in determining suitable sentence. Life imprisonment

justified. Evidence of brutal assault preceding the gruesome murder by decapitation of a defenceless woman.

ORDER

The accused is sentenced to life imprisonment.

JUDGMENT ON SENTENCE

MAMOSEBO J

[1] The accused was convicted on 11 November 2024 of murder (dolus directus) read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) which prescribes a minimum sentence of life imprisonment unless the court found substantial and compelling circumstances justifying the imposition of a lesser sentence.

[2] In *Mudau v the State*[1] Majiedt JA made these insightful remarks:

[13] ...Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity, as Corbett JA put it in *S v Rabie* [1975 (4) SA 855 (A) at 866A – C]:

“[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.”

[3] The State proved the following previous convictions which were admitted by the accused:

On 2 June 2010 he was convicted of assault and was cautioned and discharged. On 24 January 2012 he was convicted of assault with intent to do grievous bodily harm whereafter he was sentenced to six months imprisonment wholly suspended for five years on specified conditions. He was also declared unfit to possess a firearm in terms of s103 of Act 60 of

2000. This court has now convicted him of murder (dolus directus).

- [4] Section 271A(b) of the Criminal Procedure Act 51 of 1977 (CPA), determines that certain convictions fall away as previous convictions after the expiration of 10 years unless during that time the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed. See Du Toit: Commentary on the Criminal Procedure Act, Service 69, 2022 at 27-8.
- [5] The personal circumstances of the accused were placed on record from the bar as follows: He is 33 years old and unmarried. He has no dependants. Prior to his incarceration he was employed at the Carnarvon Abattoir where he earned R650.00 per week. His highest level of education is Grade 9. He has no pending cases. Despite the disturbing pattern of the incremental seriousness of the offences committed by the accused, his counsel urged the Court to consider him favourably as a candidate for rehabilitation. Mr Biyela further submitted that the accused's personal circumstances, particularly his age, the fact that he was able to maintain a clean record over the past ten years, and that he was economically active should cumulatively serve as substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. Counsel also relied on *S v Lourens*[2] where the court said that a sentence imposed must always be individualised, considered and passed dispassionately. Counsel further contended that retribution and deterrence should not be the driving force when the court considers sentencing.
- [6] My Biyela further invoked *S v Meyer*[3] arguing that this is a typical case where the offending act is the result of an argument emanating from jealousy and/or provocation between persons involved in a love relationship. It led to a physical assault and death. Counsel pleaded that this situation be considered as a mitigating circumstance. Mr Biyela went on to state that although the motive for the killing is unknown there is evidence to support that the accused and the deceased at some point were seen engaged in an argument. Counsel further pleaded for an evaluation of all the factors and a deviation from the prescribed minimum sentence. The defence did not call any witnesses in mitigation of sentence.
- [7] Ms Engelbrecht did not call any witnesses to lead vivo voce evidence in aggravation of sentence, but handed in, by consent, two Victim Impact Statements, the one of T[...] d[...] B[...], the deceased's daughter, marked Exh "N", and the other by S[...] B[...], the deceased's mother, marked Exh "O" as well as the Victim Impact Report compiled by the social worker, Ms Sisanda Many, marked Exh "P".
- [8] T[...] is the deceased's only child and daughter. She was 16 years old at the time of the deceased's death. She was fond of her mother who raised her single-handedly. Her mother was a supervisor in the Expanded Public Works Programme (EPWP). At some point, before joining the EPWP, her mother even took her with to Mossel Bay for employment to care for her. Her relationship with her mother was good while they still resided at her grandmother's

house. There were no issues pertaining to her care and maintenance. However, after her mother entered into a relationship with the accused, things changed as her care and maintenance became an issue because the accused was opposed to it. According to her the 'mother-daughter' bond was also adversely affected. The deceased had to carry out her parental duties and responsibilities

behind the accused's back. T[...] loathed the fact that the accused was rude and had assaulted both her mother and grandmother. Their relationship was tumultuous, and she did not support it. Forgiving the accused for the loss of her mother is not on the cards for her.

[9] Two of the three children that Ms S[...] B[...] had, are sons, H[...] and W[...] M[...]. The deceased was the eldest and only daughter. She had a healthy relationship with the deceased and loved her very much. In her statement she referred to the deceased as her right hand because the deceased would at times assist her with her two sons (the deceased's brothers). The deceased loved school but had to leave when she fell pregnant. She did not approve of the deceased's love relationship with the accused. She knew the accused since his early stages in life and even knew his family. He was raised by his grandmother and had no relationship with his mother. Growing up, the accused was treated

like a member of their family. His manners were negatively affected by his alcohol consumption to such an extent that he would fight with anybody for no apparent reason. His alcohol consumption rubbed off on the deceased who progressed from consuming occasionally to daily. Ms S[...] B[...] pointed out that to date the accused has not tendered any apology to them. They have had to struggle with the funeral arrangements where she even had to borrow money to bury the deceased. She died at the age of 33. Ms B[...] cannot find it in her heart to forgive the accused.

[10] Ms Manya has a degree in Social Work (BSocSc) and has been employed by the Department of Social development since 1 January 2007. She is stationed at Carnarvon and her registration number is 10-22843. She conducted interviews with the surviving family of the deceased, W/O Fritz, who is the Commander of the Family Violence, Child Protection and Sexual Offences Units (FCS), in Carnarvon, Mr Godfrey Jansen, the Chairman of the Community Policing Forum (CPF) at Carnarvon as well as consulting the Trauma Counselling and Debriefing Manual –

2020. She also quoted a passage from President Cyril Ramaphosa's speech of 2 November 2023 on gender -based violence sourced from SAnews.gov.za.

[11] It cannot be gainsaid how the surviving family members are undergoing what Ms Manya explained as acute trauma. They are all grieving the deceased's loss differently. The ghastly sight of the condition in which they saw her has not made their road to recovery any easier. The impact that the death of the deceased has had on her daughter, mother and brothers is unimaginable. One positive aspect is that the Department of Social Development has implemented an intervention plan

to assist the family with the loss of their loved one. In her interview with W/O Fritz, Ms Manya explained that he gave her an

overview of the GBV stats in the Kareeberg Municipality and had raised the concern that their success rate in dealing with this

scourge is adversely affected by the high rate at which GBV victims withdraw their cases against their perpetrators before they are finalised in court. Mr Jansen, the CPF Chairperson in Carnarvon exclaimed that alcohol consumption seems to be the main driver of domestic violence or gender-based violence in Carnarvon.

[12] The deceased was in a five-year love relationship with the accused. Ms Engelbrecht emphasised that their relationship falls squarely within the purview of a domestic relationship as defined in s1 of the Domestic Violence Amendment Act, 14 of 2021 where 'domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:

- (a) They are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they are persons in a close relationship that share or [recently] shared the same residence.

[13] Counsel further pleaded with the Court to bear in mind the scourge of gender-based violence that continues to besiege women in our country with femicide reaching abnormal levels. Evidently, as testified to by Dr Kanaomang, the accused had brutally assaulted the deceased which translates into the physical abuse that she endured as a form of domestic violence. One can also empathise with the deceased's dilemma of struggling to care for her own child whilst knowing how it offends the accused. These are the types of psychological and financial abuses that victims of gender-based violence find themselves in all in the name of love.

[14] Sentencing must be victim-centred as espoused by Ponnann JA in *S v Matyityi*[4]. The learned Judge further explained[5]:

[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate

analysis

will enhance proportionality, rather than harshness.’

[15] In *Director of Public Prosecutions v Mngoma*[6] Bosielo JA said:

[13] ...For a sentence to be appropriate it must be fair to both the accused and society. Such a sentence must show a judicious balance between the interests of the accused and those of society.

[14] A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, will lead to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic. Courts should take due cognisance of the salutary warning expressed by Marais JA in *S v Roberts* 2000 (2) SACR 522 (SCA) para 20 where he stated:

“It [the sentence] fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships.”

[16] In as far as remorse is concerned, the accused has shown no remorse whatsoever for his actions. Ponnann JA has explained what remorse entails in *S v Matyityi*[7]. Even after the circumstantial evidence has shown that he murdered the deceased there has been no attempt by the accused to explain his actions except for a bare denial and the different versions that he concocted to exonerate himself. In any event, and for purposes of sentence, remorse is a neutral factor. The defence also intimated that his age as a 33-year-old should serve as a factor to be favourably considered as a candidate for rehabilitation. Borrowing from Ponnann JA in *S v Matyityi*[8] at the age of 33 the accused could hardly be described as a callow youth. At best for him, his age is a neutral factor.

[17] In *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and Others*[9] Navsa JA had this to say on the aspect of rehabilitation:

[22] Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation. Pre- and post-Malgas the essential question is whether the sentence imposed is in all the circumstances, just.'

[18] Mr Biyela emphasised that deterrence and retribution should not be the driving force when it comes to the sentencing of the accused. But this submission is not supported by the SCA whose judgments, according to our doctrine of precedent, are binding on the high courts. The following pronouncements were made by Makgoka JA in *Kekana v the State*[10]:

[41] In *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185; [1997] ZASCA 7) at 519c – e this court pointed out that, given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence. Harms JA went on to explain, with reference to *S v Nkwanyana and Others* [1990] ZASCA 95; 1990 (4) SA 735 (A) at 749C – D, that in other instances retribution may even be decisive. See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147c – e; *S v Swart* 2004 (2) SACR 370 (SCA) paras 11 – 12; *S v Govender and Others* 2004 (2) SACR 381 (SCA) para 32.'

The learned Judge concluded at para 42 with the following:

[42] The upshot of all these authorities is that, whatever the appellant's personal circumstances and his prospects of rehabilitation, those pale into insignificance when weighed against the aggravating factors. In all the circumstances, I am of the view that life imprisonment on each of the murder counts is the only appropriate sentence.'

[19] Being angry and engaging in an argument with another person, more especially one with whom you are in a love relationship, does not justify taking a life. The right to life is fundamental in our country. The accused has violated that right. He waited until everyone had left before he pounced on an unsuspecting and defenceless woman in the sanctity of what she regarded as her home. I have no doubt that this murder was premeditated seeing that the accused first argued with the deceased, then retired to their bedroom and only after the guests had departed, did he see it fit to slaughter the deceased after assaulting her in a manner that left her severely bruised.

[20] Surely, the interests of society demand the imposition of appropriate sentences to maintain public confidence in the courts but also to prevent lawlessness where people will resort to taking the law into their own hands. The ravaging increase in gender-based violence cases mainly on women is disconcerting. The sentence imposed must give a true reflection of the community's outrage for the senseless killing.

[21] In *S v Malgas*[11]the Marais JA held:

‘B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons.’

[22] The murder was gruesome to such an extent that the accused’s personal circumstances recede into the background. The aggravating circumstances far outweigh the mitigating circumstances. I could not find any substantial or compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment for the murder of the deceased.

[23] In the result the accused is sentenced to life imprisonment.

NORTHERN CAPE DIVISION

For the State

Adv T Engelbrecht

Instructed by:

The Director Public Prosecutions

For Accused:

Adv. K Biyela

Instructed by:

Justice Centre, Kimberley

[1] (764/2012)

[2012] ZASCA 56 (9 May 2013) para 13; also in *S v SMM 2013 (2) SACR 292 (SCA)* para 13

[2] *S v Lourens 2016 (2) SACR 624 (WCC)* para 15

[3] *S v Meyer 1981 (3) SA 11 (A)* at 16H – 17A

[4] *S v Matyityi 2011 (1) SACR 40 (SCA)* para 16

[5] *Ibid* at para 17

[6] *Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA)* at 432b

[7] *Ibid* para13

- [8] Ibid para 14
- [9] Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and Others 2009 (2) SACR 361 (SCA) para 22
- [10] Kekana v the State 2019 (1) SACR 1 (SCA) paras 41 and 42
- [11] S v Malgas 2001 (1) SACR 469 (SCA) para 25
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