

SOUTH AFRICA / JUDGMENT

S v Bhuda (CC46/2021) [2022] ZAMPMHC 14 (13 October 2022)

[2022] ZAMPMHC 14

COURT

Middelburg High Court, Mpumalanga

BEFORE

M T Mankge

CASE / FILE NUMBER

CC46/2021

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IN THE HIGH

COURT OF SOUTH AFRICA MPUMALANGA

DIVISION HELD

AT MIDDELBURG LOCAL SEAT

Appeal Case

Number: CC 46/2021

REPORTABLE: YES

OF INTEREST TO

OTHER JUDGES: NO

REVISED

In the matter

between:

THE STATE

And

VUSI

DONALD

BHUDA

THE ACCUSED

JUDGMENT

MANKGE J:

- [1] The accused in this matter was on 12 October 2021 convicted of one
- (1) count of Murder (Read with the provisions of section 51(1) of Act 105 of 1997 (“CLAA”), one (1) count of Robbery with aggravating circumstances, (Read with the provisions of section 51(2) of Act 105 of 1997 (“CLAA”), and three (3) counts of Rape (which is contravention of the provisions of section 3 of Act 32 of 2007, also read with the provisions of section 51(1) of “CLAA”).
- [2] I now proceed to consider the sentence of Mr. Bhuda.
- [3] At the commencement of the trial the court explained to the accused the applicability of the minimum sentence with regard to charges that were read to him, it was explained to him that, same is applicable to all the counts against him. And that, should he be convicted this court is obliged in terms of 1997 Act to sentence him to either life imprisonment or to a term of imprisonment that is applicable his circumstances, unless substantial and compelling circumstances are established or exists that justify the imposition of a lesser sentence, and he indicated that he understands this explanation.
- [4] Section 51 and 53 of the Criminal Law Act 105 of 1997 (“CLAA”) provide:
- “51 “(1)” Notwithstanding any other law but subject to subsections (3) and (6), a High court shall, if it has convicted a person of an offence referred to in Part I of the Schedule 2, sentence the person to imprisonment for life.*
- “(2)” Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall-*
- (a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of
- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) . . .”
- “(3)(a)” If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.*
- [5] I have purposefully quoted the above provision of the Act, because in the sentencing of Mr Bhuda the quoted provisions apply with regard to all the charges that he pleaded and was convicted of.

- [6] For this court to arrive at an appropriate sentence this court is bound to consider the nature and the seriousness of the offences that the accused has been found guilty of, the accused personal circumstances as well as the interests of the society. A sentencing principle that is set out in a Supreme Court of Appeal case of said in *S v RO and Another* 2010 (2) SACR 248 (SCA) I really want to emphasize it here as I am of the view that it captures the Triad of Zinn well. "Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interest of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusion."
- (7) In the case of Mr. Bhuda ("CLAA") is applicable as stressed above. I also have to consider whether or not he has established substantial and compelling circumstances which warrant a departure from the prescribed minimum sentence.

On Murder

- [8] For Murder to fall within the ambit of Schedule 2 Part I of CLAA, that murder must have been amongst others;

'(c)'

the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit . . . "robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act (Act 51 of 1977);

- [9] On convicting the accused this court was satisfied that the death of the deceased was caused by the accused in committing robbery with aggravating circumstances as defined in section 1 of the criminal procedure act 51 of 1977 this therefore attracts a life imprisonment in terms of Section 51(1) of CLAA, unless of course the accused establish to the satisfaction of this court, substantial and compelling circumstances to allow a departure from a prescribed life imprisonment.

On Robbery

- [10] On this charge the circumstances of Mr Bhuda, this being his first brush with the law, makes his current conviction to attracts a sentence of imprisonment of 15 years in terms of CLAA.

On the three counts of Rape

- [11] Mr Bhuda has pleaded guilty and have been found guilty of rape which is read with the provisions of section 51(2) of the CLAA.

[12] In my analysis of the factors submitted by the accused (which I will place on record later) I took into consideration the Oxford Dictionary meaning of "substantial which is defined in the same dictionary as" considerable, fundamental and weighty. The word "compelling" on the other hand it is defined as captivating, irresistible, convincing and persuasive. Now the simple question is who must be convinced or persuaded by these factors, clearly it is the court who is considering these

factors. Secondly I am of the view that the words substantial and compelling creates a high standard of proof, and unavoidable mammoth on an accused person who is confronted with adducing such factors.

[13] I will proceed to look at what the accused asked this court to consider as his 'substantial and compelling circumstances'. I will look this together with what the State argued is aggravating in the case of Mr Bhuda, when this exercise has been completed this court must still be convinced that a lesser sentence then the prescribed sentence is a proper sentence.

[14] If after this exercise I find that the prescribed sentence in the particular circumstances of Mr. Bhuda would be startlingly inappropriate, I would be constrained to depart from the prescribed minimum sentence.

[15] I also need to assess whether the prescribed minimum sentence on all the counts is proportionate to the offences that the accused is convicted of, and whether the approach on sentencing as proposed by the defence of considering the accused personal circumstances cumulatively whether it will prove their argument satisfactory in light of all the evidence submitted by the State in aggravation of sentence.

[16] I have thoroughly considered the accused mitigating circumstances as well as the State written and oral submissions. I am grateful to both counsels for assisting this court in arriving at a just decision. I have also considered the victim impact statement from both Ms. Cynthia Ngoma and Mr. Kenneth Maseko, (the uncle of the deceased).

[17] Ms. Ngoma is basically saying in her statement, because of what Mr. Bhuda did to her she is now a different woman. It is clear to deduce from the facts placed before court that this lady ascended the adulthood world a different woman all together (she was violated by Mr. Bhuda when she was only 15 years, at the time of these proceedings she is an adult). She is saying her life will never be the same. But what I find more disturbing is that the accused is still threatening her life even though he is incarcerated. Now, this is bad and it cannot be tolerated by any stretch of the imagination.

[18] One must not violate a woman and also be allowed to continue keeping that woman in prison. She is leaving in a prison that has been created by Mr. Bhuda. The accused did not only violate her physically he is now playing mind games and is making sure that he is now violating her mind. This makes this court to even question the accused's remorse that he now wants to profess, I have no doubt that, this should count for something when an appropriate sentence is considered all things having been properly considered.

The gravity of the offences

- [19] All the 5 offences were committed in the cruelest and disrespectful manner possible. As for murder it was unnecessary in my view, if what the accused wanted was the deceased items he could have taken the items and leave her alive. (that would have still been wrong obviously), if his version would be correct that the deceased was his girlfriend and she was cheating on him, he could have just walked out of the relationship and go get loyal woman out there, instead of killing her.
- [20] Even if she cheated, why then rape her before killing her, it all points to the level of disrespect that the accused was treating this woman and his outlook to entire female society as it is evident from his own statement. No regard at all for female race, none whatsoever. But I have no doubt that her life was more worthy to her children than the items taken. Her three children still needed their mother even if she did not have a cellphone and bank cards or any material things.
- [21] The accused ended the life of this young mother causing her children, and a her 90-year-old granny to mourn her pre-maturely. This court heard through the victim impact statement from the deceased uncle how her death has affected this family and in particular the deceased three minor children. No matter how the accused apologizes this has an irreversible effect on the deceased children, that's why the Right to life remains the only ultimate and significant right, it need to be guarded jealously because once taken away it cannot be recovered or be reformed in any way, it is gone finish, done and dusted.
- [22] The seriousness of all the offences in this instance of Mr Bhuda its foundation is the following in my view: Mr Bhuda attacked and preyed on women, (unfortunately one of them ended up losing her life). Even though he suggests that the victim was his girlfriend it would seem on the main he was hunting unsuspecting women who, (as we are told by him) wanted to play some sort of a game with him. To be imposters in exchange for money, once they are in his world he pounces on them and violate them as he did with all the victims in this case.
- [23] Mr Bhuda tells this court through Mr Muthivhithivhi that, he has no explanation for this behaviour, and really this worries anyone who is listening to this statement, it simple says it is a good thing he was restrained by being arrested otherwise many unsuspecting young women would have been the victims of his wicked unexplainable behaviour.
- [24] As mentioned above all these offences remain serious and also very prevalent in the entire country as corrected highlighted by Ms Nkosi. Hardly a day goes by without hearing such on media and other social platforms. It is indeed a malignance to the society. It is sadly, becoming true each day that this beautiful country has turned to a warzone where female society is leaving under constant viciousness. I have no doubt it is a just thing to do, to stick to the ordained minimum sentence when responding to this type of war against female society, more so if there is no compelling and substantial circumstances that is established to deviate from the sentence.

- [25] This is now an opportune time to look at the accused personal circumstances submitted to investigate whether this court can find any substantial and compelling circumstances which will allow for deviation. The accused did not lead any evidence in mitigation of sentence, he only made submissions through his counsel.
- [26] Mr Bhuda says to this court, please look at the following, the fact that: I am 31 years of age, I have 1 minor child 9 years of age. I used to own a fast-food business before my arrest making an amount of R3000-00. I use to support my child with this money but the child will be fine because he/she is a recipient of a social grant. I am asking to be forgiven by all my victims, the deceased family as well as the court. Even though I don't raise this as a justification but I want you court to note that I was abusing drugs as well. Basically this is all that Mr Bhuda expect me to consider in my investigation of compelling and substantial circumstances. He says he was using drugs, (How this, is mitigating is still a mystery), especially if the accused himself concedes that the drugs cannot be blamed for his conduct. He is just clutching at straws and hiding with his thumb here, nothing else.
- [27] When the accused was facing a 'Theft of a lunch bar' the above circumstances would have easily been considered as decent mitigating circumstances. However same cannot be said when the accused is facing a sentence that is ordained by the legislature. It is either you have those compelling and substantial circumstances or you don't. I do understand however that the accused person is not expected to invent what he does not have. My considered view in that instance is that once those circumstances are non-existence, the just thing to do is to have the principle established in the 1997 Act to take effect.
- [28] I however note and consider one circumstance that I find mitigating on the accused part, that this is his first brush with the law, but the fact that when he started with the crimes, he started with the crimes that are tormenting this province and the entire globe and crimes that are directed against women only. It causes even his personal circumstances to really play a relatively smaller role (stealing the words of the Supreme Court of Appeal in *S v Swart* quoted by Ms Nkosi in her written submissions).
- [29] The accused own statement indicate that he cared less about 'a woman' when committing these offences. The actions of the accused on the day exposed meanness of the highest order. The truth is, this mercilessness is another thing that is raising eyebrows in this case, it solicits the question whether the society is safe when people who can behave on this level of brutality are released back to the society? and I am certain that the answer to this question is a clear-cut no.

The interest of the society

- [30] As I deal with the interest of the society, I want to first pass my words of comfort and encouragement to the accused's mother who has always been a part of this process she always come seat and support her son. She is part of the society, we are all aware how

mothers suffer because of what they children do, when they end up in conflict with the law, I would imagine that she did not plan to have a child who seats in accused's dock and who will spend the rest of his life in prison. I want to ask her not to ever blame herself, she must not point any finger towards her right now, I really want to pass this court's words of comfort to her for what is about to happen this afternoon.

- [31] Back to the interest of the society, I have really touched on this point briefly above when I was dealing with both the gravity of the offence and when I was dealing with the accused personal circumstances, now I ask myself what type of sentence will best serve the interest of the community of Mpumalanga and to a large extent the female community of South Africa, when taking into account the prevalence of these type offences in our communities.
- [32] The community is leaving in extreme fear because of these type of offences which they are confronted with day in and day out. I am certain that if we did not have people who behave like the accused, there would not even be a need for female society to walk-around with things like paper-sprays in their handbags, just to put extra security to protect their bodily integrity, and this extra security means extra financial strain to the already struggling people because of the state of our economy. From the accused statement it is easy to deduct that these women were enticed by the accused because they were hoping to receive monies from him. Now for people (men in particular) to take advantage of struggling women lure them with the intention of violating and even killing them tells me that we have indeed reached bottom of the pit as a society. And really this is unfair to other male people out there who are trying hard to stay away from abusing women and children.
- [33] I ask whether deviation from a prescribed minimum sentence will best serve the communities when these crimes are increasing every day, my view is that deviation from a prescribed sentence when the crime is increasing cannot be justified, because this shows an imbalance in the scale of (crime vs punishment).
- [34] I am alive to the fact that whilst this court is enjoined not to place too much heavy emphasis on one element of the Triad of Zinn over the others, however this court is also enjoined to discourage imbalances. These imbalances, if not controlled they can easily drive the communities to take law into their own hands. My view is that only when the circumstances that are tendered by the accused are of an unusual and exceptional kind that the departure can be justified.
- [35] The community of Mpumalanga look to the courts for protection and justice, as correctly highlighted by the State in their written submissions. It remains our primary duty as courts to see to it that communities do not lose this hope, and we have to do that by passing sentences that speak against the crime that is caused to them. Of importance from all this is that the sentences that are passed in response to these type of crimes should make the female communities to leave a secure and fearless lives in this province, knowing that they have courts which respond to their cries. By this, I am by no means overemphasizing one element over the other.

- [36] I conclude this point by taking a leaf in a case of *S v Mhlakaza* 1997 SACR 515 (SCA) 518 E-G, That “the object of sentencing is not to satisfy public opinion but to serve public interest” this having been noted, my duty whilst I consider the helpful guidelines as laid down in *S v Zinn*, I have to pass a sentence that is fair even if it does not satisfy the public, otherwise the sentence will be fundamentally flawed.
- [37] Having said this I am still of the view that Murder, Robbery, and Sexual violence on women, the manner in which they were committed by the accused was committed in the most egregious, disrespectful and inhumane manner. All these crimes are also very prevalent in this province, I need to pause and mentioned that this term alone, and the past term all the cases that are, and were serving before me or in this court’s roll are of a similar nature “JUST “war against females” and in my view there is no clearer proof of prevalence than that.
- [38] Lastly I want to touch on *Malgas v The State* (117/2000) ZASCA 30; [2001] 3 ALL SA 220 (A) (19 March 2001) our guiding SCA case on minimum sentence, at paragraph 9 the SCA emphasised that ‘the specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny’ . In this case of Mr Bhuda the circumstances outlined on his behalf are not satisfactory to this court to justify a departure from the prescribed minimum sentence on all the charges. Both counsels agreed that the nature of the convictions require that the accused be declared unfit to possess a fire arm. I agree.
- [39] Taking all the above into consideration a proper and appropriate sentence for Mr Bhuda and which this court now imposes on him is the following:

SENTENCE

On count 1: Murder (Read with the provisions of section 51(1) of Act 105 of 1997)

-Imprisonment to Life

On count 2: Robbery with aggravating circumstances (Read with the provisions of section 51(2) of Act 105 of 1997)

- 15 Years imprisonment

On count 3: Rape (Read with the provisions of section 51(1) of Act 105 of 1997) -Imprisonment to Life

On count 4: Rape (Read with the provisions of section 51(1) of Act 105 of 1997) -Imprisonment to Life

On count 5: Rape (Read with the provisions of section 51(1) of Act 105 of 1997) -Imprisonment to Life

- [40] I further order that sentences of 15 years, imposed on count 2 is to run concurrently with the term of life imprisonment impose on count 1.

[41] The accused is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

M.T Mankge

Judge of the High Court

DATE OF HEARING: 11

October 2022

DATE OF SENTENCE: 13

October 2022

For the State: Adv

Nkosi

For the defence: Mr.

Mothivhithivhi

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