

SOUTH AFRICA / JUDGMENT

S v Bixa (CC60/2018) [2019] ZAWCHC 82 (27 June 2019)

[2019] ZAWCHC 82

COURT

Western Cape High Court, Cape Town

BEFORE

Salie-Hlophe

CASE / FILE NUMBER

CC60/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: CC60/2018

In the matter between:

THE STATE

and

MR BULAWA BIXA Accused

JUDGMENT ON SENTENCE DELIVERED ON 27 JUNE 2019

SALIE-HLOPHE, J:

- [1] Mr. Bixa, on the 02nd of May 2019, this Court found you guilty and convicted you as charged, namely, that you murdered your nephew, 4 year old Bonani Kevin Poni by stabbing him 32 times with a knife and that the murder was committed with the direct intention to kill him.
- [2] Now is the time for me to meet out an appropriate sentence to you for the crimes of which you had been convicted. The determination of a suitable sentence does not entail a mechanical process in which predetermined sentences are imposed for specific crimes. In each case the sentencing Court has to take into account all relevant factors, afford the appropriate weight thereto and strike a balance between the various interests to consider. In determining a sentence which is just and fair, I have regard to the triad of factors that have to be considered as set out in the case of *S v Zinn* 1969 (2) SA 537 (A). The Court must therefore take into account your personal circumstances as the accused and being the person convicted of the crimes, the nature of the crime including the gravity and extent thereof and the interests of the community.

[3] In deciding on such a sentence the Court must tinge it with a measure of mercy and strive to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation.

[4] The general rule as held by the Appellate Division in *S v Rabie* 1975 (4) SA 855 (AD) at 862 G-H is that:

".. .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."

[5] You gave evidence in mitigation of sentence. Your counsel also called social worker Ms. Anthea Gallant as well as your mother, Ms. Bulelwa Bixa. Ms. Mahlasela also addressed the Court *ex parte* apropos factors which I should take into account in order to impose a lesser sentence to you in respect of the crime of which you had been

convicted. Counsel for the State, Mr. Sityata, on the other hand addressed the Court *ex parte* in respect of submissions which in his view are aggravating, warranting the imposition of a harsher sentence.

[6] The legislature otherwise known as the lawmakers have recognized that certain serious crimes must be met with a minimum sentence. You have been convicted of murder, falling under Part II of Schedule 2 and as a first offender of this type of crime, you should be sentenced by the Court to a minimum sentence of 15 years imprisonment in terms of Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 commonly referred to as the minimum sentence legislation.

[7] I had at the start of closing submissions ventilated with your counsel and counsel for the state that an appropriate sentence could in the circumstances warrant of this Court to exceed the prescribed minimum sentence, taking into account the aggravating features of the murder, including the weapon you used, the brutality of the murder and the age of the deceased, in respect of which you had been convicted. Both counsel had an opportunity during the adjournment to take adequate instructions and they had each addressed me on their submissions in that regard.

[8] I will now turn to the triad factors which need be considered herein, starting with your personal circumstances.

PERSONAL CIRCUMSTANCES:

[9] Born in Mthata in the Eastern Cape in 1995, you had recently celebrated your 23rd birthday. Your mother raised you as a single parent along with two other siblings. You have a fulfilled childhood and upbringing with no exposure to violence or trauma. Further care was provided by your maternal grandmother when your mother took up employment in Cape Town and around 2011 you relocated to Delft, Cape Town living with your cousins and extended relatives with whom you enjoyed a good relationship, including your brother, the father of the deceased child. Your relatives, which included your mother as well as the father

of the deceased contributed to your living expenses. By all accounts your life as it had unfolded over the years, living with your mother and grandmother and later with your relatives in Delft had been positive and you were well loved and cared for. Though the Delft area is rife for gangsterism you had, with the support of your family, the fortitude and resilience to resist in becoming a member.

- [10] Whilst you worked as a general worker in 2016, you abandoned your employment after a few months to attend to matters in the Eastern Cape. You had not been employed thereafter and had been in custody for approximately 20 months since the date of this incident in October 2017. Your mother testified that she was shocked with the murder of which you had been convicted, the victim involved and struggles emotionally in the wake thereof. Ms. Gallant testified that she consulted with you after you had been convicted of this murder and in preparation of a pre- sentencing report which had been handed in as Exhibit E. She also testified that in her professional opinion you remained unforthcoming with the details leading up to the death of the deceased and that you were not candid in the matter.
- [11] Your counsel further submitted that your youthful age at 23 (21 at the time of the offence), as well as the fact that you could be rehabilitated , that you are a first offender and that you had spent 20 months awaiting trial should be taken into account as factors which viewed cumulatively justifies this Court to depart from the imposition of the prescribed 15 year sentence. I will deal with that aspect later in this judgment.
- [12] I turn now to the second factor to be considered, that being the crime of which you had been convicted, the manner of execution

thereof as well as the nature, seriousness and impact thereof.

THE OFFENCES:

- [13] The victim of this offence was non other than your nephew. You were his uncle and in a position of trust. You lived in the same home and in fact it is not in dispute that the child was essentially in your care in light of the fact that both his parents were employed, making living with you in the house in Delft easier for the child and his parents. You remained adamant during the trial, as well as your testimony in mitigation, that you cannot remember the moment at which Bonani had been savagely stabbed to death. Had you displayed a genuine remorse for your conduct, it would have been viewed by this Court as a mitigatory factor in considering a more lenient sentence. However, this Court considers it aggravating that you vacillated in accepting responsibility for this child's death. On the evening of this tragic event you apologised to Ms. Lola Poni, the mother of the deceased, for stabbing her young son. Then you went back on this acknowledgment and denied how the child had died or that you had any knowledge about it. This going to and fro with the truth and your account of events has had an adverse and torturing effect of the loved ones of this child, which effectively robs them from healing in their grief and accepting the traumatic events and reality that their child had been murdered. You are a not only a cold-blooded killer but indeed also a coward for doing this to your own family. Bonani was

only 4 years old. He was an innocent little boy who loved his surroundings and his family, which includes you as his uncle. He

loved watching television and that was the last thing he had been doing when you went about to brazenly and gruesomely stab him a staggering 32 times. The pathologist whom performed the post mortem examination on the body of the deceased, Dr. Lambert Mostert,

testified as to his findings which were also recorded in his post mortem examination report. He determined that the cause of death was due to multiple stab wounds to the body, 32 in total made up as follows: 11 to the left upper chest, 8 to the lower chest, 10 to the back, one to the right upper arm. So severe was the infliction of the stab injuries, that you perforated your young victim's left lung 9 times with 1 incised wound, the heart sustained three perforations with 1 stab wound. The force of these stabbings were so severe and violent that various fractures to the rib cage were sustained including a traumatic herniation of the colon, simply understood to be that the colon had ballooned out of the rear or the child's body through the gashes sustained to his back. The deceased child also sustained defensive injuries on his wrists and hands, indicative that he tried to ward off your attack. Defensive wounds and cuts inflicted on the top side of his hands are interpreted to be as a result of closing his face with his hands as a way to visually block out the fatal attack on him.

[14] This child was vulnerable, defenceless and at 4 still just a toddler. He stood no chance in surviving the fatal attack. It is undeniable that he would have been confused, shocked and scared in the last moments of his life. After all, the person whom subjected this egregious violence on him was none other than someone he had trusted, that his parents trusted, that he loved and had occasions to play with. Mr. Bixa, you breached that trust in the most horrific way. You did not take this Court into confidence as to what had caused you to have this outburst of rage and anger to the extent that you killed your nephew. From the evidence, it is highly likely, that Bonani wanted to watch cartoons which you did not want to watch. The loud music which you repeatedly played at that time suggests that you wanted things your way. In the process of asserting yourself over this child, you took his life in the most gruesome manner. It is a further aggravating feature that in no way did you desist or pause in your attack for you proceeded in constant and consistent fury. Stabbing a child 32 times would have taken some time, he would have screamed, exclaimed in pain and anguish, but like a lamb to a slaughter, you forged ahead without any care or concern. Even after the attack, you did not call for medical assistance. You indicated that you saw the child in a pool of blood and did not even go over to him to see if he was dead or alive and if so, how you could assist him. You kept loved ones and others away, by locking the house, refusing anyone from entering and made sure to hide yourself to delay being confronted with what you had done. You did not care about anyone other than yourself. Even in this child's last moments, you stopped him from being comforted by his mother. You even stopped him from being held in those last moments or in the moments after his death. It is difficult to imagine the unbelievable pain and trauma

Bonani's mother would have felt as she ran towards the house where she was told her child had been attacked, the anguish she would have experienced, being locked out of the house and seeing through a window her child lying in a pool of blood. You stood with the knife in your hand, blood dripping down from it and saying you had stabbed the child which you later deny. This is the conduct of someone who is completely unmoved by the trauma experienced by everyone around you. You were not only unsympathetic about what you had done, you were completely aloof and uncaring as to the raw emotions and trauma which unfolded around you.

INTERESTS OF THE COMMUNITY:

- [15] Gratuitous violence and the infliction of harm and attack on children has sadly become an everyday feature in our society. It filters through our communities, the courts and media like shockwaves. This crime is another unfortunate reminder that our children are under attack and siege. It is undeniable that we are experiencing high levels of violent crime and in particular with reference to this case, violent crime against children. As we build a cohesive society within our communities and in our country, we need to send a clear and an even louder message to our youth that violence has no place in our society and that it is strongly condemned. It can never be seen to be the order of the day but through its frequency, by way of social fatigue, become an acceptable form of life. Our Courts need to continue to send a very strong message that this conduct is morally and legally reprehensible and that offenders will be punished accordingly, for if not, it could and would also result in society losing faith in the justice system and taking the law into their own hands to administer justice. It is thus important and the duty of the Courts to contribute in their role as the justice system to impose appropriate sentences, particularly where children are the victims of violent crimes, attacked and murdered.
- [16] Section 28 of the Bill of Rights in our Constitution states that in addition to basic nutrition, shelter and care, every child has: 'the right to be protected from maltreatment, neglect, abuse or degradation.' The inclusion in the Constitution of a special section on the rights of the child was an important development for South African children to secure their safety and protection. Unfortunately children continue to be exploited, harmed and murdered, notwithstanding the inclusion of their fundamental rights to safety and protection. The Court must take these rights into account when meting out punishment for offences, such as the ones of which you, Mr. Bixa, had been convicted.
- [17] Children have the right to feel safe and protected wherever they go, to play happily in their playgrounds, to walk to and from school freely without fear of violation or attack. Children have the right to be nurtured within their homes and community; to expect a haven in which they can put all of their enquiring minds to the fascinating world around them; to explore the innocence of their youth and to draw strength from the memories of their childhood to become fulfilled and balanced adults. In short, they have the right to look to the world around them to create an environment free and protected from crime and violence. The late Chief Justice Mahomed echoed similar sentiments regarding the rights of women and the acts of violence and crime that they are subjected to in the well-known and

oft quoted dictum of *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 SCA at 345 A-B.

[18] It is important to state that as the accused, you cannot be sacrificed at the altar of deterrence for other would-be offenders,

nor can it impose punishment on you anger. However, the interests of the community must be satisfied that offenders of serious crimes such as these be punished accordingly. If offenders are punished too lightly for serious offences, society would lose confidence in our Courts and so too would law and order be undermined. Serious crimes of this nature therefore compel that the objectives of retribution and deterrence weigh more than the objectives of rehabilitation of the offender and accordingly the interests of the accused would recede to the background.

CONCLUSION:

[19] Your counsel submitted that, inter alia, your youth, prospects of rehabilitation, the fact you are a first offender, that you never had brushes with the law and that you had spent time awaiting trial as cumulative justification for departing from the 15 year sentence that you face.

[20] Mr. Bixa, I have taken all the relevant factors into account. The Court takes into account the time which you had spent in custody and is mindful not to impose a sentence which could break you. The Court is alive to the prospects that you can come out of prison rehabilitated and become a responsible member of society.

[21] Weighing up all the mitigating and aggravating factors and circumstances, I can find no other suitable sentence which would fit you as the criminal, the crime you had committed and which is fair to society. The Court, in exercising its discretion, believe that the aggravating circumstances outweigh those in mitigation. To impose the minimum prescribed sentence would, on the facts of this case, be woefully inappropriate and would lead to an injustice. I therefore impose a punishment exceeding the minimum sentence of 15 years. I am of the view that a sentence of 22 years would fit the crime, be just and equitable and meet all the objectives of sentencing.

For the reasons aforesaid, I order as follows:

- (i) You are hereby sentenced to 22 years direct imprisonment;
- (ii) In terms of the Firearms Control Act 60 of 2000, you are declared to be unfit to possess a firearm.

SALIE-HLOPHE, J

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