

SOUTH AFRICA / JUDGMENT

S v Bodibe (sentence) (CC 14/2021) [2021] ZAGPPHC 715 (20 October 2021)

[2021] ZAGPPHC 715

COURT

North Gauteng High Court, Pretoria

BEFORE

C Van Veendaal

CASE / FILE NUMBER

CC 14/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: CC 14/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

20

October 2021

In

the matter between:

THE

STATE

and

DITABA

BODIBE

Accused

JUDGMENT

VAN VEENENDAAL, AJ

- [1] The Accused has been convicted of one count of murder, in terms of section 51(2) of Act 105 of 1997, as well as assault common. It is now the court's duty to sentence the Accused.
- [2] Punishment must fit the criminal, as well as the crime, be fair to society and be blended with a measure of mercy. When sentencing an accused, a court is required to consider the four objectives of punishment (deterrence, prevention, rehabilitation and retribution) in view of the triad of factors as set out in *S v Zinn* 1969 (2) SA 537 (A). These factors are
- (i) the personal circumstances of the offender, including his character, conduct in life and personality, and everything that influenced the commission of the offence; (ii) the nature and seriousness of the offence committed; and (iii) the interests of the community, including the necessity for a level of uniformity in sentencing.
- [3] In view of the seriousness of the murder of which the accused is guilty, the legislature has decreed that the court is obliged to impose a minimum sentence of 15 years' direct imprisonment unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. In considering whether such circumstances exist and, if so, what sentence is appropriate, it is necessary to examine the circumstances of the offence intensively and attempt to determine the exact degree of seriousness of the particular act in respect of which the accused has been found guilty, as well as the personal circumstances of the accused and the interests of the community.
- [4] It is, ultimately, often a matter of reconciling competing interests in order to ensure a fair and just sentence. An appropriate balance must be struck. A sentencing court 'has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion' (per Mocumie JA in *S v Mhlongo* 2016 (2) SACR 611 (SCA) at [9]; see also *S v Horn* 2018 (1) SACR 685 (WCC) at [12] n 9).
- [5] In *S v RO & Another* 2010 (2) SACR 248 (SCA) Heher JA stated at [30]: 'Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality.) The elements at play are the crime, the offender and the interests of society or, 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 conclusions.'
- [6] In *S v Van Loggenberg* 2012 (1) SACR 462 (GSJ) Willis J said that a sentence has five important functions (at [6]):
- (i) It must act as a general deterrent, in other words, it must deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile;

(ii) it must act as a specific deterrent, in other words, it must deter this individual from being tempted to act in such a manner ever again;

(iii) it must enable the possibility of correction, unless this is very clearly not likely;

(iv) it must be protective of society, in other words, society must be protected from those who do it harm;

(v) it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated.'

[7] The five important functions referred to above should also be read with the following 'basic principles pertaining to sentencing' as formulated by Myburgh AJ in *S v Tsotetsi* 2019 (2) SACR 594 (WCC) at [29]:.

'(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

(b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in *S v Zinn* [1969 (2) SA 537 (A)].

(c) Regard must be had to the interests of society (the third element of the Zinn triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.

(d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from reoffending and the deterrence of would-be offenders.

(e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.

(f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.

(g) Finally, mercy is a factor. A humane and balanced approach must be followed.'

[8] The offence: The Accused stabbed the deceased at least twice after a quarrel. He had already pushed her once so that she had fallen and two people had tried to intervene by the time he stabbed her. The accused caused the death not only of the deceased, but also of her unborn child. The murder happened in full view of bystanders and passersby, in front of a school gate. The Accused also tried to stab Mofokeng, who was the witness in this trial.

[9] Turning to the personal circumstances of the Accused: The Accused is now 29 years old and was 27 years old at the time of the commission of the offence. He is not married but he is father to three children, aged 6, 8, and 9 years. His employment at a garden service earned

him R1 500 per month from which he maintained his children. Accused's mother passed away in 1998 and he grew up with his grandmother, not knowing his father. His grandmother passed away in 2008. He had lived together with the deceased in a shack since shortly after their relationship started in 2019.

- [10] Accused is not a first-time offender. He has previous relevant convictions of assault – 22 October 2012, leading to a fine of R2400 or 90 days in prison suspended for three years, 21 July 2014, Assault with the intent to do grievous bodily harm which earned him 12 months in prison, and another matter of assault with the intention to do grievous bodily harm on 23 September 2015 (although the offence occurred on 12 July 2012), which lead to R4000 or 8 months in prison and possession of a dangerous weapon which earned him 30 days in prison. He was released on 25 January 2018 upon expiration of sentence. The Accused had been declared unfit to possess a firearm on a previous occasions.
- [11] From the above, it is clear that the Accused embarked on a life of violence in spite of being a parent. He had spent time in prison and was released about a year before he became involved with the deceased in this case. Time spent in court and in prison did not inhibit his propensity to commit violent crimes.
- [12] The community: The deceased was 25 years old, the middle child of three siblings, unmarried, pregnant, but the parent of a 6 year old girl. Her unborn child died with her. Her surviving daughter now lives with the deceased's elder brother, who is now raising her with his own two children. The deceased grew up with her grandmother, after her mother passed away in 2008. Her grandmother passed away in April of this year. The Deceased also leaves a 14 year old sister. The State submits that the family informed him that the relationship between the Accused and the deceased had been volatile and violent, which caused the family to ask that the Accused be sent to prison for a very long time.
- [13] Mofokeng, the complainant in count 2, was present when the deceased was assaulted and tried to assist her, then she was basically assaulted again and killed right in front of his eyes
- [14] The State submits that the Accused's conduct constitutes aggravating circumstances. He is a violent man whose violent conduct has become steadily worse and has now cost the life of the deceased and also her unborn child.
- [15] The court has to apply the minimum sentences and should not depart from it for flimsy reasons. The case law is very clear on that. See *S v Malgas* 2001 (1) SACR 469 SCA. Although there were instances where there was deviation from this principle, the Supreme Court of Appeal has never deviated

from its warning that there should be truly convincing reasons for deviating from the prescribed minimum sentence.

- [16] In *S v Malgas* (supra) the court, at paragraph 22, says the following regarding finding something that convinces the court to deviate from the prescribed minimum: "What that something more must be it is not possible to express in precise, accurate and all-embracing

language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

- [17] The court must try to find substantial and compelling circumstances to individualize sentence for each Accused, balancing it against the interests of the community and also trying to serve as deterrent example to others who consider embarking on a life of crime.
- [18] The court has to consider whether the personal circumstances of the Accused constitutes circumstances that are substantial enough to avoid being called “flimsy” in order to deviate from the prescribed minimum. The state argued that the reasons for deviation as forwarded by the Defence, did not establish substantial and compelling reasons to deviate from the prescribed minimum sentences.
- [19] Severe punishment has been prescribed for murder. A court is not to embark on speculative hypotheses favourable to the offender, express undue sympathy or an aversion to imprisoning first offenders or express personal doubts as to the efficacy of the policy underlying the legislation.
- [20] The case of *S v Matyityi* 2011 (1) SACR 40 (SCA), expressed the difference between remorse and regret. Ponnann JA had the following to say about this aspect at para 13: 'There is, moreover, a chasm between regret and remorse. 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.'
- [21] The Accused does not deny his hand in the death of the deceased. He pleaded guilty and did not put the state to the proof of all the allegations. However, it would not appear that he has a gnawing pain of conscience or at least some appreciation and acknowledgment for the

extent of his error. The Accused already had at least three previous chances to learn from his experiences that one should not be violent. His crimes escalated over time from theft, to assault, to assault with the intention to cause grievous bodily harm, to now eventually murder. The accused has no respect for the life or limb of others, he is a violent man. Not only did he take the life of a woman he professes to love, but he also caused the death of her unborn child. Women, especially pregnant women, must be protected by their partners as they are carrying the future of themselves. Women should be able to turn to their partners for protection and not be afraid of them.

- [22] Sentencing must serve as deterrence of others who consider embarking on a life of crime. The message that must go out to others in the community, must be that even though a perpetrator may try to evade the long arm of the law, he will be found, linked to offences and will have to stand his trial and face conviction and sentence. Violent men, who perpetrate gender based violence, must be deterred and they must realise that a lengthy prison sentence will follow when they cause suffering to their dependants.
- [23] Although the interests of society and the deterrence and sense of conveying the anger of society at the Accused must be reflected in the sentence, the offender must not be sacrificed on the altar of deterrence. This was stated by Ackermann J in *S v Dodo* [2001] ZACC 16; 2001 (1) SACR 594 (CC) at [38]: 'Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others bears no relation to the gravity of the offence . . . the offender is being used essentially as a means to another end and the offender's dignity assailed.'
- [24] With reference to the quoted par 22 from the Malgas case (*supra*), I do not have a growing unease that imposing the prescribed minimum sentence on the Accused would be unjust, taking into account all the circumstances.
- [25] I consider that these circumstances, in conjunction with each other, do not justify a finding of substantial and compelling reasons, and do not allow for a reduction in sentence. The Accused is a hardened criminal, he embarked on a career of crime at the age of 17, although he tried to beg the court for understanding of his remorse. However, how and in which manner he suffers remorse, is not disclosed to the court. Because the Accused has not changed his violent ways after previous clashes with the law, and because he has not shown true remorse, it would not appear that the Accused is a good candidate for rehabilitation and thus he must be removed from society for a long period.
- [26] I find it aggravating that the deceased's unborn child died with her, that the accused made no effort to pull back on his attack of the deceased when others tried to intervene and that the accused killed his life partner. The Accused has infringed on the basic rights of his victim. I can only refer to the following dictum from *S v Matyityi* above —

'[this] is unacceptable in any civilised society, particularly one that ought to be committed to the protection of the rights of all persons, including women [and children]'. ”

For this reason I find the minimum term of 15 years inadequate and an increase in sentence is appropriate.

[27] The court wishes to instruct the Accused to ensure that he maintains good relationships with his family while in prison and to follow the programmes offered in the prisons for his personal benefit, including the so-called victim-offender programmes in order to realize the impact of his conduct on the society.

[28] The deceased's family is also hereby informed that they can keep the prison authorities up to date with their contact details so that they can contribute to the dialogue at the parole board, once the Accused is being considered for parole.

[29] I make the following order:

1. The sentence I impose on count 1, murder, is effectively 20 years imprisonment
2. The sentence on count 2, assault common, is 3 years imprisonment;
3. The sentences are ordered to run concurrently.
4. The accused is declared unfit to possess a firearm.

C VAN VEENENDAAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For the State:

Mr Jacobs

For the Accused:

Mr Kgagara (Legal-Aid)

Heard on:

19 October 2021

Delivered on:

20 October 2021

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