

SOUTH AFRICA / JUDGMENT

S v Cwinyane (KS17/2020) [2020] ZANCHC 86 (18 November 2020) [2020] ZANCHC 86

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

KS17/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

Number:

KS 17/2020

Heard

on: 18/09/2020

Delivered

on:

18/11/2020

In the matter between:

THE

STATE

V

GOPOLANG

JOSEPH

CWINYANE

ACCUSED

JUDGMENT**ON SENTENCE****MAMOSEBO J**

[1] The accused was convicted of premeditated murder read with s 51(1) of the Criminal Law Amendment Act [1] (CLAA) on 18 September 2020. The case was postponed for a pre-sentencing report on the care of the children and the sentencing phase.

[2] Section 51 (1) of the CLAA stipulates:

"(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

[3] In *S v Banda and Others*[2] the Court held the following:

"The elements of the triad contain an equilibrium and a tension. A Court should, when determining sentence, strive to accomplish and arrive at the judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation; the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and fry to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community,

its welfare and concern.

The main purposes of punishment were reiterated as being deterrence, prevention, reformation and retribution. In *S v Rabie*[3] the following remarks were made:

"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or explanation.... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment."

[4] The following are the accused's personal circumstances. He is 36 years old and a first offender. He has not displayed violent conduct prior to this case. He was gainfully employed before incarceration and was a responsible father to his children. The eldest is a daughter, 18 years old born in 2002 and in her first year of tertiary studies at Kathu College, while his son, a 13-year old born in 2007, is repeating Grade 6. He is a member of the Zion Christian Church (ZCC) and as a result did not consume alcohol or use drugs until the death of his wife when he started consuming alcohol. He was on warning since his arrest and was kept in custody only after his conviction. He is the youngest of six siblings. He comes from a single structure family and was raised by his mother and maternal grandmother. He described his

upbringing as positive to the Probation Officer, Ms Nomonde Ntshona, whose report, "Exhibit F", was handed in by agreement between the parties.

- [5] Ms Ntshona's report has highlighted the needs of the Children in response to the enquiry for the primary caregiver as envisaged by the Constitutional Court in *S v M*[4] where the Court advised as follows on the proper approach to be followed:

"(c) The proper approach of a sentencing court where the convicted person is the primary caregiver of minor children.

- [28] The directions in this matter referred to sentencing of primary caregivers, not to the wider class of breadwinners. Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like

ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly

protected right of a child to parental care under section 28(1)(b). We are accordingly not called upon in this judgment to deal with delineating the duties of the sentencing court where the breadwinner is not also the primary caregiver. Suffice it to say that, as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise. "

- [6] The probation officer's report has highlighted the following pertaining to the children:

6.1 Both children feel a strong connection to their parental home;

6.2 During the week, the daughter leases a room in Kathu paid for by her maternal aunt to be near to the college. Over weekends she stays at their parental home with a family guardian. Her College fees are paid for by the National Student Financial Aid Scheme (NSFAS);

6.3 During the week the minor son stays with their maternal aunt in the vicinity until weekend when he goes to their parental home;

6.4 During the interview with the probation officer the daughter is said to have been articulate in expressing her emotions that she was having difficulty accepting the loss of their mother and that she had not found closure.

6.5 The son was very economic with words when answering questions: the sign of an introvert and displayed no emotions.

6.6 The conclusion by the probation officer following the interview with both children is that it is clear to her that they need intense counselling which was never provided to them. This is disconcerting

considering that their mother was murdered on 03 December 2017.

6.7 The daughter has confirmed to the probation officer that the maternal side of the family,

particularly their uncle and aunt, were their main support structure;

6.8 The Department of Social Development has undertaken as envisaged in the Children's Act and Regulations, to provide child grants and look into issues of foster care as well Shoprite vouchers for groceries.

[7] In as far as the nature and seriousness of this offence is concerned, it is undoubtedly gruesome. Dr Gideon Anizoba concluded that the cause of death was consistent with strangulation.

[8] The accused should have been the one protecting the deceased. She has left two minor children who will never enjoy the warmth and presence of a mother at home. What exacerbates the gruesomeness of this murder is that the deceased was killed in the sanctity of her bedroom. The accused was not ashamed in his attempt to shift responsibility to his own daughter and the doctor who performed the post mortem.

[9] Women and girl children are still battling to achieve what the former Mahomed CJ had pronounced

in 1997 in *S v Chapman*[5] when he said:

"[4] ... Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. "

[10] The right to life is fundamental in our Constitution. The accused violated that right. After strangling her he summoned her brother blaming him for the delay in rushing her to hospital. The murder was planned and premediated.

[11] Turning to the interests of society. Undoubtedly, society expects the imposition of appropriate sentences

from the courts in order to maintain public confidence in our criminal justice system. The scourge of Gender Based Violence and

abuse against women and children is ravaging our country on a daily basis and results in countless deaths of defenceless victims. The sentence imposed must give a true reflection of the community's outrage for the senseless killing.

[12] The impact that the death of the deceased has had on her two minor children is unimaginable in light

of the fact that the children now have to face the unexpected consequence of living without both parents.

[13] The accused has shown no remorse whatsoever for his actions. Despite the overwhelming circumstantial

evidence against him directly implicating him in the murder of his wife. There has been no attempt to explain his actions at all, except a bare denial and the different versions he concocted to exonerate himself. The accused lacked remorse as explained by the Supreme Court of Appeal in *S v Matyityi*[6].

[14] The following pronouncements were made by Makgoka JA in the unreported judgment of *Kekana v The State*[7]

"[41] In *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) 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 & 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 and 12; *S v Govender & 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."

[15] Mr Schreuder urged the Court to consider an imprisonment term which will afford the accused an opportunity to rehabilitate himself. He suggested an 18-year term of imprisonment as appropriate. I must state the accused's personal circumstances and his prospects of rehabilitation pale into insignificance weighing them against the seriousness of the premeditated murder and the aggravating factors considered.

[16] I agree with Mr Matsoso, for the State, that there are no substantial and compelling circumstances. The accused's mitigating circumstances have to recede to the background based on the nature and seriousness of the offence. The deceased's untimely death has resulted in psychological and emotional distress to her children and siblings. They require further professional interventions which includes counselling. The scourge of Gender Based Violence has indeed become the second pandemic that our country is battling with.

[17] In *S v Malgas*[8] the Court 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.”

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

The Registrar of this Court is directed to furnish a copy of this judgment to the Department of Social Development who are in turn

requested to provide counselling to the deceased's children.

NORTHERN CAPE DIVISION

For the State: Adv J Rosenberg & Adv MS Matsoso Instructed by: Director of Public Prosecutions

For the accused: Adv JJ Schreuder Instructed by: Legal Aid South Africa

[1] Act 105 of 1997

[2] 1991(2) SA 352 (BG) at 355A- C

[3] 1975 (4) SA 855 (A) 862 A-B

[4] (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007)

[5]

[1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A) at para 4.

[6] 2011 (1) SACR 40 (SCA) at para 13; also reported at [2010] 2 All SA 424 (SCA) (30 September 2010)

[7](37/2018)

[2018] ZASCA 148 (31 October 2018)

[8] 2001

(1) SACR 469 (SCA); [2001] 3 All SA 220 (A) at para 25

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