

SOUTH AFRICA / JUDGMENT

S v Dlamini (CC9/2020) [2020] ZAGPPHC 685 (4 November 2020)

[2020] ZAGPPHC 685

COURT

North Gauteng High Court, Pretoria

BEFORE

Broodryk

CASE / FILE NUMBER

CC9/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA (BENONI)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES : YES / NO

(3) REVISED 4/11/20

CASE NO: CC9/2020

DATE: 15/10/2020

In the matter between

THE STATE

and

L L DLAMINI

Accused

SENTENCE

BROODRYK, AJ: The accused, Lunio Lewis Dlamini, has been convicted of murder, read with the provisions of Section 51(2) of Act 105 of 1997, that is the General Law Amendment Act.

The accused, according to the indictment is referred to as a 49 year old male, a South African citizen of House [....]. I am, however, informed by Mr Mashabela that he is now 50 years old.

The accused is therefore in terms of Section 51(2)(a) subject to a sentence as a first offender to imprisonment of a period of not less than 15 years. In dealing with sentence the Court must consider the factors refers to in *S v Zinn* [1969 (2) SA 537 (AD)], these being the interests of society, the nature of the offence as well as the personal circumstances of the accused. The court must also consider the objectives of sentencing which are prevention, rehabilitation, deterrence and retribution.

The court in terms of the Criminal Law Amendment Act must impose a minimum sentence of 15 years, as alluded above, unless the court finds substantial and compelling circumstances that justify a deviation there from.

The Supreme Court of Appeal has indicated that the court must not deviate from the prescribed minimum sentence for “flimsy reasons”. See in this regard *S v Malgas* 2001 (1) SACR 469 (SCA)

In dealing with what substantial and compelling circumstances are I refer to a judgment of Henriques J in *S v Pillay* 2018 (2) SACR (KZD) and I quote from Paragraph 9 to 11 under the heading “What are substantial and compelling circumstances?”

[9] When sentencing an accused person, a court has to evaluate all the evidence, including the mitigating and aggravating factors, to decide whether substantial and compelling circumstances exist. A court must be conscious of the fact that the legislature has ordained a particular sentence for such an offence, and there must be truly convincing reasons to depart therefrom, which reasons must be stipulated on the record.

[10] It is for this reason that courts have not attempted to define what is meant by substantial and compelling circumstances.

This is in keeping with the principle that the imposition of sentence is pre-eminently the domain of a sentence in Court.

A Court must consider all the circumstances of the case, including the many factors traditionally taken into account by courts, when sentencing offenders. For circumstances to qualify as substantial and compelling, they need not be “exceptional” in the sense that they are seldom encountered, or rare, nor are they limited to those which diminish the moral guilt of the offender.

[11] Where a court is convinced that, after consideration of all the factors, an injustice would be done if the minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence”.

I then turn to the evidence. Firstly, Mr Mashabela on behalf of the accused, addressed the Court from the bar. He did not lead any evidence. He referred me to the following personal circumstances of the accused: That he is 50 years old; that he is unmarried; that he has two adult children of the ages of 24 and 28; that he is in a relationship with one Lydia Mokoena; that he is earning R750,00 per week as a part time tiler and plumber; that he has no previous convictions, and that there is no

evidence that the accused had been violent and abusive before this incident.

Upon a question of the Court as to the motive for the offence, Mr Mashabela told the Court that he had reasoned with the accused, but that he could not get anything from him, in this regard.

He submitted that the following would constitute substantial and compelling circumstances. I take it from his argument that he meant it cumulatively and in this regard, he referred to the following circumstances: Firstly, that the accused had a clean record. Secondly, that he is 50 years old and thirdly that there was no pre-meditation. Fourthly that the accused had been in custody, awaiting trial since 10 February 2019, in other words 1 year and 8 months, and lastly that the accused himself was assaulted after the incident and that this was also a sort of punishment meted out to him, although it was in an illegal manner, and a sort of a mob justice.

Upon a question of the Court Mr Mashabela agreed that the assault in this case was of a violent nature, and as to a possible life sentence, Mr Mashabela argued that such a sentence would be too extreme on the facts of this case.

The state, as represented by Mr Jacobs, then called the mother of the deceased in aggravation. Zanele Portia Ngwenya testified in this regard as follows, and I briefly refer to her evidence. She told the Court that she is the mother of the deceased, that she was 19 years old, and that the deceased at the time of her death, was 7 months old. She told the Court that she is not married, and that the father of the deceased was also present here in Court. He is 21 years of age, and they have no

other children. She stated that on the day of the incident, which was a Sunday, the granny, the grandmother of the deceased took the baby and she expected that the baby would be back at 4 o'clock in the afternoon. However, when that did not happen, at about 11 o'clock that night the police came, and they informed her that her baby has passed away. She was not aware that the grandmother would have taken the baby to the shebeen. She told the Court that the grandmother who is referred to in evidence, as one Zodwa, that she did not have a problem with her. At the time of the incident she was doing her matric, and as a result of the death of her child, she struggled, she could not cope and her marks dropped. At that stage she started crying. She was clearly very emotional; she told the Court that with the marks that she obtained, she could not apply to go to university, although she finished her matric, and obtained a senior certificate. Her marks were as I stated earlier, not good enough for her to go to university.

She told the court that when she sees other young kids she feels very bad, and she feels like she is a failure. She told the Court that she felt as if everything that she did she could not do perfect, and she also told the Court that she struggled to sleep at night.

She told the Court that she requested, as she put it, a double life sentence, for the accused, as that is the only way that she could go on with her life.

As to the accused, she told the Court she does not know him. She also told the Court that she did not know Lydia Mokoena- Lydia Mokoena is the one who took the baby from the shebeen to her house to go and make her a juice. She told

the Court that she was not aware of that fact. She told the Court that at this stage she is not working, and she also referred to the father of the child, and she stated that he was similarly affected, negatively, and that he is blaming himself for everything.

As he was working, he felt if he was there, he might have been able to do something to save the baby. She also stated, and she told the Court that the death of her child affected her relationship with the father of the child. Upon being asked by the prosecutor what was depicted on the T-shirt that she had on, she told the Court that she had this T-shirt especially printed, on it was her own face, as well as the face of the baby, the deceased imprinted.

She told the Court that she did that to indicate to the accused, that the baby was not a demon, and that it was an innocent child. She also told the Court that, or she was adamant that she wanted a double life sentence for the accused. She furthermore told the Court that the family of the accused looked at her with hostility, once she entered the Court, and that apparently also said that the accused did not kill the child.

This witness was then taken under cross-examination by Mr Mashabela and he specifically asked her how would a double life sentence make her life better, and she stated well the position would be that it would be safe, and she again referred to the fact that she does not like the way the accused looked at her. She referred to last week Wednesday, the 7th October, when the trial started, and she told the Court that the accused looked at her, as she described it, "in a bad way".

When questioned about this "bad way", she told the Court that she meant that he was looking at her in a threatening manner. She also told the Court, upon a question from Mr Mashabela, that she had come to Court previously with this T-shirt, and I think she referred to last Friday when the judgment was given.

Upon questions from the Court she reaffirmed that she did not know the accused, and that she saw him for the first-time last week Wednesday, when the trial started.

Upon a question from the Court she testified that she was never approached either by the accused or by his family and offered commiseration with the death of her child. She once again reiterated that only a sentence of 50 years would be appropriate, according to her.

Upon conclusion of this evidence, and once Mr Mashabela had argued, Mr Jacobs argued on behalf of the state, and he referred to the prevalence of this offence; the seriousness thereof and the fact of the weapon that was used, referred to in evidence as a garden hoe, or in Afrikaans a “skoffelpik”.

He also drew attention to the fact that the accused showed no remorse and that he did not take the Court into his confidence. He referred to the evidence of the mother where she asked for life imprisonment and he pointed out that society demands life imprisonment in cases such as this, and in fact he submitted that an appropriate sentence would be that of life imprisonment. He submitted that although the accused was convicted of murder, read with the provision of Section 51(2) of Act 105 of 1997 and that normally the minimum sentence would be that of 15 years, he submitted that this was such a brutal assault, that he cannot but ask for life

imprisonment. He then referred to an unreported judgment and he handed up a copy, the judgment is *S v Kolani Nyangwa*, this is a judgment of the high court, of South Africa, eastern cape local division in Port Elizabeth, Case CC25/2018, judgment was delivered on 7 August 2019 by my brother Goosen J.

Very briefly Mr Jacobs also referred to this fact, that this unreported case to which he referred the facts were very much on par with the facts in this case, it was a similar type of brutal assault, except that the deceased in that matter was 14 years old. Just to put the facts in context, I refer to paragraph 9 of the judgment on sentence, and I quote.

“The deceased was 14 years old; she would have turned 15 three weeks after the day of the crime. She was subjected to horrific violence. During the course of the struggle two braids were torn from her scalp. The assault upon her commenced in one part of the building and continued through other parts. Her blood, in the form of spatter marks, was found in all three rooms. In the room where the main attack occurred, the scene evidence suggests a sustained and vicious attack. She was bludgeoned with a piece/ pieces of rubble. The post-mortem report records a significant number of wounds suggesting that she was bludgeoned repeatedly. Whilst prone on the ground, the accused delivered a blow to her head, which caused a large depressed fracture of the skull. To do so he used a cinder/ a cement block. She was then dragged to another room. Here the assault continued. She was then set alight. The fire destroyed her body from mid-torso down”.

And then lastly, just paragraph 10.

“The evidence suggests and extraordinary degree of violence. It also establishes direct physical contact between the victim and the

accused as the deadly assault was carried out”.

I will deal with this judgment a bit more, later on in my judgment on sentence. I then refer to the case of *S v Vilakazi* 2009(1) SACR 552 (SCA) and I refer here to paragraph 58 and I quote from the judgment of Nugent, JA where he stated as follows:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me, to be the kind of “flimsy” grounds that Malgas said should be avoided.”

In *S v Martin* 1996 (2) SACR 378 (WLD) Flemming DJP referred to the fact that in dealing with the sentencing of an accused, one of the most important questions to ask, is why did you do it?

I then deal with the case of *S v Matyityi* 2011 (1) SACR 40 (SCA) Ponnann, JA and I refer here to paragraph 13 or more specific from page 47 next to the letters a to d.

In that case there was also no evidence lead in mitigation on behalf of the accused although that case dealt with a situation where the accused pleaded guilty, important observations were made about the question of remorse and as I stated earlier, I quote as follows from page 47.

“There is, moreover, a chasm between regret and remorse. Many accused persons might 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 acknowledgment of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself/herself, at being 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/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/her change of heart; and whether he /she does indeed have a true appreciation of the consequences of those actions. There is no indication of any of this, all of which was peculiarly with the respondent’s knowledge, was explored in this case”.

I then also refer to paragraph 17 the same judgment of Matyityi, and I quote:

“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 the victim, and in that way, hopefully a more balanced approach to sentencing can be achieved. 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”.

In this regard I refer to the evidence of the mother of the deceased. Here in this Court, as I have already summarised it above, there can be no doubt that the mother and the father of the deceased, their lives were changed forever and that they were severely damaged and traumatised and that they will carry this for the rest of their lives.

Bearing in mind all of the above, I have no doubt to find that even seen cumulatively that there are not any substantial and compelling circumstances in order for this Court to deviate from the prescribed sentence. In fact, the mitigating factors completely pale into insignificance if they are weighed up against the aggravating factors. However, the enquiry does not end there. In casu it is clear that the deceased a defenceless 7-month-old baby, was killed in a brutal and vicious way. According to the post-mortem report in paragraph IV of EXHIBIT B, there was not only several bruises, referred to in the report as contusions, scrape

wounds, referred to in the report as abrasions, and lacerations which are really cuts on the deceased and that it was clear that the deceased suffered a cracked skull, with a crack from the left to the right ear, there was subarachnoid bleeding, and there was also fractured ribs, referred to ribs 6 and 7 on the right hand side.

If cognisance is also taken of the type of weapon that was used, a garden hoe which is visible in photograph 6, of EXHIBIT C, it is clearly a substantial instrument, and that there is no doubt that the injuries were inflicted with more than considerable force. It is also evident that it was not merely a single blow which killed the deceased, clearly several blows were meted out, while the deceased was lying prone and defenceless on the floor.

Words escape me to adequately describe the gravity of the offence in this case. Clearly the deceased must have been in considerable pain prior to her death and there can simply be no justification at all for the senseless killing of a 7-month-old baby. I then refer again to the case of *S v Pillay supra* at paragraph 8:

“In terms of S v Malgas, in the event of substantial and compelling circumstances not existing, then a sentencing court is entitled to depart from imposing the prescribed minimum sentences, if it is of the view that, having regard to the nature of the offence, the personal circumstances of the accused and the interest of society, it would be disproportionate and unjust to do so. This is often referred to as the proportionality test”,

I then also refer to paragraph 5 of the judgment of Goosen J in the Nyangwa case which was handed up to me:

“It should be emphasised that the legislatively prescribed sentences, while serving as a benchmark, do not preclude the imposition of more severe sentences. The legislative provision serves merely as a guide. Such guidance is to be considered in the light of all relevant factors, both mitigating and aggravating. Once these are evaluated the Court must ask itself, whether the prescribed sentence or that which it considers, ought to be imposed is proportionate and appropriate”.

As it stands the Court is faced with an accused who does not want to take the Court into its confidence. On the face of it, there appears to be no motive for the brutal and callous attack on the deceased. It is so, that motive is not required in our law, in order for a conviction to follow, and while motive usually does not excuse criminal conduct, it might actually explain

it, and this is something which a Court will always have in regard. Mr Mashebela on behalf of the accused, to his credit, told the Court that he had reasoned with the accused, in this regard, trying to ascertain some motive, but to no avail.

He stated that he could get no assistance from the accused in this regard. The key to whatever motivated the accused to do this dastardly deed, remains in the pocket of the accused. The accused is not a child, he is a mature man of 50 years, with adult children and with no previous convictions. The dictum in *S v Martin* supra, to which I referred earlier, as to the question, why did you do it, therefore remains unanswered to the extreme detriment of the accused.

I even considered the utterances of the accused, that it was not a child, but a demon, as sort of a veiled reference to some sort of belief in witchcraft. However, the accused specifically denied in his evidence that he killed the deceased, and/or that he said that he killed the child because it was a demon.

It should be noted that this was never the case of the accused and to the Court these utterances appeared to be a mere afterthought after the accused was literally caught red handed with the hoe in his hand, standing above the body of the deceased lying on the ground. So that this question of any belief in witchcraft also does not assist the accused. There is no basis for this

Court finding that such a belief played any role whatsoever. Similarly, his version that he was so under the influence on the fateful day that he could not remember what happened, was rejected by the Court. At the best for the accused he had consumed about two beers and as stated in EXHIBIT E, that is the psychiatric report, the alcohol use disorder referred to in paragraph 5 of the report, had no bearing on paragraph C and D, which referred to the accused's ability to stand his trial and to his criminal capacity at the time.

There is also no evidence from the accused, and I emphasise acceptable evidence, that alcohol influenced whatever he did on that day. So clearly the consumption of alcohol could not have diminished his moral blameworthiness. Bearing in mind all of the above and the fact that the aggravating factors so outweigh the mitigating factors, a sentence of 15 years imprisonment would be vastly disproportionate in this case.

I then refer again to the unreported judgment of Nyangwa and I quote from paragraph 10:

"The evidence suggests an extraordinary degree of violence. It also establishes direct physical contact between the victim and the accused, as the deadly assault was carried out".

Paragraph 11, I quote.

"Mr Stander, for the state, submitted that the process of killing the deceased was such as to place the crime in a category of the most serious. I agree. It is difficult to conceive the degree of violence that was meted out by the accused, and what the victim experienced in her last moments".

Paragraph 13.

“When the aggravating nature of the crime is weighed against the mitigating circumstances present, there is, in my view, no doubt that there is no basis to impose a sentence less than that prescribed. The only question that arises is whether a more severe sentence ought to be imposed”.

I then refer to paragraph 17 of the said judgment and I quote:

“Mr Bodlo, for the accused, sought to persuade me on the basis of proportionality, and in the exercise of mercy, that I should not

impose the prescribed sentence. For reasons that I have already indicated, I am not so persuaded. In my view, a sentence of 15 years imprisonment would not be proportionate in that it would be too unduly lenient.

It would not adequately reflect the outrage that must rightly be felt by the society when faced with such egregious violence visited upon a child. It would also not address the fact, to be inferred from the nature of the crime, and the accused’s conduct, that he poses a serious threat to society.”

Paragraph 18.

“Mr Bodlo also relied on consideration of proportionality in countering the sentence sought by Mr Stander. Such a sentence it was submitted, would unduly emphasise the nature of the crime. I disagree. This was a dreadful crime, carried out with shocking violence. To treat it as anything less, would bring about an injustice.

He argued also that the Court should show mercy to the accused. The plea for mercy, however, rings hollow. He has remained silent throughout. We are left without any explanation for what occurred and have no understanding of the view of his crime”.

I should add that that is completely on par with the facts in this case. It is a dreadful crime carried out with shocking violence and we do not know what motivated the accused. Lastly, I refer to the first sentence of paragraph 19 of the judgment, and I quote:

“This Court cannot be motivated by maudlin sympathy for the accused. It is required to deliver justice.”

I therefore find that the only sentence that is appropriate and proportionate with all the factors I referred to above, is that of life imprisonment. The accused must please stand.

Mr Dlamini you are sentenced to LIFE IMPRISONMENT. Secondly, no order is made in terms of section 103 of Act 60 of 2000 that is the Firearms Control Act. It merely states that by your mere conviction of murder in this case, you are DECLARED UNFIT TO POSSESS A FIREARM.

.....

4/11/10

BROODRYK, AJ

ACTING JUDGE OF THE HIGH COURT

For the state: Adv K Jacobs, instructed by the Director of Public Prosecution, Pretoria

For the defence: Adv Mashabela,

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