

SOUTH AFRICA / JUDGMENT

S v Hlatswayo (SS 046/18) [2023] ZAGPJHC 749 (22 June 2023)

[2023] ZAGPJHC 749**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

SS 046/18

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: SS 046/18****1.****REPORTABLE: YES / NO****2.****OF INTEREST TO OTHER JUDGES: YES / NO****3.****REVISED: Yes****Date:**

22 June 2023

In

the matter between:

THE

STATE

And

HLATSWAYO,

HAPPY CHRIS

JUDGMENT

- SENTENCE

Coram NOKO J

Introduction

[1] The accused was charged with one count of murder in terms of section 51(1) of Criminal Law Amendment Act 105 of 1999 in that he intentionally and unlawfully killed Solomon Sibusiso Mkwana (deceased) by stabbing deceased several times successively with two knives. The accused was accordingly found guilty on 29 July 2022. The case was postponed for arguments on sentencing and subsequently postponed on two occasions to dates during recess[1] enable the accused to procure the Victim Impact and Pre-Sentence Reports. The two reports were duly submitted and were marked exhibit

G and H respectively. Both reports are summarised hereunder.

Pre-sentence report

- [2] The accused's counsel called the probation officer, Ms Velisiwe Sibisi (Sibisi), who was sworn in before providing her testimony. She testified that she has a 4-year degree, bachelor of Social Work, obtained from UNISA and has four years' experience as a social worker. She is employed by the Gauteng Department of Social Development.
- [3] She testified that she interviewed the accused, the accused's maternal uncle, Bafana Hlatswayo, accused's brother, Tshepo Hlatswayo, and the investigating officer Constable Ntshangase. The witness testified the accused told her during the interview that he grew up with his maternal family. Further that he did not have a close relationship with the paternal family during his early childhood.
- [4] The witness further stated that the accused appeared to be remorseful even though there were contradictions as he was not taking responsibility for the offence he committed. This is also fortified by the fact that the accused pleaded not guilty to the charge proffered against him. In her opinion she believes that the accused is nonetheless a good candidate for rehabilitation.
- [5] The witness proceeded to read the report for the record and the content thereof is summarised as follows. Sibisi provided the background on how the accused was raised together with his sibling. Both his parents passed on and he had to live with his maternal grandmother who also passed. The passing of his parents affected the accused badly and unfortunately, he did not receive counselling and was then leaving with the hurt though he had accepted their passing. He subsequently lived with his paternal grandmother.

- [6] She reported further that the accused relates well with his half-brother, Xolani Mandla Hlatswayo, but not maternal uncles who treated him badly. He has no intimate relations and do not have children. He was sexually molested by the deceased. The maternal grandmother was aware but did not provide any assistance and instead she stated that the abuse should be kept under wraps. This was confirmed by his step-brother and maternal uncle.
- [7] At the time of the incident, so went this report, the accused was staying at his maternal family house in Duduza. It had seven bedrooms and he had his own bedroom. He would occasionally visit his stepbrother in Orange Farm where he will do some odd jobs though he preferred to stay in Duduza. He still preferred Duduza even though it was an informal housing set up was ravaged by crime and substance abuse.
- [8] He reported to the probation officer that though he was doing odd jobs he was still able to take care of his basic needs. To this end the probation officer stated that his financial circumstances did not induce him to commit crimes. The offence in this instance was committed when he was defending himself.
- [9] The accused's step-brother and maternal uncle reported to Sibisi that the accused had short temper. Besides that, he was humble and well behaved. His behaviour changed after the incident and he started to be violent, always carrying dangerous weapon, he also informed his uncle that he had a strong urge of wanting to kill and further that he would be better if he is taken back to prison. He was subsequently taken back to prison as the family members were leaving in fear.
- [10] The accused informed probation officer further that he generally enjoyed good health. He would occasionally consult with psychiatrist and psychologist. His stepbrother reported that he at times displayed conduct of someone whose mental condition was not good. He received medication but did not complete the course which had a negative side effects.
- [11] The accused informed Sibisi that he attended school until grade 11 and he believed that the dropping off was because the deceased bewitched him as a result of which his academic performance deteriorated. He is a member of church and though the area is crime ridden he was not influenced thereby and the offence committed cannot be linked with the fact that the area is crime ridden. This was just purely a case of self-defence.
- [12] He further conveyed to Sibisi that he does smoke weed and cigarette. He has been smoking weed since he was 4 as the family members are Rastafarians who maintained their culture. He does also drink alcohol but do confirm that on the day of the incident he was not under the influence of liquor.
- [13] With regard to the commission of the offence the accused stated that the deceased would occasionally abuse him sexually. Further that on this day the deceased accosted the accused with the knife with the intention of raping him. He managed to take the knife away from him and then stabbed him in self-defence. He however acknowledges his wrong doing and regrets that he ended the deceased's life.

- [14] The probation officer delved into the accused personal circumstances and the facts behind the demise of deceased. That the accused was defending himself from possible rape by the deceased. Further that he did not intend to murder the deceased and was just defending himself. The probation officer has suggested that rehabilitation would be appropriate option for the accused to reconstruct himself.
- [15] Considering possible sentencing options, probation officer opined that since there is a minimum sentence prescribed a fine would not be an option at all. Secondly, suspended sentence will be too lenient, and "... will not rehabilitate the accused's behaviour, instead it will promote his unwanted behaviour, rather than weakening it. The probation officer is of the view that this sentence will send a wrong message to the potential offenders and make society to lose their trust injustice system. "[2] The probation officer further added that correctional supervision may also not be suitable sentence for the offence of murder. Lastly, the direct imprisonment will be suitable and would in addition rehabilitate the accused and also build society's trust in the justice system. This option will further "...address the elements of deterrence, rehabilitation and retribution." [3]

Victim Impact Report

- [16] The Victim Impact Report was compiled by Mr Mathew Mokwele (Mokwele) a probation officer attached to Germiston office of the Gauteng Department of Social Development. The probation officer stated that coincidentally the victim was Ms Sesi Lilian Khoza who is the grandmother to both the deceased and the accused. The victim gave the probation officer her personal background and her growing up in Mpumalanga until she got married and relocated to Thokoza, Gauteng Province. Though coming from a poor family background, she was provided with basic necessities of life including love and support from her parents.
- [17] The deceased was, according to the Mokwele, a traditional healer and was supportive to his siblings. The victim was staying with the deceased. Ms Pule Kula, being sister to the deceased was also interviewed and her evidence was that she was called by the neighbour on the day of the incident to the house and on reaching the house there were already members of SAPS, emergency service personnel and neighbours. She could not assist with information as to what actually happened except what the neighbour told her that the deceased was stabbed by the accused.
- [18] The victim stated that was distraught by the incident and was shocked that the deceased was killed by his cousin. She also believed that the accused is a danger to the society. She was not taken for counselling but would consider it.
- [19] This feeling, so proceeded the report, of hurt was also shared by Mrs Portia Pule who found it unbelievable that the accused will brutally murder his cousin. She blames herself as she was not home on that specific day. She still has flashbacks of seeing the brother's body lying in a pool of blood. She is still struggling to sleep. The incident also caused the family lot of money for the burial as the deceased was a traditional healer and as such rituals performed costed greatly. This was aggravated by the fact that the deceased did not even have a

funeral policy.

- [20] The deceased's other sister, Ms Sipesihle Mhlambi, also relayed her disbelief that her brother was killed in the way he was. She hates the accused and wished that he rots in jail. She also believed that the accused has anger issues.
- [21] The other sister, Ms Mbali Buthelezi, stated that she was still overwhelmed by the passing of her brother. She still could not cope with his passing. She will never forgive the accused for what he did. The impact on her behaviour was negative and unbearable. She still has memories of the brother's lifeless body in the kitchen. She is no longer sociable and prefers to be alone and always isolating herself. She still cannot fathom why would one brother would kill the other. The incident has broken the family up, since one brother had died and the other one is in jail.
- [22] In view of the depth of the hurt caused the probation officer observed that the family has not healed and there is a need for counselling. They were still emotional and angry during the interview. Even if counselling may assuage their negative feeling the impact may still be experienced later in their lives. The conduct of the accused has traumatised the family and it may take some time for them to heal.

Aggravating circumstances

- [23] The state contended that it is obvious that the accused failed to show any remorse. The evidence demonstrated that the offence was premeditated and if he was remorseful, he could have pleaded guilty from the beginning. Paragraph 9 of the pre-sentence report indicates that the accused always carried a dangerous weapon and had a strong urge to kill. This is what prompted the community members to complain when he was given bail and which was withdrawn at the instance of the accused or on his instructions.
- [24] The probation officer also confirmed that the fact that the accused pleaded not guilty militates against the possible inference that he was remorseful for his actions. The argument, so proceeded the prosecution, which was raised during trial that he had a diminished legal capacity was not backed by any cogent evidence. In this instance the only appropriate sentence would be a direct imprisonment. A sentence for fine or suspended sentence will not be appropriate in the circumstances as was stated in the probation officer's report.
- [25] In conclusion the prosecution submitted that the only appropriate sentence for the accused is direct imprisonment in terms of the minimum sentence prescripts. The defence having failed to demonstrate that there are compelling and substantial reasons on the horizon to unsettle the sentencing regime decreed by the legislature.

Arguments in mitigation

- [26] The defence counsel on the other hand submitted that the accused was of school going age at the time of the commission of the offence, He reported the sexual assaults by the deceased to community members but could not be assisted even after his own grandmother refused to accompany him to lay a criminal charge. Counsel contended further that the accused experienced multiple sexual assaults, he was diagnosed with PTSD. The expert, so went the argument, who testified on behalf of the accused opined that the accused displayed conduct of someone who is hyper-vigilant and re-experiencing traumatic events. At the time of the commission of the offence one could not deduce that it was planned.
- [27] It must be noted, so the argument continued, that the community still frown at reporting of sexual misconducts between males. This fails to appreciate the seriousness and impact of sexual assaults which are prevalent, which are serious and amount to brutal invasion to privacy, dignity and integrity of the victims. This is also what discouraged the accused from reporting the sexual encounters with the deceased. This situation is aggravated, so went the argument, by the fact that victims of sexual violence do not receive proper assistance as those employed to assist do not possess the necessary skills to provide the requisite assistance.
- [28] The accused, so counsel continued, experienced what the expert identified as emotional flooding triggered by extreme provocation. He was confronted with an inappropriate conduct from the deceased which he previously experienced and as a result lost his inhibitions.
- [29] The counsel for the accused correctly submitted that sentencing should be guided by having the consideration of the crime, the offender and interest of the society and also have regard to the purpose of sentencing being deterrence, prevention, rehabilitation and retribution. Counsel further submitted that the court should avoid serious misdirection.
- [30] Counsel submitted further that the accused in this instance is a good candidate for the deviation from the minimum sentence. He was a victim of sexual assault; the offence was not planned and the social worker having reported that the he was remorseful. The counsel further submitted that courts previously held that the basis for the deviation should not be that there were extra ordinary reasons. Further stated that the accused made a mistake and he was a victim of sexual assault.
- [31] With regard to the appropriate sentence the counsel stated that the Constitutional Court had emphasised the importance of rehabilitation as a primary consideration. Deterrence though being one consideration should not be considered as being dealt with only through incarceration. The accused can be deterred by the possibility of being caught and being punished and not necessarily the severity of the sentence. Equally so, the counsel contended that courts should also be discouraged from over emphasising retribution as an important purpose of sentence. This included a quote from Chaskalson P that "[R]etribution ought not to be given undue weight in the balancing process. " Further that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need

for Ubuntu but not victimization.[4]

- [32] Reference was also made by defence counsel of the judgment of *S v Malgas* 2001 (2) SA 1222 SCA where it was held that the court should avoid the possibility of imposing minimum sentence which may be found to be disproportionate to the crime. In addition, that it was stated in *S v Dodo* (2001) (3) SA 132 that the court should have regard to the effect of sentence which may be found to offend the constitutional right not to be punished in a cruel, inhuman and degrading way.
- [33] In considering whether compelling and substantial circumstances exist, counsel contended that this should not be construed as referring to exceptional in the sense that such circumstances are rare or limited to those which diminish the moral guilt of the offender.[5] The factors of the accused which must be taken into consideration includes, first, anger, pain and provocation which led to the accused losing control, secondly, age and poverty, absence of previous convictions, educational status which meant that accused was not intellectually matured to be able negotiate in challenging situations, family circumstances, the accused was from a poverty stricken family, having grown up without a father figure as he passed when he was still young. His psychological status, being with low self-esteem, feeling insignificant in the society. Further that the accused was kind hearted and cared for his family and grandmother with chores in the house. The accused has further shown to be honest, disciplined and reliable person despite his conviction.[6]
- [34] Defence counsel submitted further that the accused showed his remorse and he has also apologised to the family and his own family.[7] This should be inferred, so the argument continued, from the surrounding circumstances bearing in mind that "...the court had to look at the surrounding actions of the accused rather than what he says in court "
- [35] Counsel for the accused referred court to several judgments where counsel asserted that the courts took a dim view of the accused's conduct who did not provide his version in support of the statement that the accused was remorseful. In this regard reference was made of the SCA in *S v Matyityi* 2011 (1) SACR 40 (SCA) where it was held that "[T]here must be factual basis for a court to make a finding of remorse. " Counsel further that stated that [T]aking the court into one's confidence apparently means that the accused must take the witness stand so that the sentencing court can have a proper understanding of what motivated the accused to commit a crime; what has provoked his change of heart and whether he does indeed have a true appreciation of the consequences of his actions. [8]
- [36] Notwithstanding the fact that the accused failed to personally proffer any explanation or factual basis for court to consider, the counsel asserted in the heads of argument that "[T]he accused has clearly demonstrated that he is truly remorseful and his contrition and remorse are materially mitigating factors that we ask this court to give more weight. " In addition, counsel further stated that "sentencing the accused to the prescribed minimum sentence will be grossly unfair, the accused is very remorseful...[9]

Legal

Analysis

[37] The parliament found it prudent to promulgate legislation in terms of which prescribed minimum sentence would have to meted out in respect of certain offences. The court is entitled where there are substantial and compelling reasons to depart from the prescribed minimum sentences. The courts have not been prescriptive to defining what substantial and compelling reasons are and the exercise would ordinarily entail processes which have traditionally been put into consideration to determine a proper sentence and as clearly set out in *S v Zinn* 1969 (2) SA 537(A) and closely allied thereto are to be considered in tandem with the main purposes of punishment namely, deterrence, prevention, reformation and retribution. [10]

[38] In instances of a particular case the circumstances are such that it would be disproportionate to impose a minimum sentence would be unjust in that it would be disproportionate to the crime, the criminal and the needs of the society then a court would be entitled to impose a lesser sentence. [11] That notwithstanding the court cannot impose a lesser sentence for flimsy reasons. Whilst the defence has requested that the court

should show mercy in deciding on the sentence the court in *S v Chapman*[12] at para 4 stated that the courts are duty bound to send a clear message that the courts are determined to protect equality and freedom ..., and we shall show no mercy to those who invade these rights.”[13]

The accused.

[39] The accused is the first offender and is 27 years of age. He has no children. He dropped out at grade 11. He has no biological parents both having passed on and has been staying with the grandparents. It is noted that he grew up in a crime ridden neighbourhood and he is also from a poverty-stricken family. He has made admissions in terms of section 220 of the Criminal Procedure Act.

[40] The accused has not testified in mitigation of sentence. Though his legal representative emphasised that the accused is remorseful. There is no evidence presented before this court to buttress this assertion. It is strange however that the defence counsel went all out to procure authorities which emphasised that it is imperative that the accused person should take the stand and give testimony which will assist the court in concluding that indeed the accused is remorseful but the accused failed to heed his counsel's legal exposition. Thus, the court has regrettably been denied the opportunity to listen and make its mind up regarding the alleged remorse. Despite the vigorous claim that he is remorseful the fact that he chose not to speak to the court meant this assertion is unfounded and may be construed as an attempt to mislead this court.

The community.

[41] The community needs the protection from the court against being savaged by those who unleashes serious offences unto it. Public outcry should not be ignored but that . . . cannot be permitted to displace the careful judgment and final balancing that are involved in arriving at an appropriate sentence.[14]

The offence

[42] The accused stabbed the deceased several times. He was stopped and disarmed but picked up another knife and continued stabbing the deceased. This was certainly beyond the bounds of self-defence. The fact that the accused failed and or refused to testify leaves the state case uncontroverted. The accused counsel from the bar submitted that the accused has shown remorse. This was also stated in the report of the probation officer, that notwithstanding the accused refused to testify and confirm the versions presented by his counsel or the probation officer. Both their views remain inadmissible to the extent that those views have not been confirmed under oath by the accused.

[43] The probation officer who prepared pre-sentence report opined that the appropriate sentence should be a direct imprisonment. The probation officer who prepared a victim impact report painted a terrible picture of the effects of the murder on family members of the deceased and the deceased's grandmother who is the victim. The incident occurred more than half a decade ago but none of the members appear to have absolutely healed. The probation officer having concluded that they are still struggling to accept what has happened. It may take a while for the family to fully recover from this unpleasant experience. [15]

[44] Having considered all factors set out above and specifically unsubstantiated and uncorroborated arguments advanced on behalf of the accused there is no traces of substantial and compelling reasons to deviate from the prescribed minimum sentence. That notwithstanding due to the duration or the time already spent in prison even though the delay was caused by the postponements by or on behalf of the accused and further that part-heard are allocated to recess imposing the minimum sentence would be disproportionate. I therefore conclude that imprisonment for the 13 would be appropriate.

[45] In consequence, I make the following order:

The accused is sentenced to effective 13 years imprisonment.

NOKO MV

JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION, JOANNESBURG

APPEARANCES

Counsel for the accused: Adv

I-IPE Khanyile,

Pabasa, Sandton.

Attorneys for the accused: Legal

Aid Board

Counsel for the State: Adv

VS Sinthumule.

NPA, Johannesburg

Date of Hearing: 17 February 2023.

Date of Judgment: 23 June 2023.

- [1] The directive on part-heard matters provides that such matters must be set down only during court's recess.
- [2] See paragraph 12 of the Probation Officer's Report.
- [3] Ibid.
- [4] See Accused's Heads of Argument at para 30.
- [5] See Accused's Heads of Argument at para 51.
- [6] Para 59 et seq of the accused Heads of Argument.
- [7] See para 70 of the Accused Heads of Argument where it is stated that "There must be some factual basis for a court to make a finding of remorse.
- [8] See accused's Heads of Argument at para 70. Other cases were *S v Martin* 1996(2) SACR 378 (W) where the court at para 39 held that there was often no factual finding of true remorse is accused does not step Out to say what was going on in his inner self *S v Morris* 1972(2) SA 617 (A) where counsel for the accused averred that the court held that "it was the plain duty of the appellant to satisfy the court of his remorse by giving evidence himself which could be tested by cross examination. " Also, in *S v Mashinini* 2012 (1) SACR 604 (SCA) where the court held that the appellants need to verbalise the remorse.
- [9] See para 79 of the Accused's Heads of Argument.
- [10] see *s v Rabie* 1975 (4) SA 855(A).
- [11] see *S v Malgas* 20010) SACR 469 (SCA) at para 25.
- [12] 1997 (3) SA 341(SCA).
- [13] This was a rape case and cited on the basis of parity of reasoning.
- [14] *s v SMM2013* (2) SACR 292 at para 13.

[15] See para 9 of the Victim Impact Report.

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