

SOUTH AFRICA / JUDGMENT

S v J.N (CC04/2024) [2024] ZAMPMBHC 60 (3 September 2024) [2024] ZAMPMBHC 60

COURT

Mbombela High Court, Mpumalanga

BEFORE

Manthata

CASE / FILE NUMBER

CC04/2024

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,
MBOMBELA)

CASE

NUMBER CC04/2024

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

03/09/2024

MANTHATA

AJ

In

the matter between: THE
 STATE
 AND
 J[...]
 N[...]
 ACCUSED

JUDGEMENT

- [1] The accused J[...] N[...] a 53 years old, male major, and the deceased S[...] P[...] M[...] had a love relationship. They had three
- (3) children aged 19, 16, and 9 years old respectively and were staying together with the children.
- [2] The love relationship between the accused and the deceased experienced problems that prompted the deceased to lay a complaint in terms of the Domestic Violence Act 116 of 1998. Resultant to the complaint an interim protection order was issued wherein the accused was ordered not to assault, threaten or harass the deceased. At some stage the accused and the deceased went to court for the interim protection order and same was made final.
- [3] On the 08/02/2023 an argument ensued between the accused and deceased. The argument escalated to the extent that the accused stabbed the deceased to death. The post mortem report admitted into evidence as exhibit "A", the contents of which were admitted, indicates that the deceased suffered multiple sharp force injuries to the neck. The report indicates several step wounds sustained by the deceased. A photo album admitted into evidence as exhibit "D" attested to this.
- [4] Against the above background, the accused J[...] N[...] appears before this court, Mbombela High Court arraigned on a charge of murder read with provisions of Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. (murder where there is domestic relationship between the accused and the victim).
- [5] Accused who is legally represented pleaded guilty and was convicted of murder read with the provisions of Section 51(1)(g) of the Criminal Law Amendment Act 105 of 1997 where the death of the victim resulted from physical abuse as contemplated in paragraphs (a) and
- (b) of the definition of "domestic violence" in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim.

[6] The offence for which the accused is convicted attracts a minimum sentence of Life imprisonment by virtue of the fact the murder arose out of the domestic relationship between the accused and the victim. The court is obliged to impose the prescribed minimum sentence of life imprisonment and will only deviate to impose such if substantial and compelling circumstances exist in terms of Section 5(3) of the Act 105 of 1997.

[7] The court held in the case of *S v Malgas*[1] that:

“A court was not given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as a sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of the crime and the public’s need for effective sanctions against it...The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.”

[8] The court should consider the factors traditionally considered in assessing an appropriate sentence in order to determine whether substantial and compelling circumstances exist. In this regard the court should consider the nature of the crime committed, the personal circumstances of the offender and the interests of the society and that of the family of the deceased.

[9] Ackerman J, in *S v Dodo*[2] said that:

“It should be remembered that the cause’ of criminal punishment is the ‘offence’, consisting of ‘all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender’ and that consequently ‘the length of punishment must be proportionate to the offence.’”

[10] Considering the nature of the criminal act, there is no doubt that murder is a very serious crime. The seriousness is compounded by the fact it is a domestic violent related murder where there was a protection order against the accused. Furthermore, it is serious in the sense that it left three (3) minor children without a mother. What the accused did was a clear demonstration of a disrespect of the law.

[11] This is a clear case of gender-based violence which is a scourge in our society and community. In *S v Mudau*[3], an unreported judgement by Mathopo AJA stated the following:

“Domestic violence has been a scourge in our society and should not be treated lightly but deplored and severely punished. Hardly a day passes without a report in the media of a woman, or a child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity.”

- [12] Section 11 of the Constitution of the RSA provides that everyone has the right to life. In *S v Makwanyane*[4], O’Regan J stated:

“The right to life was included in the Constitution not simply to enshrine the right to existence... but...to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The right to life is the most primordial right which humans have. If there is no life, there is no human dignity.”

The accused has deprived the children and the family of the deceased of a precious life which will never be returned despite whatever sentence can be imposed.

- [13] The accused has testified in mitigation of sentence. He confirmed the fact that he has three (3) minor children and they are all schooling. The children receive child social grants which according to him is collected by the eldest child. He is no longer staying with the children and they are staying at their grandmother’s home. He is employed and still maintains the children. He asks for forgiveness and if the deceased’s family were present in court he would ask them for forgiveness.

- [14] Sachs J said in, *S v M*[5] that:

“Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.”

- [15] In *S v M*[6] the court said that a primary caregiver was described as 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.

- [16] The accused is no longer staying with the children and is no longer taking care of them on daily basis. Under the circumstances I find accused not to be a primary care giver. I therefore find that the interests of the children are outweighed by the interests of the society which demand that crime of this nature must be punished harshly.

- [17] As already stated that the accused pleaded guilty, it is submitted that a plea of guilty is a sign of remorse and that it is an indication accused is a suitable candidate for rehabilitation. The State on the other hand contended that the accused displayed no remorse but a regret of what he had done influenced by overwhelming evidence against him.
- [18] In *S v Matyityi*[7], Ponnann JA stated the following regarding remorse:
- “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 the 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.”*
- [19] The accused has to take the court into his confidence and persuades the court that he is genuinely remorseful. He kept on saying he is remorseful but failed to tell the court what has since provoked the change of heart. This is also viewed in the context that there was a protection order against him implying that he had problems with the deceased. He was ordered not to assault, threaten or harass the deceased in terms of the protection order governed by the Domestic Violence Act. But instead he ended up killing the deceased.
- [20] Since there was a protection order against him prohibiting him to commit violent act, he had sufficient time for pause and reflection before he proceeded to commit the offence. But the accused despite the protection order went on to commit a violent act. The fact that the deceased was allegedly cheating on him did not give him a licence to kill her.
- [21] I considered what the accused said in his testimony in mitigation of sentence. The fact that he sent his family delegation to the deceased to ask for forgiveness at the time of the funeral and that they were chased. I believe that was not a convenient time for the family of the deceased to can deal with the matter.
- [22] Accused said after his release on bail he attempted again to send his family delegation to the deceased’s family and his delegation refused. This incident occurred on the 08 February 2023 and the court heard accused’s evidence of mitigation on the 27 August 2024. It is now 1 year and 9 months that the incident had occurred and accused saying he did not have an opportunity to ask for forgiveness. I am not persuaded that he wanted to ask for forgiveness but failed.
- [23] In *S v Michele*[8] the court also found that a plea of guilty does not necessarily indicate true remorse, particularly where the crime (fraud), once discovered, would have been almost impossible to deny. In such circumstances a guilty plea was once more regarded as a neutral factor.

- [24] I find that the accused failed to take the court into confidence that his plea of guilty indicate a true remorse, I find that the plea of guilty is a neutral factor.
- [25] It is submitted that accused is a candidate for rehabilitation and the court should therefore consider rehabilitation as a purpose of punishment. Rehabilitation is not the only factor to consider as a purpose of punishment, the court should also consider, retribution, deterrence and reformative, and prevention.
- [26] I am of the view that retribution and deterrence, as compared to rehabilitation as purpose of punishment, as submitted, should play a role.
- [27] It was held in *S v Swart*[9] that:
- “In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each, according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role”.*
- [28] 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.[10]
- [29] The accused in mitigation of sentence asked the court to impose a sentence of 25 years imprisonment. Even if I were to impose such a sentence, there would be no motivation left for him to become rehabilitated, because, even if he does, he will still have to serve a lengthy period of imprisonment in this case.
- [30] Members of the society at large particularly children and women are subjected to physical and other forms of violence. It becomes even worse if they had to lose their lives as a result thereof. I have already indicated that this a case of a gender-based violence. It is understandable that there is a loud voice from members of the society and community at large for protection against cases of this nature. The ultimate institution that can provide for this protection is our courts.
- [31] Our court should therefore be wary to impose lenient sentences that will result in the community losing confidence in the administration of justice and our judicial systems and take the law into their own hands[11].
- [32] I now come to consideration of whether or not substantial and compelling circumstances exit for the court to deviate from the imposition of life imprisonment. I have considered the accuseds’ personal circumstances, his age, marital status, employment status, the fact that he is a first offender, the fact that he has three (3) minor children, and lack of genuine remorse. I have also considered the seriousness of the crime and the impact it has on the children. I have also considered submissions by the Defence and the State.

[33] Nugent JA in *S v Vilakazi*[12] had the following to say:

“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.”

I agree with the court in Vilakazi case and I find that this should be the position in this case.

[34] From all the above factors I find that there are no substantial and compelling circumstances presented for deviation from the imposition of the life imprisonment. I am therefore not going to deviate from imposing the prescribed minimum sentence.

[34] Consequently, the accused is therefore sentenced to life imprisonment.

34.1 No order is made in terms of Section 103 (1) (g) of the Firearm Control Act 60 of 2000. Accused is automatically declared unfit to possess a firearm.

34.2 It is ordered in terms of Section 103 (4) of the Firearm Control Act for the Immediate search and seizure of:

- (i) All competency certificates, licenses, authorizations and permits issued to the accused in terms of this Act;
- (ii) All firearms in his possession; and
- (iii) All ammunition in his possession.

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

DATE OF DELIVERY 03 SEPTEMBER 2024

[1] 2001

(1) SACR 469 (SCA)

[2] 2001

(3) SA 382 (CC)

[3] 2010 JDR 0641 (SCA): (547/13) [2014] ZASCA 43

[4]

[1995] ZACC 3; 1995

(3) SA 391 CC

[5] 2007

- (2) SACR 539 (CC)
- [6] 2008
- (3) SA 232(CC)
- [7] 2011
- (1) SACR 40 SCA
- [8] 2010
- (1) SACR 131 (SCA) par [7]
- [9] 2004 (2) SACR 370 (SCA)
- [10] S v Tsotetsi 2019 (2) SACR 594 (WCC) at [29]
- [11] See S v WV 2013 (1) SACR 204 (GNP) and R v Karg 1961 (1) SA 231 (A)
- [12] 2009 (1) SACR 552 (SCA)
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