

SOUTH AFRICA / JUDGMENT

S v Khasibe (CCD18/2022) [2022] ZAKZPHC 43 (30 August 2022)

[2022] ZAKZPHC 43

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout

CASE / FILE NUMBER

CCD18/2022

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: CCD18/2022

In the matter between:

THE STATE

and

BONGANI MBONGENI CHRISTOPHER KHASIBE

ACCUSED

SENTENCE

Bezuidenhout AJ

- [1] On 18 August 2022 the accused, Mr Bongani Christopher Khasibe, was found guilty of one count of murder read with the provisions of section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, which in effect means that the prescribed minimum sentence is life imprisonment, unless I am satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence.
- [2] The indictment alleged that the accused killed Ms T[...] M[...] ('the deceased') on 21 June 2021. She was 29 years old at the time.

- [3] The murder of the deceased was witnessed by her 6-year-old son, Mr N[....] M[....], as well as her mother, Ms Nonhlanhla Cele, both of whom testified before me. The deceased's 3-year-old son was also present when she was murdered.
- [4] The facts were set out in detail in my judgment, and I will not repeat it, save to say that the accused and the deceased were involved in a relationship which was an abusive one. On 17 June 2021, the deceased applied for a protection order against the accused. Although the Form 5 Notice was not served on the accused, he was aware of the application by the deceased. He came to her homestead on 21 June 2021, accosted her in her home and proceeded to kill her in a most brutal manner in front of her mother and children.
- [5] The post mortem report, and its facts and findings were admitted by the accused. In paragraph 4 of the report, handed in as Exhibit 'B', Dr Deysel described the injuries sustained as follows:
- (a) A stab wound, $\pm$ 15 mm long to the right temple.
 - (b) A stab wound, $\pm$ 40 mm long to the right cheek.
 - (c) A stab wound, $\pm$ 45 mm long to the upper posterior lateral aspect of the neck on the right side.
 - (d) Ten stab wounds to the upper anterior chest, all 20-25 mm long.
 - (e) Three stab wounds to the upper posterior arm, and upper back.
 - (f) Six stab wounds to the right upper back and arm.
 - (g) Four stab wounds to the left side of the chest.
- [6] The State proved previous convictions against the accused, which he admitted. Of significance is the conviction of murder on 30 January 2005. The accused was sentenced to 25 years' imprisonment for killing his wife. He was released on parole on 2 October 2017, serving only 12 years of his sentence. The parole period was to endure until 29 December 2029.
- [7] The accused's counsel addressed me in mitigation, as he chose not to testify. She placed the following personal circumstances of the accused on record:
- (a) He is 52 years old.
 - (b) He is single but has four adult children and two grandchildren.
 - (c) He is self-employed and operates a tuck shop. It was his evidence during the trial before this court that he sold alcohol at the tuckshop. His counsel confirmed that he did not have a licence to do so.

- (d) He earned approximately R10 000 per month from his tuckshop which he used inter alia to support his two grandchildren.
- (e) His highest level of education was grade 10 (standard 8).
- (f) He has been in custody since 22 June 2021.
- [8] It was submitted on behalf of the accused that his personal circumstances, considered cumulatively, amounted to substantial and compelling circumstances, justifying a deviation from the prescribed minimum sentence. I was asked to blend the accused's sentence with mercy.
- [9] Counsel for the State handed in an affidavit by Ms Babongile Thobekile Chuene. Attached to this affidavit was a victim impact statement by Ms Cele, the deceased's mother. It was marked as exhibit 'E'.
- [10] Ms Chuene assisted Ms Cele to write her statement. Ms Cele set out in detail the psychological and emotional trauma suffered as a result of the crime. She stated that she was shocked about what had happened and will never forget what she saw. She was unable to help her daughter. She suffers from high blood pressure and questioned why the accused had to kill the deceased in front of her and the children. She detailed how N[...] had been affected. He used to be a happy child but has become withdrawn and his mind is always somewhere else. Ms Cele further stated that after the incident she became ill, she

could not cook or go to fetch water and was emotional all the time. She feels helpless and does not know what to do anymore. Her

grandchildren have lost their mother. Ms Cele suffered financially as a result of the incident. She did not have money to pay for the deceased's funeral and had to ask for assistance from her family. She also expressed her and her family's sadness when they found out that the deceased was pregnant at the time of her death. This information was recorded in the post mortem report. Ms Cele expressed the hope that the accused would be sentenced to prison for a long time.

- [11] Counsel for the State addressed me on sentence and referred me to *S v Robertson*[1] where Kusevitsky J dealt in detail with the biggest scourge in our society, namely gender based violence and femicide.
- [12] In paragraph 1 of the judgment, femicide is described 'as the murder or intentional killing of a female by her intimate partner'. The judge quoted various statistics which emanated from reports compiled for sentencing purposes.[2] Reference was inter alia made to a report which stated that in South Africa, half of female murders could be classified as femicide, with femicide in South Africa being six times higher than the global average. A further statistic quoted was that globally, 66 000

women fell victim to femicide.

- [13] Counsel for the State submitted that the accused has shown that he has a predisposition to commit violence towards his intimate partners. It was also an aggravating factor that the deceased was killed in front of her two small children and her mother.
- [14] It was also submitted that the murder of the deceased was clearly premeditated, as the evidence showed the accused lying in wait for the deceased to return home, whilst armed with a knife.
- [15] Counsel for the State lastly submitted that the cumulative effect of the accused's personal circumstances did not amount to substantial and compelling circumstances, and that life imprisonment was the only appropriate sentence.
- [16] When it comes to sentencing an accused, a court must decide what sentence would be appropriate bearing in mind a number of factors. The author S S Terblanche in his *A Guide to Sentencing in South Africa*, provides a summary of the basic principles according to which sentence is imposed:
- '(1) The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case. The sentence should not be too light or too severe.
- (2) An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors . . . the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender. . .
- (3) An appropriate sentence should also have regard to or serve the interests of society. . . The interests of society can refer to the protection society needs . . . or the deterrence of would-be criminals. . .
- (4) In the interests of society the purposes of sentencing are deterrence, prevention and rehabilitation, and also retribution.
- ...
- (6) Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve it. In the case of very serious crime, where long terms of imprisonment are appropriate, it is not an important consideration
- (9) Mercy is contained within a balanced and humane approach to consideration of the appropriate punishment. This appropriate punishment is not reduced in order to provide for mercy. . .' [3] (Footnotes omitted.)
- [17] As far as sentencing involving the minimum sentence legislation is concerned, the seminal judgment of *S v Malgas* [4] set out how the court should deal with substantial and compelling circumstances. In essence, a court should use the prescribed

sentences as a point of departure and should weigh all traditional sentencing considerations. A court should only depart from the

prescribed sentence if imposing such sentence would be unjust.

[18] The accused's counsel has urged me to find that his personal circumstances, considered cumulatively, would amount to substantial and compelling circumstances. In *S v Vilakazi*[5] Nugent JA said the following:

'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.'

[19] I have referred above to the scourge of gender based violence in our country. I have detailed the deceased's injuries, which demonstrates the incredibly violent and vicious attack on her by the accused. She must have suffered incredible pain, shock and horror in her last moments. Our courts have addressed the issue of gender based violence over and over. In *S v Rohde*[6] the following was held:

'Crime based on gender is an affliction in our society. Crimes against women are a social ill and efforts by government and society are increasing in light of a steady increase in these types of offence. The rate of murder of women in South Africa is alarmingly high, compared to the global average. Attitudes to women determine how women are treated in society. It is the lowered perception of women as human beings, all of whom are entitled to human dignity and equality, which results in the unhealthy social paradigm that they can be victims, and in fact end up as victims of crime because they are women. The judiciary must guard against such perceptions and creating the impression that the lives of women are less worthy of protection.'

[20] In *S v Pacham*[7] the court quoted liberally from a lecture presented by Maya P:

'54 . . . She emphasised that the complex nature of the trend towards gender-based violence in our society needs to be addressed and that gender-based violence is rooted in structural inequalities between men and women and is characterised by the use and abuse of physical, emotional, or financial power and control.

55. It was pointed out that our Legislature has enacted a number of statutes aimed at addressing these women-oriented challenges and that it is not debatable that women are a vulnerable group whose well-being and safety is precarious in our patriarchal society, arising from factors related to their historic oppression and exclusion from economic activity. It was noted that the legal mechanisms in place to deal with this scourge in our society are seemingly inefficient in light of the continued rampant gender-based violence in our country.

56. The learned justice continued to point out that one of the insidious qualities of gender based violence and femicide is its far reaching, adverse impact on all aspects of a victim's life and its devastating impact on a number of their constitutional rights, which guarantee human dignity, freedom and security of persons. Our nation is committed to the creation of a society that is free from violence and puts a high premium on a person's bodily integrity. Gender based violence and femicide directly violate these foundational principles of our Constitution.
57. The learned justice emphasised that the Courts, guided by various principles of our legal system, play a crucial role in ensuring just outcomes in these cases and in alleviating the problem. They bear the difficult task, when the guilt of an offender has finally been proved, of finding the right balance between a just sentence on one hand, and a clear message that will deter gender-based violence in society on the other hand.'
- [21] According to the crime statistics released by the South African Police Services for the fourth quarter of the 2021/2022 financial year (for the period of January to March 2022), 898 women were murdered.[8] A further 1 222 women were subjected to attempted murder, and 15 034 were the victims of assault with the intent to commit grievous bodily harm.
- [22] In order to bring about awareness to the plight of women in this country, the month of August was proclaimed as Woman's Month. I started with this session, doing crime, on Monday, 15 August 2022. I have already done three cases in which the victims were women. Instead of celebrating women, we are mourning them.
- [23] The accused has shown himself to be a man who shows no respect for women. Instead of being loving and caring to his intimate partner, he abuses, assaults, and kills. He was sentenced to 25 years' imprisonment for killing his wife. For reasons unknown to us he was released on parole after serving less than half his sentence. Despite being on parole until 29 December 2029, the accused showed little regard for the law, and demonstrated that his time spent in prison did nothing to rehabilitate him and keep him from a life of crime. He sold liquor without licence. He assaulted and abused the deceased over a period of time to such an extent that he broke her arm. When she took steps to try and protect herself from his vicious assaults by applying for a protection order, he killed her. I get the distinct impression that the accused could not handle this much younger woman going against him.
- [24] The statistics of offenders released from custody who re-offend makes for shocking reading. Depending on which website is accessed, it is estimated that between 50% and 70% of offenders released from custody re-offend. The Department of Correctional Services faces many challenges such as overpopulation and lack of resources, but society in general will lose faith in our legal system when an accused, duly arrested, convicted, and sentenced, is released back into the community after serving, in instances such as the present, less than half of his sentence, only to re-offend. In the present matter, the accused took another life, whilst he should still have been in jail.

- [25] The accused's counsel has urged me to blend his sentence with mercy. He has shown the deceased no mercy. He has shown her children no mercy when he killed their mother in front of them. He has shown her mother no mercy when he killed her daughter in front of her. No parent should ever have to see something like this.
- [26] Our courts have not hesitated to impose life imprisonment in cases of gender based violence and femicide.[9] In terms of section 73(1)(b) of the Correctional Services Act 111 of 1998, 'an offender sentenced to life incarceration remains in a correctional centre for the rest of his or her life', subject to certain provisions of the Act. In terms of section 73(6)(b)(iv), a person who has been sentenced to 'life incarceration, may not be placed on day parole or parole until he or she has served at least 25 years of the sentence'.
- [27] I have taken all the usual factors into account as well as the basic principles referred to above. I have also taken the following additional factors into account:
- (a) The violence and viciousness of the attack on the deceased.
 - (b) The fact that the accused killed the deceased in front of her children.
 - (c) The previous conviction of the accused, showing a clear propensity to commit crimes against women who are his intimate partners.
 - (d) The accused's utter lack of remorse.
- [28] I can find no substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence.
- [29] I accordingly sentence the accused to life imprisonment.
- [30] I also direct that a copy of this judgment be provided to the Department of Correctional Services, to be placed in the accused's prisoner file in order to be considered by the Parole Board when it convenes to decide on whether the accused qualifies for parole, in 25 years' time.

BEZUIDENHOUT AJ

Appearances:

Date heard: 18

August 2022

Date of Judgment: 30

August 2022

On behalf of the State: Adv

S Singh

Director of Public Prosecutions

On behalf of the Accused:

Adv Marais

Legal Justice Centre

- [1] S v Robertson 2022 [ZAWCHC] 104.
- [2] Ibid para 32.
- [3] S S Terblanche A Guide to Sentencing in South Africa 3 ed (2016) at 151-152.
- [4] S v Malgas 2001
- (1) SACR 469 (SCA).
- [5] S v Vilakazi 2009
- (1) SACR 552 (SCA) para 58.
- [6] S v Rohde 2019
- (2) SACR 422 (WCC) para 54.
- [7] S v Pacham (2019) JOL 45328 (WCC) paras 54-57.
- [8] https://www.saps.gov.za/services/downloads/fourth_quarter_presentation_2021_2022.pdf (accessed 25 August 2022).
- [9] See S v Binjane 2021 JDR 1810 (GP), S v Nkuna 2021 JDR 1433 (NWM), S v Tumaletse 2020 JDR 0344 (NCK).

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