

SOUTH AFRICA / JUDGMENT

S v Khomo (CCD50/2020) [2020] ZAKZPHC 60 (16 October 2020)

[2020] ZAKZPHC 60**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout

CASE / FILE NUMBER

CCD50/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****CASE NO:**

CCD50/2020

In

the matter between:

THE

STATE

vs

XOLANI

KHOMO

ACCUSED

JUDGMENT**ON SENTENCE****BEZUIDENHOUT AJ**

- [1] The accused was found guilty of one count of murder to which the provisions of section 51(2) and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable. In terms of these provisions, the accused, being a first offender, faces a minimum sentence of 15 years' imprisonment, unless I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The indictment alleged that the accused unlawfully and intentionally killed Nomfundo Nomcebo Tembe on or about 12 September 2020, near the Chappies area, Sundumbili, Eshowe.

- [2] The accused pleaded guilty and his counsel, Mr Mbatha read out a statement prepared in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, which was subsequently handed in as Exhibit 'A'. Attached to it, as Exhibit 'B', was the report of the Medico-Legal Post Mortem Examination conducted by Dr MA Deysel on 14 September 2020.
- [3] The facts which led to the commission of the offence were set out in Exhibit 'A' and were accepted by counsel for the State, Mr Mthembu, as being in accordance with what was contained in his docket.
- [4] According to the accused, he was at his home in the Chappies area at Sundumbili, Eshowe in the company of his two brothers, his girlfriend and some friends. They were socializing and consuming alcohol. They were drinking beers and had been doing so from 17h00 until 23h00.
- [5] The accused's girlfriend and others left to go to their homes and the accused remained at home with his brothers, who had already fallen asleep. The accused continued drinking the last two beers whilst seated on the veranda of his house.
- [6] The deceased came to the accused's house, asking for matches to light her cigarette. The accused informed her that he had no matches but the deceased demanded matches. The accused then asked her to leave his house as she was alone and appeared to be drunk. The accused also told her that his girlfriend would have issues with him if she were to see the deceased in his home alone at that time of the night.
- [7] According to the accused, the deceased continued to demand matches and started to make insulting utterances regarding his relationship with his girlfriend. The deceased went into his house to look for matches. The accused then followed her to the kitchen and tried to pull her out of the house. A struggle ensued and the accused took a kitchen knife which was lying on top of the table and stabbed the deceased several times in her neck.
- [8] The deceased bled profusely and collapsed on the floor. The accused tried to cover her throat with a cloth to stop the bleeding but the deceased was already unconscious.
- [9] The accused ran to his girlfriend's house and reported what he had done and subsequently went to his neighbour, one Mr Mhlongo, who was a policeman to also report to him what happened.
- [10] The accused stated that he instantly admitted to the police that he was responsible for the stabbing and death of the deceased.
- [11] The accused admitted further that he caused the injuries as appeared from the so-called post mortem report, Exhibit 'B'.
- [12] In paragraph 4 of Exhibit 'B', Dr Deysel described the external appearance of the deceased's body, inter alia, as follows:
- (a) Numerous stab and incised wounds as per an attached diagram.

- (b) The shaded area on the diagram represented irregular deep defects caused by a multitude of stab and hack wounds, with a total transection of the oesophagus, larynx, muscles and major blood vessels. The defect reached the anterior aspect of the cervical spine.
 - (c) There was also bruising on the left side of the head as well as bruising of the scalp.
 - (d) The jaw, referred to as the mandible, was fractured.
- [13] A diagram was enclosed with the report as Annexure 'A', and depicted around 22 stab and incised wounds found on the deceased, as well as the shaded area referred to by Dr Deysel.
- [14] The accused's counsel addressed me in mitigation. He placed the following personal circumstances of the accused on record:
- (a) He is 27 years old and a first offender.
 - (b) He does not have children.
 - (c) He was self-employed as a brick layer and earned between R1 600 and R3 000 per fortnight, depending on availability of work.
 - (d) He supports himself, his younger sister who is a student and his mother who is a pensioner.
- [15] Accused's counsel urged me to take into account that the murder of the deceased was not planned. He submitted that the deceased's utterances provoked the accused and if it had not been for those so-called utterances, the incident would not have happened. It is maybe important to note that neither in his section 112 statement, nor through his counsel's address, did the accused disclose what these utterances were that led him to perpetrate such a savagely violent attack on the deceased.
- [16] It was further submitted that the accused had consumed alcohol which had contributed to the commission of the offense. It was also submitted that the accused had played open cards by immediately admitting what he had done and that the matter was not dragged out unnecessarily.
- [17] Accused's counsel further submitted that the accused was remorseful and regretted what he had done and wanted to apologise to the deceased's family. According to accused's counsel, this attitude of the accused places him in a position to be rehabilitated, which should be taken into account when considering sentence.
- [18] It was submitted that the cumulative effect of all the accused's personal circumstances together with the facts amount to substantial and compelling circumstances as set out in the decision of *S v Malgas* 2001 (1) SACR 469 (SCA). Accused's counsel submitted later in reply that this matter should really have been heard in the regional court as it was not a premediated murder, and that the accused would only have received a sentence of 10 years' imprisonment.

- [19] Counsel for the State, Mr Mthembu addressed me in aggravation and handed up two victim impact statements. The first statement, received as Exhibit 'D', was made by the deceased's mother, Ms Florence Ndlovu.
- [20] It is clear from the statement that the deceased's death has had a profound impact on Ms Ndlovu. More so because she was taken to the scene of the crime and made to wait for certain processes to finish, all the while being able to see her daughter's body, which she described as follows:
- 'She was stabbed. I could not even count the stab wounds on her neck. She was slaughtered like a goat.'
- [21] The second statement received as Exhibit 'E' was made by the deceased's 12- year-old sister, who wrote in her own handwriting about the close bond she shared with her sister and how her death has impacted their lives.
- [22] Counsel for the State submitted that the actions of the deceased did not warrant the actions of the accused. Her only sin was to ask for matches. He submitted that the accused killed the deceased in a gruesome and barbaric manner and that the amount of violence used can never be justified.
- [23] Counsel for the State further submitted that the accused has failed to explain what the deceased did or said that angered him so much. He also submitted that at no stage was the deceased a threat to the accused.
- [24] I was also informed that the deceased had a 3-year-old child who will now be looked after by her grandmother.
- [25] It was further submitted that murder was a very prevalent crime in the area and I was urged to consider the effects of the scourge of violence against women, which has been brought to the forefront in recent times.
- [26] Counsel for the State referred me to the decisions of *S v Malgas*, supra, as well as *S v Matyityi* 2011 (1) SACR 40 (SCA). I will refer to these decisions herein below.
- [27] It was submitted that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence, and I was urged to find that there were many more aggravating factors present which would in fact justify a heavier sentence being imposed than what was prescribed in the minimum sentence legislation.
- [28] The seminal judgment when it comes to sentencing involving the minimum sentence legislation is *S v Malgas*, supra, and to which both counsel referred me. According to SS Terblanche in *A Guide to Sentencing in South Africa* 3ed (2016) at 76-78, the judgment can be separated into four different aspects to be considered, namely:
- (a) The prescribed sentences are the point of departure.

- (b) If a departure is called for a court should not hesitate to depart.
- (c) The weighing of all the traditional considerations.
- (d) Depart when the prescribed sentence will be unjust.

[29] The accused's counsel urged me to find that the accused's personal circumstances amounted to substantial and compelling circumstances, justifying an imposition of a sentence less than the prescribed minimum sentence.

[30] In the matter of *S v Vilakazi* 2009 (1) SACR 552 (SCA) Nugent JA said the following at para 58:

‘... 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.’

[31] I do not believe that the accused has been able to demonstrate sufficient circumstances justifying the imposition of a lesser sentence than the minimum prescribed sentence. I therefore do not have to deal with the matters raised in Malgas.

[32] The question as to whether a sentence in excess of the prescribed minimum sentence is competent, has been answered in the affirmative in *S v Mthembu* 2011 (1) SACR 272 (KZP), which was approved of and confirmed on appeal in *S v Mthembu* 2012 (1) SACR 517 (SCA). The full court held as follows:

‘[19.3] In order to ensure that consistently heavier sentences were imposed, the intention of the legislature was to limit the discretion of courts in one direction, ie the imposition of sentences less than the prescribed minimum, and to leave the courts' discretion

unlimited in the other direction, ie to impose sentences heavier than the prescribed minimum.

[19.4] I respectfully disagree that it was the intention of the legislature to ensure that severe, standardised and consistent sentences be imposed and thereby limit the extent to which sentence may depend upon the personal views of the judge, or any factor that may vary from judge to judge. In this regard the following passage in Malgas (at 472, para 3) is apposite:

“What is rightly regarded as an unjustifiable intrusion by the Legislature upon the legitimate domain of the courts, is legislation which is so prescriptive in its terms that it leaves a court effectively with no sentencing discretion whatsoever and obliges it to pass a specific sentence which, judged by all normal and well-established sentencing criteria, could be manifestly unjust in the circumstances of a particular case. Such a sentencing provision can accurately be described as a mandatory provision in the pejorative sense intended by opponents of legislative incursions into this area. A provision which leaves the courts free to exercise a substantial measure of judicial discretion is not, in my opinion properly described as a mandatory provision in that sense. As I see it, this case is concerned with such a provision.”

If the intention of the legislature in passing the Act was to prescribe that the minimum sentences provided for should be imposed as appropriate sentences, and not merely to prescribe appropriate minimum sentences for the crimes in question, this may, in my view, result in the courts not being 'free to exercise a substantial measure of judicial discretion' in the passing of such sentences.

Such an interpretation would border upon the minimum-sentencing provisions being regarded as 'mandatory' within the meaning of that term, as set out in the quoted passage.'

[33] Accused's counsel made a lot of the fact that the accused pleaded guilty and was apparently remorseful. Counsel for the State referred me to the decision of *S v Matyityi*, supra, where the following was said by Ponnann JA at para 13:

'[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. . . 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. . . Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. . . 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 or her confidence. . . .'

[34] In *S v Piater* 2013 (2) SACR 254 (GNP) the fact that the accused did not take the court into her confidence by testifying and subjecting herself to cross-examination, was held against her.

[35] It is clear that the accused has failed to take this court into his confidence as he has not explained what the deceased had said that drove him to such a violent and vicious attack. The accused did not give evidence and did not subject himself to cross-examination.

[36] Provocation is of course a mitigating factor, as acts performed under severe provocation are understood by ordinary human beings as an understandable human reaction and thus, to a certain extent excusable. In this regard see *S v Ndzima* 2010 (2) SACR 501 (ECG) paras 24-30. But once again, in the absence of the accused explaining what exactly was said to him by the deceased, it is

difficult to assess the true extent of any possible provocation.

[37] As far as the accused being a first offender is concerned, it is trite that this is usually considered as a mitigating factor. However, in the present matter, the nature of the crime and in particular the 'gruesome and barbaric manner' (to quote counsel for the State) in which the deceased was killed, clearly shows that the accused had no regard for the deceased and in my view, this then also becomes a neutral factor.

- [38] I described the deceased's injuries herein above. She suffered a vicious and violent attack and died a horrible death. The amount of force applied by the accused is astonishing, and is borne out by the extent of the injuries.
- [39] Violence against women is being perpetrated on a daily basis and has been the subject of many campaigns, urging the men in this country to stop the attacks on women. According to the crime statistics of 2019-2020, 2695 women were killed, equating to one woman being killed every 3 hours. (See Crime Statistics: Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2019-2020) at 82, available at https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf accessed 14 October 2020). The SAPS has also released the latest crime statistics for the first quarter of 2020, in terms of which 65 women were killed between April and June 2020, during the lockdown period. (See Police Recorded Crime Statistics: Crime Situation in Republic of South Africa Three Months (April to June 2020-2021) at 7, available at https://www.saps.gov.za/services/April_June%202020_2021.pdf, accessed 15 October 2020). Our communities expect the courts to protect women against violent crimes.
- [40] It is unclear if the accused attacked and murdered the deceased purely because she was a woman. What is however very clear is that the accused apparently could not handle being insulted by the deceased and proceeded to viciously and violently attack and then kill her.
- [41] The death of the deceased clearly has had a devastating effect on her mother, Ms Ndlovu, and her anguish was clear to see during the plea proceedings, which she attended. The deceased's child is going to grow up without a mother, all because the accused could not handle an insult.
- [42] When it comes to deciding on an appropriate sentence, it is always useful to look at other cases and sentences imposed as a guide. It is of course difficult to find cases with the exact same circumstances as the present matter. It is also important to remember that although the accused was charged with and convicted of murder, he was not convicted of premeditated murder which would have attracted the much harsher sentence of life imprisonment.
- [43] In the matter of *S v Koester* 2016 JDR 1499 (ECG) the accused was sentenced to 18 years' imprisonment for committing a 'brutal and callous attack for no justifiable reason'. The deceased, with whom the accused had been in a relationship for 10 years, sustained very serious facial and head injuries after being hit with a spade. The accused was not a first time offender.
- [44] In *S v Sonamzi* 2018 JDR 0246 (ECP) the accused was sentenced to 18 years' imprisonment for killing the deceased in an attack that was described as 'callous and brutal'. The court held that a 'sentence in excess of the prescribed minimum sentence' was called for. The accused had no relevant previous convictions.

- [45] In *S v Mhaule* 2020 JDR 0203 (MN) the accused was sentenced to 20 years' imprisonment for killing his ex-girlfriend with a panga, she sustained four 'chop' wounds to her head. The accused was a first offender who pleaded guilty.
- [46] In *S v Mashao* 2015 JDR 2263 (GJ) the accused was sentenced to 20 years' imprisonment for killing his wife, who sustained multiple stab wounds. The accused was likewise a first offender who pleaded guilty.
- [47] In arriving at a just sentence, I am well aware that I must not allow public opinion to override the duty of the court to achieve a balance between all the relevant factors. In *S v Homereda* 1999 (2) SACR 319 (W) at 324b Cloete J pointed out that 'it is not the function of the Courts slavishly to give effect to public opinion'.
- [48] In *R v Karg* 1961 (1) SA 231 (A) Schreiner JA said the following at 236A-C:
- 'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.'
- [49] I have taken all the usual factors into account as prescribed in the many authorities over the years:
- (a) The seriousness of the crime.
 - (b) The circumstances of the accused.
 - (c) The interests of society, which involves issues such as deterrence, prevention and rehabilitation (although I must add that rehabilitation is not a consideration in the case of serious offences where long terms of imprisonment are appropriate).
- [50] I have also taken into account the following additional factors, unique to this particular matter:
- (a) The violence and force used by the accused as is evident from the injuries sustained by the deceased.
 - (b) The accused's failure to disclose what provoked him to commit such a violent and vicious crime.

(c) The fact that the accused and the deceased were not involved in a relationship and there was accordingly no emotional bond between them that could possibly explain the accused's violent reactions towards the deceased.

[51] Bearing all the aforesaid in mind and in exercising my discretion, I believe that imposing a sentence heavier than the prescribe minimum sentence is appropriate and justified. I accordingly sentence the accused to a period of 20 years' imprisonment.

BEZUIDENHOUT AJ

Date of plea hearing: 08 October 2020

Date of sentence: 16 October 2020

Appearances

For the State: Mr ME Mthembu

Director of Public Prosecutions (KZN)

Pietermaritzburg

For the Accused: Mr BC Mbatha

Legal Aid Service (KZN)

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