

SOUTH AFRICA / JUDGMENT

S v Kutumane (CC17/10) [2011] ZAWCHC 178 (24 March 2011)

[2011] ZAWCHC 178**COURT**

Western Cape High Court, Cape Town

BEFORE

Fortuin

CASE / FILE NUMBER

CC17/10

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: CC17/10

THE STATE

versus

PAMELA KUTUMANEFirst Accused

THENJIWE BELLESecond Accused

SENTENCE

- 24 MARCH 2011

FORTUIN. J:

[1] When the court considered sentence, the 3 factors laid down in *S v Zinn*¹ were considered thoroughly. These factors are the personal circumstances of the accused, the seriousness of the crime and the interest of the community. The court also considered the interest of the victims in this matter.

[2] Your personal circumstances were considered and the following was found:

Ms Kutumane, you are currently 45 years old, a widow with two children, one son aged 29 years and a minor son aged 13, who are being taken care of by his 68 year old maternal grandmother. You completed grade 9 at school and was a successful business woman at the time of the commission of the offences. This court takes into account the fact that, as a result of your incarceration, you lost your business which you worked for so hard. You are suffering from hypertension as well as other medical conditions which can be treated easily both inside and

outside of prison, but generally seems to be coping well in the prison environment. Your only concern seems to be the welfare of your minor child. You have been incarcerated for the past 3 (three) years. You also lost the love and affection of your boyfriend as a result of your incarceration.

- [3] Ms Belle, you are currently 47 years old and have 5 children and 1 grandchild. Your last born child was delivered while you were incarcerated in Pollsmoor Prison. Even though you have one unrelated previous conviction, this court is sentencing you today as a first offender. Your minor children are cared for by their 68 year old maternal grandmother.
- [4] You completed grade 11 at school and qualified as a home base carer. You were employed as such at the time of your arrest. This court takes into account that you lost your job as a result of your incarceration. You also lost your boyfriend, the father of your 3 youngest children. You are a healthy person who seems to be coping well with your incarceration- Your only concern seems to be the care of your minor children. You have been incarcerated for the past 3 (three) years.
- [5] Ms Kutumane and Ms Belie, it should be mentioned that the people who you paid to commit the gruesome murder on Ms Magwa. were both teenagers. Siyabonga Bele considered the two of you in the same light as his mother. You abused your position as a mother figure to corrupt these two young boys, destroying their lives in the process, your only aim being greed. The seriousness of the crimes [6] The offences which both of you were convicted of, are serious. With regard to counts 1 and 2. the counts of racketeering, the legislature considered these offences of such a serious nature that a specific statute was enacted to ensure that planned, criminal activity can be prosecuted. The aim of your enterprise was to target vulnerable people by taking out funeral policies on their lives and then killing them, because you could not wait for nature to take its cause. [7] Running an enterprise like this is unacceptable. You are both strong and enterprising women. Ms Kutumane, you used the little that you had and built it up into a successful business. You clearly have the leadership qualities to have become a role model to other women in your community. Instead you used your strong characteristics not to build a better life for yourself and your loved ones, but to kill and destroy a family where another strong woman was struggling to keep her family together by cleaning your house. In the process you also destroyed your own family. Both of you should be punished severely for being part of this enterprise. [8] I now turn to the convictions on counts 4, 8 and 10, the charges of fraud. Even though the amounts involved are relatively small, the claims were fraudulently made and it involved the killing of the assured. This court should show its loathing by sentencing both of you with the necessary firmness. [9] Count 15 is the charge of the attempted murder of Mr Lindile Sizani. It should be borne in mind that Mr Sizani was sickly. Ms Kutumane and Ms Belle, it is absolutely shocking how you planned this attempt on Mr Sizani's life. You prepared a drink filled with tablets, you took Mr Sizani's sister away from the house, and you explained to Mr Siyabonga Bele and Mr Lulama Butsaka how to commit the murder. The meticulous planning of this crime clearly pushes this attempt into a serious category. [10] I now turn to the murder of Ms

Nomsa Magwa. Murder, in particular, is very serious. The deceased was in your employment. Ms Kutumane. She was the person you entrusted your house to. She must have been a trustworthy person, who depended on you as her employer. [11] To have someone killed for money is despicable. Through your greed you denied the children of the deceased the love and care of a mother. You denied her siblings a sister. [12] On behalf of you, Ms Belle, there was an attempt to argue that the deceased's children would have lost her in any event because of her HIV status, and that the murder did therefore not affect them that much. This argument was shocking to say the least. It is the exact same line of thought that must have been used by the two of you when you planned the murder of Ms Magwa and the attempted murder of Mr Sizani. The fact that both of your victims were ill is not mitigating, Ms Kutumane and Ms Belie, it is aggravating. The vulnerable in our society, i.e. the young, the aged, the sick and the homeless should be protected. They should not become easy prey for greedy people like you. If this court allows those arguments to be used in mitigation, then this court will be contributing to the destruction of the moral fibre of our society. This cannot be tolerated. The interest of the community [13] Our communities are unhappy about the high crime statistics in our communities. Murder, in particular, is escalating and the courts are being looked at to deal firmly with those convicted of such crimes. The crimes of which you were convicted. Ms Kutumane and Ms Belle, shook the communities of Guguletu and surrounding areas. From the number of people who attended the hearing, it is clear that your actions shocked the people of your community. This court needs to ensure that the people in your community will feel safe to walk their streets again and that they should not, in future, fear that people from amongst them will exploit their vulnerability and kill them for money. [14] The crime of murder was considered by the legislature to be of such a serious nature that it was included in a list of offences in the Minimum Sentences Legislation Act 105 of 1997, (the Act). The offence of murder of which both of you were convicted is one which falls within Part 1 of Schedule 2 of section 51 of the Act. This section states that, where murder was planned or committed with premeditation, this court is obliged to impose a minimum sentence, unless substantial and compelling circumstances exist. [15] In *S v Malgas* 2001(1) SACR 469, the following was said with regard to what substantial and compelling circumstances are not and when courts should deviate from the prescribed minimum sentence. "The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation., and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded." [16] Ms Kutumane. in your case no substantial and compelling circumstances were proven or became obvious from the evidence during

the trial. Ms Belle, in respect of you the same applies. This court could not find any substantial and compelling circumstances. [17] It should be noted that, even if the legislature did not prescribe a minimum sentence, this court considers the offences of which you were convicted in such a serious light that a particularly heavy sentence would have been handed down in any

event. [18] On behalf of both of you it was argued that your minor children need you at their side to enable them to develop into healthy adults. This court must however remind you that, as mothers of these young children, you should have known that they will need you as they grow up before you decided to deprive other children of their mother by taking her life. [19] Also, it was correctly argued by the state that your children would be able to see you at regular times, should you be incarcerated.

This should be juxtaposed with the children of the deceased, who will never be able to see their mother again. [20] The court, in line with its obligations in terms of section 28 of the Constitution, considered the impact that long custodial

sentences would have on your minor children. Section 28(1)(b) and sec 28(2) in particular were considered. They read as follows: "28. (1) Every child has the right - ...

to family care or parental care, or to appropriate alternative care when removed from the family environment: 28. (2) A child's best interests are of paramount importance in every matter concerning the child." [21] This court considered the argument about the interest of your minor children seriously. Ms Kutumane, even though your child is struggling to get used to a lower standard of living than what he was used to. his maternal grandmother is taking care of him as best she can Ms Belle, your children are also cared for by their maternal grandmother. In both your cases the physical needs of your minor children seems to be catered for. Their grandmother, although of a relatively advanced age, is not without support. She has a support system in that some of her adult family members are living with her. [22] This court should however emphasize that it is not a good life lesson for your children to see how someone, who committed a murder, is punished with a non-custodial or short term of imprisonment. The message that this court should send out to the community at large is that murder is a serious crime and offenders should be punished harshly and that you cannot take someone else's life and be punished lightly. This court has a duty to act in the best interest of the minor children. Creating a society where those who commit murders are punished appropriately is surely in the best interest of your children [23] The issue of the interest of minor children when a custodial sentence is considered for their primary caregiver was at the centre of the decision in *S v M3*. The Constitutional Court held that the responsibilities of parents are far-reaching. At para 34 of the judgment the following was held

[5] Ms Kutumane and Ms Belie, it should be mentioned that the people who you paid to commit the gruesome murder on Ms Magwa. were both teenagers. Siyabonga Bele considered the two of you in the same light as his mother. You abused your position as a mother figure to corrupt these two young boys, destroying their lives in the process, your only aim being greed.

The seriousness of the crimes

- [6] The offences which both of you were convicted of, are serious. With regard to counts 1 and 2, the counts of racketeering, the legislature considered these offences of such a serious nature that a specific statute was enacted to ensure that planned, criminal activity can be prosecuted. The aim of your enterprise was to target vulnerable people by taking out funeral policies on their lives and then killing them, because you could not wait for nature to take its course.
- [7] Running an enterprise like this is unacceptable. You are both strong and enterprising women. Ms Kutumane, you used the little that you had and built it up into a successful business. You clearly have the leadership qualities to have become a role model to other women in your community. Instead you used your strong characteristics not to build a better life for yourself and your loved ones, but to kill and destroy a family where another strong woman was struggling to keep her family together by cleaning your house. In the process you also destroyed your own family. Both of you should be punished severely for being part of this enterprise.
- [8] I now turn to the convictions on counts 4, 8 and 10, the charges of fraud. Even though the amounts involved are relatively small, the claims were fraudulently made and it involved the killing of the assured. This court should show its loathing by sentencing both of you with the necessary firmness.
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- [10] I now turn to the murder of Ms Nomsa Magwa. Murder, in particular, is very serious. The deceased was in your employment. Ms Kutumane. She was the person you entrusted your house to. She must have been a trustworthy person, who depended on you as her employer.
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The interest of the community

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sentences would have on your minor children. Section 28(1)(b) and sec 28(2) in particular were considered. They read as follows:

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to family care or parental care, or to appropriate alternative care when removed from the family environment:

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[21] This court considered the argument about the interest of your minor children seriously. Ms Kutumane, even though your child is struggling to get used to a lower standard of living than what he was used to. his maternal grandmother is taking care of him as best she can Ms Belle, your children are also cared for by their maternal grandmother. In both your cases the physical needs of your minor children seems to be catered for. Their grandmother, although of a relatively advanced age, is not without support. She has a support system in that some of her adult family members are living with her.

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[23] The issue of the interest of minor children when a custodial sentence is considered for their primary caregiver was at the centre of the decision in *S v M3*. The Constitutional Court held that the responsibilities of parents are far-reaching. At para 34 of the judgment the following was held

"In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of s 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look

problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable." [24] in para 40 of the judgment the following was held: "... Indeed, it is profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and antisocial criminality is appropriately and publicly repudiated." [25] The Constitutional court went further in para 41 and held as follows: "The Zinn triad postulates that an element of the circumstances of the primary caregivers that will be taken into account is the special severity for the caregivers of being torn from their children. This, however is a consequence of their misconduct for which the law, in the light of all the circumstances, will require that they take appropriate responsibility. ..." [26] The question that needs to be answered is what order this court should make that will reflect both the need to sentence appropriately and to take the provisions of section 28 into account. In *S v Howells*⁴, approved in *S v M5* similar complications were encountered. Van Heerden. AJ, as she then was, made provision in the order to deal with this difficult balancing act. I intend to make a similar order. [27] The court did consider the pleas for mercy seriously and decided to be merciful and to take together some of the convictions for the purpose of sentence. [28] In the circumstances, the following sentences are imposed: Because custodial sentences are inevitable, the Department of Social Development is ordered to monitor and investigate the conditions under which the minor children of the accused are living, while they are incarcerated, and to render assistance should it be necessary. Ms Kutumane, counts 4 and 8, the charges of fraud, are taken together for purpose of sentence and you are sentenced to 5 (five) years imprisonment; Ms Bele, on count 10, the charge of fraud, you are sentenced to 5 (five) years imprisonment. Ms Kutumane and Ms Bele, counts 1 and 2, the charges of racketeering are taken together for the purpose of sentence and you are sentenced to 10 (ten) years imprisonment; On count 15, the attempted murder of Mr Lindile Sizani, you are sentenced to 12 (twelve) years imprisonment. Mrs Kutumane, the sentences imposed on counts 1, 2, 4, 8, and 15, are ordered to run concurrently. Mrs Belle, the sentences imposed on counts 1, 2, 10, and 15, are ordered to run concurrently. On count 18, the count of murder of Ms Nomsa Magwa, you are sentenced to life imprisonment FORTUIN, J

"In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of s 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable."

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Ms Kutumane and Ms Bele. counts 1 and 2, the charges of racketeering are taken together for the purpose of sentence and you are sentenced to 10 (ten) years imprisonment;

On count 15, the attempted murder of Mr Lindile Sizani, you are sentenced to 12 (twelve) years imprisonment.

Mrs Kutumane, the sentences imposed on counts 1, 2, 4, 8, and 15, are ordered to run concurrently.

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On count 18, the count of murder of Ms Nomsa Magwa. you are sentenced to life imprisonment

FORTUIN, J

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