

SOUTH AFRICA / JUDGMENT

S v Mabena (CC 174/2017) [2018] ZAGPPHC 893 (28 June 2018)

[2018] ZAGPPHC 893

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

CC 174/2017

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: CC 174/2017

THE STATE

Versus

PHILLIP PIET MABENA

JUDGMENT ON SENTENCE

SARDIWALLA J

Introduction

- [1] The accused was convicted of the murder of Linah Evelyn Mamba ('the deceased'), committed under circumstances falling within the purview of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("The Criminal Law Amendment Act") in that the offence that he committed was planned or premeditated.
- [2] In considering sentence the Court must have regard to the seriousness of the offence, the personal circumstances of the accused and the interests of society; these must be balanced with the factors that may constitute substantial and compelling circumstances that warrant deviation from the prescribed sentence. The considerations have become well-established as the Zinn triad, namely, the crime, the offender and the interests of society. See *S v Zinn* 1969(2) SA 537 (A) at 540G.

Substantial and compelling circumstances

[3] When determining whether there are substantial and compelling circumstances to justify a lesser sentence a trial Court must consider all factors that may reduce the blameworthiness of the offender and mitigate culpability to come to the conclusion whether substantial and compelling circumstances exist or not. This aspect was set out clearly in the well-known decision of *S v Malgas* 2001 (1) SCACR 469. The Court summarised its approach at 470-471 as follows:

A. "Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly or 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.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against

sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided.”

[4] The concept of substantial and compelling circumstances is not defined in the legislation but is a discretion that has been given to the Courts, to determine on a case by case basis, as to what constitutes compelling and substantial factors. A factor does not have to be uncommon to warrant its departure from the prescribed minimum sentence but can be justified, having regard to the weight of all the relevant factors, where there is a justification for doing so.

Deterrence or retribution

[5] Sentencing demands that in serious crimes of this nature that the accused must be punished but that mitigating circumstances must be taken into account. The position of the accused and the circumstances of the offence deserve thorough consideration. We are strongly guided by the case *S v Holder* 1979 (2) SA and *S v Rabie* 1975 (4) SA 855 (A) which were significant cases on this aspect here the Court stated that:

“punishment should befit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”

[6] A Court is therefore obliged to consider all the sentencing options. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:

‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’

‘. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves

neither the interests of justice nor those of society.’

[7] Referring to *R v Swanepoel* 1945 (AD) 444, the court in *S v Khumalo and Others* 1984(3) SA 327 (AD) at 330 D-E held that deterrence was the ‘essential’, ‘all important’, ‘paramount’ and ‘universally

admitted' object of punishment. It further held that the other purposes of punishment are accessory to deterrence. The retributive theory has to do with punishing a past wrongful act, whilst reformative, preventive and deterrent theories are all about the future, "in the good that would be produced as a result of the punishment" as observed in *Rabie supra* at 862A-B.

- [8] It was pointed out by the Court in the case of *R v Karg* 1961(1) SA 231 (A) at 236A-B that while the deterrent effect of punishment has remained as important as ever, the retributive effect, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. The Court went on further to state that if sentences for serious crimes are too lenient the administration of justice may fall into disrepute and

injured persons may be disposed to taking the law into their own hands.

- [9] That retribution and deterrence are well recognised factors in punishment was also recognised by Nugent JA in *S v Swart* 2004 (2) SACR 370 (SCA) where the learned Judge of Appeal stated in paragraph 12 that:

"[12] What appears from those cases is 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."

Prescribed minimum sentence

- [10] The legislature has prescribed minimum sentences in respect of serious and violent crimes with the introduction of the Criminal Law Amendment Act in 1997. Section 51(1) read with Part 1(a) of Schedule 2 of the Criminal Law Amendment Act which prescribes a minimum sentence of life imprisonment where murder was premeditated or planned. In terms of section 51(3)(a) the Court may deviate from the minimum sentence prescribed if it finds that there are substantial and compelling circumstances justifying imposition of a lesser sentence than of that which is prescribed. For a Court to come to that

conclusion

that a specific crime warrants a deviation from the prescribed sentence it must consider the evidence before it, together with other relevant factors traditionally taken into account when sentencing, together with the principles or purpose of sentencing set

out in the judgments referred to above.

- [11] With regard to life imprisonment, the Supreme Court of Appeal in *S v Bull and Another; S v Chavulla and Others* 2002

- (1) SA 535 (SCA) at para 23 held respectively that:

‘it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment’

and;

“life imprisonment was appropriate and that it was a case where a recommendation was justified in the light of the number and seriousness of the murders, the accused’s strong image of cold-bloodedness, his lying and the total absence of any remorse and his unlikely rehabilitation. The accused was sentenced to life imprisonment on each of the counts and it was recommended that he not be released before he had served 40 years imprisonment.”

Mitigating and aggravating circumstances:

[12] I now turn to deal with all the issues submitted by the parties during the sentencing proceedings, as well as the evidence that was led during such proceedings and during the main trial.

The offender:

The accused’s personal circumstances.

[13] It appears from the evidence in the main trial that at the date of his arrest the accused was unemployed and lived at his maternal home in the days leading up to the incident. The accused testified that he is married but later in the main trial conceded that he endeavoured to mislead the Court in this respect. The accused has four children. He has no previous convictions.

The accused’s emotional state:

[14] The accused testified in the main trial that he stabbed the deceased in self-defence after an altercation broke out between them over the deceased’s unwillingness to attend a meeting to discuss her alleged affair with his uncle. The accused further denied any previous physical altercations insisting that they only had verbal arguments regarding his drinking. However the evidence of the witness Busisiwe Mamba did not corroborate this version as she testified that she witnessed the accused previously assaulting the deceased on several occasions and that the police had also intervened. She stated that the deceased had applied for a protection order against the accused barring him from visiting their home or children but that this was withdrawn. The protection order was handed into evidence as ‘Exhibit G’.

[15] During the main trial, no evidence or argument was led regarding the accused’s emotional state that may have impacted on the alleged provocation by the deceased or contributed towards the accused’s actions in self-defence.

The nature of the offence

- [16] The crime of murder is loathsome and despicable. Disgust and outrage are justifiable reactions and a more balanced look is difficult to achieve when it constitutes domestic violence against women and children.
- [17] The accused has been convicted of a very serious offence. The circumstances surrounding the killing of the deceased in this case is in need of special mention. The post-mortem of the deceased compiled by Dr Wiets Hermanus Steyn and admitted as 'Exhibit D1 and D2', revealed that the deceased died as a result of 'Stabbed Chest' which illustrate the force used on the deceased. The report detailed the external appearance and condition of the body noting that; entrance penetrating incised wound of 2cm on the left scapula below the spinous process, penetrating incised wound right side of the neck 3cm below the right ear and penetrating incised wound 3cm behind the ear.
- [18] The killing of the deceased was found to have been planned. Firstly the accused failed to provide an explanation to the Court as to why he did not alert the deceased of his intention to secure her attendance at the meeting prior to his arrival. Further that his version of what had transpired was also found to be riddled with improbabilities. Even if it were to be accepted that the deceased attacked the accused first, the force used to inflict the wounds and the locations of the wounds on the deceased indicate a clear intent to kill. The accused alleged that he attacked the deceased in self-defence and had stabbed her in the front whilst they were facing each other but the post-mortem report and pictures taken indicate that the deceased was stabbed from behind and therefore did not pose a threat to the accused to justify the use of excessive force. The accused also alleged that the deceased stabbed him first on his head but the defence led no evidence in this regard. The State however aptly pointed out that the attack on the accused which inflicted the open wound was most likely caused during the attack on the accused by the community. This version was corroborated by the evidence of Police Officer Micheal Khoboto who stated that when he intervened to remove the accused from the community attack blood was flowing from his head. Further that the accused's blood could not be found on the knife to corroborate his version. The Court found the State's version to be true beyond a reasonable doubt and accepted it in the absence of evidence to the contrary.
- [19] The actions and or brutal attack of the deceased speak of a man unmoved by the loss of life of another. The accused had ample time for reflection and reconsideration but continued to maintain his defence refusing to acknowledge the blameworthiness of his actions. That, to my mind does not speak to the actions of a man hurt by the loss of the mother of his children but rather indicate a desire to try and mitigate the unfortunate consequences of being apprehended and charged.

Impact of the deceased's death on the family

- [20] Busiswe Mamba, the daughter of the accused and the deceased testified and confirmed that the accused and deceased had a volatile relationship. The Court is mindful that the witness did not live with the deceased or the accused but was reasonably able to provide detailed

accounts of the accused's assaults on the deceased to which no evidence was led by the defence to rebut those allegations. To the contrary a protection order handed in as evidence as 'Exhibit G' corroborated her version. The Court accepted this as a true reflection of the facts. The Court is cognisant that the actions of the accused have deprived the four minor children of their mother.

Interest of society

[21] Many cases involving murder or violent crimes between members of the same family have become prevalent and have frequented our courts. In *Kekana v The State* (629/13) [2014] ZACSA 158 (1 October 2014) Mathopo AJA (as he then was), remarked at para 20 as follows:

"Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also 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 for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in *S v Chapman* when this court said the following:

'Women in this country... have a legitimate right to walk peacefully on the streets, to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without the fear the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.'

It is aggravating that the accused was the boyfriend of the deceased and the person with whom she shared four children. Particularly that the commission of the crime occurred in the confines of her home, a tranquil and peaceful place enjoyed by vulnerable members of the society and considered to be a place free of apprehension and insecurity. In this case the accused attacked a vulnerable and unarmed woman and the mother of his children. What is more concerning and serious is that the deceased, for her own reasons, sought a protection order against the accused but later withdrew it. The Court is mindful of the intimidation and vulnerability of woman in domestic abuse cases. They face constant fear and guilt that makes approaching the Courts that much more difficult.

[22] The uncontested evidence suggests that the accused killed the deceased on a mere suspicion that she was unfaithful towards him. He had previously assaulted the accused in the presence of their children. Prior to that, he had told the deceased that he intended on doing something. This makes his conduct all the more morally reprehensible

The question of diminished criminal responsibility

[23] In a more recent SCA decision of *S v Kekana* there were substantial and compelling circumstances to deviate from the sentence of life imprisonment in that the accused had pleaded guilty; had shown remorse for his actions; was a first offender and therefore there

were prospects that he could be rehabilitated. The accused was also in a turbulent relationship with the deceased where lack of trust played a major role; he felt abused and belittled by the deceased and that when his clothes were packed in a bag in the dining room he felt provoked and snapped. Despite all those factors, the Court found that the cruel and painful death of the deceased at the hands of her husband, the fact that she was killed in the one place that she ought to have been safe, the sanctity of her home, were aggravating. Worst of all, after the house was set alight he failed to rescue her and secure medical assistance for her. The Court found that the callous and heartless attitude in not checking the condition of the deceased was clear proof of his lack of remorse. It agreed with the trial Court that this conduct did not manifest genuine remorse in the manner described in *S v Matyityi* 2011(1) SACR 40(SCA) at para 13.

Remorse

[24] The accused throughout his evidence remained calm and composed and did not indicate to the Court that he regretted his actions. In fact he maintained his innocence and attempted to shift the blameworthiness to that of the deceased who for obvious reasons could not counter argue his version. The Court however noted that the accused was more concerned about the length and delay that the trial stating that it was causing him severe trauma. He showed no remorse for his actions and he did not take the Court fully to his confidence regarding what happened on the day of the incident. The Court in *S v Matyityi* supra at para 13 examined the question of remorse by stating the following:

“...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 knowing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry 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. 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. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions...”

In *Matyityi* supra the Court increased the sentence from 25 years to life imprisonment on the basis, inter alia, that the respondents conducted themselves with a flagrant disregard for the sanctity of human life or individual physical integrity. They acted in a manner that was unacceptable in any civilised society particularly one that ought to be committed to the protection of the rights of all persons including women.

[25] What is concerning is that the accused does not seem to take full responsibility for his actions. He does acknowledge that he stabbed the deceased, but yet he continued to maintain his version that the deceased stabbed him first. He did not appreciate the gravity of his actions and was not willing to accept blameworthiness. That in my view is not an indication of genuine remorse. The deceased was the breadwinner of her family and a mother to four children. There was also no evidence to support his allegations of provocation.

Are there substantial and compelling circumstances?

[26] An interpretation of the cases above all shows a clear motivation behind the actions of the accused in each case. As was observed in the cases I have referred to above, the actions of the accused in the present matter, did not happen in a spur of a moment as a spontaneous reaction to provocation as he alleged and the accused had sufficient time to consider his actions. In the present case clear motive was presented before the Court in that the accused killed the deceased on the mere suspicion that she was unfaithful towards him. The Court concluded that in the absence of any evidence of provocation that the only conclusion that could be drawn for such a heinous murder in viewing the brutality of the physical condition of the deceased's body that the attack was planned and premeditated. This case possibly borders the 'crimes of vengeance' and was possibly due to some argument that ensued between the deceased and the accused.

[27] A striking distinguishable feature between the Kekana case supra and this case is the relationship between the accused and deceased. In the Kekana case there was a protracted period of turmoil between the parties and evidence of same volatile relationship in the present case as well as the callousness with which the attack on the deceased was carried out. The accused had been in situations where his emotions were heightened and uncontrolled and is an aggravating factor.

[28] Having outlined all the factors, I am of the view that aggravating factors outweigh the mitigating factors in this case. Reasons for that are evident from what I have outlined above. I have taken into account the accused's personal circumstances; his emotional condition and mental capacity which he testified had not been affected since. In that regard I have found that he had the choice to report the incident, to seek assistance and to hand himself over to the police. Furthermore, as I have shown he did not take the Court into his full confidence in the main trial.

[29] The Court is confronted with a serious and violent crime in a country where violence against women and children are escalating. In this case, the deceased was an unarmed woman who could not have done anything to protect herself.

[30] In view of all the factors, accumulatively, and specifically with regards to the decision in S v Kekana I find there to be no substantial and compelling circumstances as envisaged in section 51(3) of the Criminal Law Amendment Act 105 of 1997 to deviate from the minimum sentence ordained for this type of crime. In my finding, the aggravating circumstances far outweigh the mitigating factors.

[31] In the result I make the following order:

The accused is sentenced to life imprisonment in terms of Section 51(1)(a) and of the Criminal Law Amendment Act 05 of 1997.

SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCE:

Date of hearing

: 27 JUNE 2018

Date of judgment

: 28 JUNE 2018

Counsel for the State

: ADV.: E MNUGNI

Counsel for the Defendant

: ADV.: F VAN AS

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