

SOUTH AFRICA / JUDGMENT

S v Mafa (CC 17/2021) [2021] ZAMPMHC 13 (6 April 2021) [2021] ZAMPMHC 13

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

CC 17/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

HF

BRAUCKMANN

06th

April 2021

CASE NO: CC

17/2021

In

the matter between:

THE

STATE

And

JAN

KEPAPIKI MAFA

JUDGMENT

(SENTENCE)

BRAUCKMANN AJ

INTRODUCTION

[1] The accused ("Mr Mafa") was convicted on two counts:

COUNT 1:

Murder, read with the provisions of Section 51(2) and part II of schedule 2 of the Criminal Law Amendment Act, 105 of 1997 ("the MSA"), in that on or about 08 September 2019 and at or near Driefontein in the district of Mdutjana he unlawfully and intentionally killed Mapula Moremi ("The Deceased"), an adult female person, and

COUNT 2:

Robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977 and read with the provisions of Section 51(2) of the MSA in that on or about 09 September 2019 and at or near Driefontein in the district of Mdutjana he unlawfully and intentionally assaulted and with force took the following items from the lawful possession of deceased, to wit: an undisclosed amount of cash and a bag of snacks ("the property"). Aggravating factors being that the deceased was killed.

[3] This judgment must be read with the judgment where Mr Mafa was convicted of the crimes in paragraph one above[1]. I am to mete out an appropriate sentence for the crimes of which Mr Mafa had been convicted. The determination of a suitable sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. The court has to take into account all relevant factors, afford the appropriate weight thereto and strike a balance between the various interests at play. The Court must have regard to the so-called 'triad' of factors that have to be considered as set out in the case of *S v Zinn*[2]. The court must take into account your personal circumstances, the nature of the crimes including the gravity and extent thereof and the interests of the community. In determining such a sentence the court must tinge the sentence with a measure of mercy[3] and strive to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation.

[4] The general rule, as held by the Appellate Division, (as it was known) in *S v Rabie* [4] is that:

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

[5] Mr Mafa have been convicted of murder and robbery with aggravating circumstances, falling under part II of schedule 2 and as a first offender of this type of crimes, a minimum sentence of 15 years' imprisonment in terms of section 51(2) (a) of the Criminal Law

Amendment Act[5] commonly referred to as the minimum sentence legislation (“the MSA”) should be applicable. The courts do, however, have the discretion in terms of section 51(3) to impose a sentence lesser than the prescribed minimum if it is satisfied that substantial and compelling circumstances exist which, viewed cumulatively, justify the imposition of a lesser sentence. The Court cannot do so for flimsy reasons nor depart from the minimum sentences lightly[6].

- [6] The court need to be satisfied that the imposition of such a sentence would not be disproportionate in the circumstances and it must be satisfied that the factors warranting a lesser sentence is of such a nature that it justifies departure from the prescribed sentence. In other words, the 15-year sentence is to be regarded as generally appropriate for the crime of murder of which Mr Mafa had been convicted and should not be departed from without "weighty" justification for doing so.
- [7] The court may also impose a sentence in excess of the prescribed minimum if the circumstances and applicable factors of the case warrant same. During closing submissions the court engaged with Mr Mafa’s counsel and counsel for the State that an appropriate sentence could possibly in the circumstances warrant of this Court to exceed the prescribed minimum sentence, taking into account the aggravating features of the murder.
- [8] The murder was callous, brutal and shocking. The deceased died a painful and violent death at the hand of someone who testified that they spent the day prior to the 8th September 2021 together. She did not die instantly; it took her a while to die. She suffered and eventually succumbed to death. The degree of violence applied to the deceased was egregious, excessive, exhibits horrifying aggression and was barbaric. A significant feature of the crime was that Mr Mafa did not call for medical assistance; instead he left her to die.
- [9] The crimes, and more specifically the brutal murder of the deceased, took place in full view of the two minor children who knew the deceased as their only mother. They looked on while he continuously stabbed the deceased for no reason at all. The court is of the view that the two boys will suffer from this traumatic experience for the rest of their lives. The evidence during the trial by Ms Moremi, the deceased’s sister was tragic. She has five children of her own of who one is in grade twelve. There are also two other grandchildren residing with her permanently. Now she have to care for the two boys as well. She is not employed and have to rely on government grants. She has nine children to care for.
- [10] The boys failed their grades in 2019, and the youngest child is aggressive and disobedient. The older one have become very slow and does not react to instructions properly. The death of the deceased is a loss to her children, her family and friends, the community circles in which she assisted. So too to her sister who, in a commissioned Victim Impact Statement explained that she cannot accept the loss. The deceased and she helped each other with the children they were taking care of. The deceased took charge of the children of both households whilst Ms Moremi was employed to earn an income to support them. This support system was taken away, and she must now stay at home to take care of the children.

The grants she is receiving is barely enough to feed all of them. I pause to mention that both Ms Moremi and the deceased's households were women headed, as they were not married. The deceased was assisted financially by Mr Mthabane.

- [11] Mr Mafa testified that before he stabbed the deceased, he had informed her that she must release him from the relationship. That cannot be correct as the two boys as well as Mr Mathabane heard him say to the deceased that she must leave with him. They also heard her refusing and warning him that he should leave failing which she was going to call the police. He then went to the kitchen and returned to the room where he killed the deceased by stabbing her multiple times with the knife.
- [12] Adv Tshwane on behalf of the state put it very aptly: he is a very selfish person who only loves himself. During the commission of these crimes, one big love story trumped all others. That is the story of malignant self-love. He never apologised or showed any remorse. To the contrary, he maintained his "innocence" throughout the trial. By raising so-called "private defence" to the charges, he showed that he would not admit guilt or own up to the mistakes he made.
- [13] Mr Mafa did not testify in mitigation of sentence, but instructed his counsel to make submissions from the bar. He did not display any remorse for the murder of the deceased. Advocate Mtshweni also did not make any submissions in that regard. During the trial no evidence tendered by Mr Mafa indicated any remorse. He did not ask to apologise to the family whilst they were at court either. Mr Mtshweni stated during argument that the reason why no evidence of remorse was tendered or submitted, was because Mr Mafa elected not to call any witnesses or testify in mitigation. That is as good as no reason at all. It is a choice Mr Mafa made, duly assisted by a prudent counsel. Had he testified, or made submissions in this regard, it would have been taken into account as a mitigating factor. That he elected not to do so will not be viewed as an aggravating factor.
- [14] It is undeniable that we are experiencing high levels of violent crime and in particular with reference to this case, violent crime against women. This court sat in the criminal courts in Breyten and Middelburg the last two terms and almost the total roll consisted of femicide matters. It is a very concerning trend in this province. More women most probably perished at the hands of their loved ones than of Covid-19 the last 12 months in Mpumalanga. It is really a very disturbing feature of the family landscape.
- [15] In *State v Chapman*[7] it was held that:
- "Women in this country have a legitimate claim 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 diminishes their quality and enjoyment of their lives."
- [16] In the case of *State v Rhode*[8] the following quotation appear

“Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased's partner, who had the duty and the responsibility to protect her and not to harm her. It is killings like the one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes.[9] “[Own emphasis]

- [17] As mitigating factors Mr Mafa’s counsel stated that the court should take into account the evidence already before it as well as the fact that he is a forty nine year old first offender who until the age of thirty five maintained a straight and narrow path. He did not come into conflict with the law at all. He has a grade 12 and diplomas in security services as well as plumbing. He was unemployed and have two children whom he is not responsible to maintain. His health is good and he is a spiritual healer. Both his parents have passed away and his siblings are not dependent on him.
- [18] He was arrested on 17 March 2020. Therefore he have spent a year in custody already. To that the state submitted that he chose to remain in custody, as the community was up in arms upon his arrest. He stayed in custody for self-preservation. He only cares about himself and nobody else, so goes the state’s argument.
- [19] The court must decide whether the personal circumstances constitutes substantial and compelling circumstances which, viewed cumulatively, justify the imposition of a lesser sentence. In the process of determining whether a departure is called for, the court should weigh all considerations traditionally relevant to sentencing. It is necessary to determine whether the particular circumstances of the case require a different sentence to be imposed. These circumstances include all factors traditionally taken into account in sentencing. None is excluded at the outset from consideration in the sentencing process. Typically, it will be the cumulative effect of all the factors that will point the court one way or the other.[10] Judicial officers should consider whether the prescribed sentences leave them with a sense of unease. When this unease convinces the court that an injustice will be done an alternative sentence should be imposed.
- [20] Having regard to the aggravating circumstances, which includes the extremely violent, cruel and barbaric way he murdered the deceased, weighing that up against the mitigating factors, blended with the total lack of remorse by Mr Mafa, this court fails to find any compelling and substantial circumstances that justifies a deviation from the minimum sentences prescribed by the MSA. He took the law into his own hands and deprived the deceased’s family of their loved one. In our view, direct imprisonment is inescapable for the crime of this gravity absent any sustainable ground of justification.
- [21] The post mortem was conducted four days after the offence was committed. The chief findings are contained in exhibit B and record the cause of death as “multiple stab injuries”. An aggravating feature is the wound that penetrated the second left intercostal space through the section of the heart. The deceased

suffered multiple holes on the upper part of the skirt and the jersey as per paragraph four of the post mortem and the injuries can also be seen on photo ten of exhibit C. The wounds in her hand is most probably a defensive wound. .Further wounds noted were:

1. “MULTIPLE SUPERFICIAL AND DEEP INCISED WOUND ON THE LOWER NECK AND SHOULDER REGIONS”
2. “SUPERFICIAL INCISED WOUNDS ON THE PALM OF THE HAND”
3. “ASSOCIATED PENETRATION OF THE CHEST, HEART AND LUNGS”.
4. “ASSOCIATED CHEST CAVITY HEAMORRHAGES”.

[22] All these wounds were inflicted in the presence of the two children, who knew the deceased as the only mother they had. It is in society’s interests that persons who commit these gruesome offences in the circumstances described are appropriately sentenced. Within the context of this case the injunction to protect women (and children) from violent crime assumes a prominent role.

[23] The aggravating circumstances (in respect of the charge of murder) are so extreme and shocking that far outweighs Mr Mafa’s personal circumstances and other the other mitigatory factors to such extent that the court is of the view that it warrants a sentence in excess of the prescribed minimum period of fifteen years. His circumstances are outweighed by society’s need for a retributive and deterrent sentence by far. In this matter a sentence cognisant of Mr Mafa’s personal circumstances which takes account of the seriousness of the offences

and the need for appropriate severity and deterrence will be appropriate. The court is also of the view that the possibility of

rehabilitation is very unlikely. Specifically because Mr Mafa did not even bother to own up and accept responsibility for his gruesome

deed.

[24] The defence raised, and relied upon (private defence) was a non-starter. When Mr Mtshweni cross examined the first state witness, he already stated the defence to her, and stated that Mr Mafa disarmed the deceased because she stabbed him on the left hand and he then retaliated. How on earth he could convince himself that under those circumstances he could successfully rely on self-defence, is not understandable. No wonder his first counsel, correctly so, advised him to plead guilty. He refused to heed the good advice and elected to humiliate her by insinuating that he was coerced into pleading guilty. That speaks volumes as to his moral blameworthiness and attitude towards the crime.

- [25] In *Dikana v S* [2008] 2 All SA 182 (E) a full bench of the Eastern Cape Division of the High Court confirmed two life sentences on a man who had murdered his ex-girlfriend and her lover, by burning them inside a shack simply because he did not accept that their relationship had ended.
- [26] In an evaluation of the cumulative effect of all the circumstances in this case call for a sentence in excess of the minimum sentence in respect of the count of murder. In my view, if it was not for the fact that Mr Mafa had a clean record for 35 years, the crimes would have justified a life sentence. The mitigating circumstances I have referred to must clearly reduce the life sentence that would otherwise have been appropriate, but in the court's view it is capable of reducing it to 25 years imprisonment.
- [27] In respect of count two, the court is of the view that the minimum sentence of fifteen years for a first offender will be appropriate.
- [28] The two offences were committed in an ongoing course of conduct and should be taken together for purposes of sentencing.
- [29] Accordingly, on count 1 you are sentenced to 25 (twenty five) years' direct imprisonment.
- [30] Turning to count two, which is also a serious crime, you are sentenced to fifteen years' direct imprisonment.
- [31] It is ordered that that the sentence imposed on count two shall run concurrently with that imposed on count one. The cumulative sentence is 25 (twenty five) years' imprisonment.
- [32] No order made in terms of section 103 Act 60 of 2000 (accused is automatically unfit to possess a firearm).

HF BRAUCKMANN

06 APRIL 2021

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE STATE: ADV TSWANE

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS (MPUMALANGA)

REPRESENTATIVE FOR THE RESPONDENT: ADV MTSWENI

INSTRUCTED BY: LEGAL AID SA

DATE OF HEARING: 31 MARCH 2021

DATE OF JUDGMENT: 06 APRIL 2021

[1] *S v Mafa* (CC 17/2021) [2021] ZAMPMHC 11 (31 March 2021).

[2] 1969 (2) SA 537 (A).

[3] S vs Rabie 1975 (4) SA 855 (AD).

[4] Supra.

[5] Act 105 of 1997.

[6] S v Malgas 2001 SACR 469 (SCA).

[7]

[1997] ZASCA 45; 1997 (3) SA 341 SCA at 345A–B

[8]

[2019] JOL 41239 (WCC) par 21.

[9] S v Van Staden (KS21/2016)[2017] ZANHC 21, par 14.

[10] See Malgas, supra.

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