

SOUTH AFRICA / JUDGMENT

S v Malothe (Sentence) (KS/12A/2024)

[2024] ZANCHC 80 (28 August 2024)

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COURT

Northern Cape High Court, Kimberley

BEFORE

O.K. Chwaro

CASE / FILE NUMBER

KS/12A/2024

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IN THE HIGH COURT OF SOUTH AFRICA

KAROO LOCAL CIRCUIT DIVISION, COLESBERG

Case No: KS/12A/2024

Date Heard: 27 August 2024

Date Delivered: 28 August 2024

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrate: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

THE STATE

and

SAMSON MALOTHE

Accused

JUDGMENT ON SENTENCE

CHWARO AJ:

The charge

- [1] Mr Samson Malothe, ("the accused") was indicted on one count of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act, No. 105 of 1997, as amended, and read with section 1 of the Domestic Violence Act, No. 116 of 1998 in that the State alleges that on or about 5 February 2024 and at Riemvasmaak, Colesberg, he unlawfully and intentionally killed P[...] M[...].
- [2] At the commencement of the trial on Tuesday, 27 August 2024, pursuant to the charge having been put against the accused, he tendered a plea of not guilty and opted not to tender any plea explanation and thus put the State to prove each and every element of the charge put against him.
- [3] The State submitted a true copy of the album compiled by Warrant Officer M Mazwi containing still photographs taken at the crime scene, which was admitted as such and marked as Exhibit "A".
- [4] The plea was tendered after the Court had ascertained that the accused understood the nature of the charge proffered against him and the possible minimum sentence that might be imposed on the finding of guilty as prescribed in terms of section 51(1) of the Criminal Law Amendment Act, No. 105 of 1997, as amended, 1998 read with section 1 of the Domestic Violence Act, No. 116 of 1998.
- [5] The State proceeded to lead evidence of four witnesses. The first three witnesses, Mesdames Sylvia Ntombizodwa Relityana and Thembeke Ambraa and Mr Mzukisi Nyekendala were factual witnesses who, in the main, testified about the events leading up to the commission of the offence on 5 February 2024.
- [6] The fourth state witness, Captain Daniel Nicholaas Mostert, testified that he took a confession statement from the accused on 6 February 2024 at around 15h24. The confession statement was read into the record and was not contested by the accused. This statement is marked as Exhibit "B".
- [7] Soon after the evidence relating to the accused's confession was concluded, Mr Steynberg, acting on behalf of the accused, indicated to the Court that the accused wanted to change his plea of not guilty and tender a plea of guilty. To this effect, the accused's plea and its explanation was encapsulated in a statement prepared under the provisions of section 112(2) of the Criminal Procedure Act, No. 51 of 1977, which statement was read into the record and admitted and marked as Exhibit "C".

[8] Ms Pillay, for the State, indicated that the State accepted the accused's plea but for certain facts relating to the allegation made by the accused that he acted in the heat of the moment and that the murder of the deceased was not planned or premeditated. In her view, the accused's conduct amounted to a planned and premeditated action, having regard to the evidence tendered by Mr Nyekendala to the effect that when the accused parted ways with him on the fateful day, he uttered words to the effect that "shit was going to happen that day".

[9] Much time was spent by both legal representatives on submissions made regarding the fact whether there was sufficient evidence proving beyond reasonable doubt that the accused had planned and premeditated the murder of the deceased. However, at the end, it became common cause that the indictment as proffered against the accused and the plea tendered by him, related to the charge formulated within the ambit of the provisions of section 51(1) of Act 107 of 1997, as amended, in that at the time of the commission of the murder, the accused and the deceased were involved in a romantic relationship.

[10] Section 51(1) of the Criminal Law Amendment Act, No. 107 of 1997, as amended, provides as follows:

"51. Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

[11] In turn Part I of Schedule 2 to the Act provides the following offences upon which imprisonment for life is prescribed on conviction:

"Murder, when-

.....

(g) the death of the victim resulted from physical abuse or sexual abuse, as contemplated in paragraphs (a) and (b) of the definition of 'domestic violence' in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim..."[1]

[12] Section 1 of the Domestic Violence Act, No. 116 of 1998 defines a "domestic relationship" in the following terms:

"'domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:

(a) They are or were married to each other, including marriage according to any law, custom or religion;

- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they are persons in a close relationship that share or shared the same residence;..”

[13] Having due regard to the evidence tendered by the four State witnesses, the confession statement made by the accused and the plea explanation tendered by the accused in terms of section 112(2) of the CPA, especially paragraph 6.6 thereof where the accused states as follows

“6.6 I admit that when I acted as set out above, the deceased and I were in a domestic relationship as defined by the Domestic Violence Act”

[14] The accused was thus found guilty and convicted as charged following the careful assessment and scrutiny of his plea statement and the legislative prescripts referred to above.

Sentencing principles in general

[15] I am mindful of the well-established test as articulated in the celebrated decision of *S v Zinn* 1969 (2) SA 537 (A) where Rumpff JA stated that a trial court passing sentence must consider what has become to be known as the “triad of factors”,

being

15.1 the personal circumstances of the accused;

15.2 the circumstances surrounding the commission of the crime, including the gravity of the offence itself; and

15.3 the interests of society in general. By the interests of society, it is meant that a trial court passing sentence must be mindful of the fact that the general community is looking up to the courts of law to apply the law consistently in punishing perpetrators of serious crimes like sexual assault and murder under the circumstances of this case.

[16] In considering the three factors outlined above, the court must not over-emphasise the one factor over another and must try to evenly balance such factors in a manner that will ensure that the sentence fits the offence, i.e. the sentence must be proportionate and must not over and/or under state one of the factors over others.

[17] I am also alive to the established theories of punishment being retribution, prevention of crime, deterrence of would-be criminals and reformation of the offender. In *S v SMM* 2013

(2) SACR 292 (SCA) Majiedt JA said the following:

'I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity.'

[18] The courts must also be mindful of the principle of mercy in passing sentence. This much was stated in *S v Rabie* 1975 (4) SA 855 (A) where the court, after explaining the element of mercy in detail, stated 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".

Legal principles on minimum sentences

[19] I agree with the submissions made by the parties that, having found the accused guilty of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act of 1997, it follows that there is a minimum prescribed sentence that the Legislature has decided must be imposed. The prescribed minimum sentences will not find application where the court holds that there are substantial and compelling circumstances justifying deviation.

[20] I am mindful of the jurisprudence relating to the proper interpretation of the minimum sentence regime as articulated in *S v Malgas* 2001 (1) SACR 469 (SCA) where the following was stated:

[18] "Here lies the rub. Somewhere between these two extremes the intention of the Legislature is located and must be found. The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept of 'substantial and compelling circumstances' was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to

circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.

- [21] In the Malgas case referred to above, the court proceeded to state the following as a summation of what the Legislature intended by introducing prescribed minimum sentences:

“[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”

- [22] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) the Supreme Court of Appeal interpreted the *S v Malgas* decision to mean that a prescribed sentence should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. It follows that the lessons learnt from *Malgas* are that:

22.1 Courts should not hesitate to depart from minimum sentences;

22.2 Such departure must not be for flimsy reasons;

22.3 Courts should always consider separately what an appropriate sentence would have been; and

22.4 Courts should depart to prevent an injustice when regard is had to the proportionality.

- [23] Having said that, one needs to note what the Constitutional Court said in *S v Dodo* 2001 (1) SCAR 544 (CC) at para 38 where the court emphasised that punishment must always be proportionate to the deserts of the particular offender.

Mitigation of sentence

- [24] The accused submitted his personal circumstances, which can be summarised as follows:

24.1 He is 43 years old, unmarried with 5 minor children aged 16, 14, 12, 9 and 4 respectively who are currently residing with their maternal grandmother.

24.2 He lost both parents, with his father having passed away in 1994, followed by his mother in 2013.

24.3 His highest educational qualification is grade 8. He worked as a casual mechanic and earned a salary of R5 000 per month.

24.4 He is a first offender in respect of crimes involving violence.

24.5 He handed himself over to the police after the commission of the crime and have been awaiting trial in custody for 6 months. He tendered a plea of guilty and thus did not waste time.

Aggravating factors

[25] The State proved two previous convictions against the accused. The accused has the following previous convictions:

25.1 On 27 June 2007, he was convicted of housebreaking with intent to steal and theft and was sentenced to 6 months correctional supervision; and

25.2 On 3 August 2022, the accused was convicted for contravention of section 11(1)(a) of the Stock Theft Act 57 of 1959 and sentenced to 12 months direct imprisonment and declared unfit to possess a firearm.

[26] The accused's previous conviction record, otherwise known as the SAP69, was handed up by agreement and marked as Exhibit "E".

[27] The State further submitted two Victim Impact Statements by Ms S[...] M[...], an elder sister of the deceased, marked as exhibit "F" and Mr William Magogwana, the deceased's brother, marked as Exhibit "G".

[28] Both statements detail the devastating effect of the tragic demise of the deceased, who was very young and who both siblings looked forward to see growing up to become someone in life. The siblings have been left traumatised by the incident to the extent that Ms M[...] states that sometimes they keep the house illuminated throughout the night as they are scared that the accused can come back at any time to finish them all off at home. Mr Magogwana states that he is still hurt by the incident and wonders where he will get her sister back.

[29] It is without any doubt that the demise of the deceased severely affected her family especially considering that she was brutally murdered at their family home.

Circumstances surrounding the commission of the offence

[30] Before considering an appropriate sentence, it is apposite to set out the facts, as admitted to by the accused, which formed the basis of his plea of guilty. The accused and the deceased were in a romantic relationship. He suspected her of cheating on him and on the fateful day, he states that he confronted her after having seen her with one Morros. He lost his temper and on the spur of the moment, he stabbed her using half a sheep shear that was in his possession. This happened at the deceased's family home under circumstances where she was defenceless.

[31] Soon thereafter the accused handed himself over to the police and confessed to the murder.

[32] A post-mortem report compiled by Dr Lemainé Fouché, a Pathologist in the employ of the Northern Cape Department of Health based at the Medico-Legal Laboratory in Kimberley was handed in by consent and marked as Exhibit "D". The report details the observations

made by the pathologist and records that she observed a body of an “adult female with multiple penetrating stab wounds to the neck, torso, and left arm, with damage to the left jugular vein, multiple intercostal spaces on the right and left, both lungs and the heart. The brain is macroscopically swollen with flattening

of the gyri. The brain, lungs, liver, spleen and both kidneys are pale in colour. Both kidneys are swollen on cut section.”

[33] The pathologist concludes that the cause of death is as a result of exsanguination (severe loss of blood) as the result of multiple stab wounds to the neck, torso and left arm.

[34] In *S v Matyityi* 2011 (1) SACR 40 (SCA) the Supreme Court of Appeal stated the following at paragraph 13 regarding remorse:

“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. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. 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 gnawing 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 for 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. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.”

[35] I am of the view that the fact that the accused handed himself over to the police immediately after the commission of the offence and pleaded guilty, does not in itself amount to remorse. In my view, it is a demonstration of regret for his actions.

[36] In as far as the accused's personal circumstances are concerned, it is worthy to note what was articulated by Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA) where the court stated as follows:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background”.

[37] It is my considered view that the accused has been found guilty of a serious offence and ordinarily, his personal circumstances ought to recede into the background.

Interests of society

[38] As I have stated above, in considering the submissions by the defence and the State, I have to be mindful of the interests of society, given the manner in which the offence was committed by the accused. Society looks up to the courts to mete out severe and serious punishment for criminal conduct similar to the one upon which the accused has been convicted.

[39] Members of society expect courts to send a clear and unambiguous message to all that acts of cowardice, like taking the lives of women, cannot be condoned. As such society expects severe and stern sentences to be meted out in cases of this nature.

[40] As I have stated herein above, the law requires this Court to deviate from the imposition of prescribed minimum sentences only where there are weighty justifications for such deviation and the imposition of a prescribed sentence would result in an injustice, given the gravity of the offence and the personal circumstances of the accused.

[41] I must hasten to state that in the absence of prescribed minimum sentences, the kind of crime committed by the accused in this case would most likely have invited the imposition of the maximum sentence which a court of law is permitted to impose and I am of the firm view that the personal circumstances of the accused as outlined above do not justify a deviation from the prescribed minimum sentences.

CONCLUSION

[42] I have had due regard to the seriousness of the offence involved, the interests of society which calls out for stern sentences against perpetrators of gender based violence and the personal circumstances of the accused.

[43] Consequently, I find that there are no substantial and compelling circumstances in the present case that would lead to the imposition of a lesser sentence other than the minimum prescribed sentence in relation to the offence which the accused was convicted upon.

[44] Therefore in respect of the charge of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act, No. 107 of 1997, as amended, read with section 1 of the Domestic Violence Act, No. 116 of 1998, the accused, SAMSON MALOTHE is sentenced to LIFE IMPRISONMENT.

[45] The Accused is also declared unfit to possess a firearm in accordance with the provisions of section 103(1) of the Firearms Control Act 60 of 2000.

O.K. CHWARO

ACTING JUDGE HIGH COURT

NORTHERN CAPE

DIVISION, KIMBERLEY

28 AUGUST 2024

Obo State: Adv. L. Pillay On instruction of: The NDPP Obo Accused: Mr. H. Steynberg On instruction of: Legal Aid SA

[1] Paragraph

(g) of Part I of Schedule 2 to Act 105 of 1997 was substituted by section 15(a) of the Criminal and Related Matters Amendment Act, No. 12 of 2021 which came into effect from 5 August 2022

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Prepared on 13 October 2026 · Esheria