

SOUTH AFRICA / JUDGMENT

S v Mlombo (CC 25/2010) [2011] ZAGPJHC 212 (18 February 2011) [2011] ZAGPJHC 212

COURT

South Gauteng High Court, Johannesburg

BEFORE

Meyer

CASE / FILE NUMBER

CC 25/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(CIRCUIT LOCAL DIVISION FOR THE EASTERN LOCAL DISTRICT)

Case No. CC 25/2010

Date: 18 February 2011

In the matter of:

THE STATE Versus JIKA ELVIS MLOMBO

SENTENCE

MEYER, J

- [1] The accused, Mr Jika Elvis Mlombo, was convicted of the murder of the late Mr Timothy Daklaas Mashego ('the deceased') (count 1), of the unlawful possession of a 9 mm pistol with serial number obliterated (count 4), and of the unlawful possession of 9 mm bullets (count 5).
- [2] The murder conviction of the accused is a conviction of an offence referred to in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the Act'). The murder was planned and premeditated. The prescribed sentence, in terms of ss 51(1) of the Act, is one of imprisonment for life, unless substantial and compelling circumstances within the meaning of ss 51(3) thereof exist, which justify the imposition of a lesser sentence. The starting point in respect of considering an appropriate sentence for the murder conviction of the accused is imprisonment for life. *State v Matyityi* (695/09 [2010] ZASCA 127 (30 September 2010), para [18]. In considering whether or not substantial and compelling circumstances exist, which would justify the imposition of a lesser sentence than that of imprisonment for life, the traditional objectives of punishment – prevention, retribution, deterrence, and

rehabilitation - apply, and I am enjoined to weigh the personal circumstances of the accused against the crime committed by him and the interests of society.

- [3] In terms of a confession that the accused made extra-curially and evidence before conviction, he had killed the deceased on 3 September 2009 to bring an end to the deceased's unrelenting revenge from which the accused tried in vain to flee. Such revenge was triggered by a love affair that had existed between the accused and the deceased's wife. The accused told Supt Pule, to whom he made the confession, that he was traced wherever he attempted to hide from the deceased. He was once shot at by the deceased and threatened to be killed and fire-arms were pointed at him by the deceased and by those who acted for him. He claimed that police officers arrived at his house and confronted him with the relationship he had with the deceased's wife. An assault upon him followed whereafter he remained in a coma for three days. He was taken to the Rob Ferreira hospital by ambulance. He also said that he laid charges at the Nelspruit SAPS against the police officers who were involved in the brutality against him.
- [4] I accordingly, for the purpose of sentence, required the police docket relating to the charge which the accused had laid as well as such medical records or information that could be obtained. According to the investigating officer, Cst DD Sanderson, who testified at these sentence proceedings, the personnel at the Rob Ferreira Hospital was unable to furnish him with any such medical records pertaining to the accused. They could simply not be traced. This, I accept, does not mean that such records never existed. Cst Sanderson further presented a police docket that was opened at the Nelspruit SAPS in connection with charges of assault with the intent to do grievous bodily harm, malicious damage to property, and the pointing of a firearm that the accused had laid against two police officers. It, however, appears from the accused's statement in that matter (exhibit 'M') that the charges relate to alleged police brutality in an unrelated matter which does not involve the deceased. The evidence of the accused, who also testified at these sentence proceedings, on this issue is unsatisfactory and does not assist in supporting his claim that he was also subjected to police brutality at the instance of the deceased.

- [5] I also required a pre-sentence report. Mr John Sipho Thwala, a probation officer in the employ of the Mpumalanga Provincial Government Department of Health and Social Services prepared one about the personal circumstances of the accused and the impact of the murder committed by him on the deceased's wife and children (exhibit 'L'). The information contained in the pre-sentence report is not in dispute, except for an erroneous statement that '[t]he accused pleaded guilty on charges of murder, possession of a fire-arm and ammunition.' He did not plead guilty to any of the charges against him. The accused and his mother furnished the probation officer with contradictory information on certain aspects. I consider such contradictions not to be material to the imposition of appropriate sentences upon the accused.

[6] The accused was born on 16 November 1967. His parents had ten children, seven boys and three girls. The accused is their seventh child. Six of his siblings had passed away. His father had also passed away some time ago. The accused, according to the information contained in the probation officer's report, displayed no behavioural problems as a child. His mother considered him to be '... a well behaved child who always avoided conflict with others', and this is why '... it was such a shock to her to learn that her son had killed another human being.' The accused passed standard nine at secondary school and he has been involved in various business enterprises over years. The probation officer inter alia refers to his involvement in '... the construction business, particularly the construction of RDP houses ...', and his '... owning a business where he constructed and installed electric gates.' The accused earned between R3, 000.00

and R4, 000.00 per month at the time of his arrest.

[7] The accused testified that he was married to Ms Angel Tsabetse and that they lived together at the time of his arrest. Two children were born from their union. Ms Tsabetse and their two children reside with the accused's mother, who is a pensioner receiving a government grant. The accused also has one other child with another woman. His children are aged 17, 14, and 8 and all school going. The accused and his mother supported the children financially before his arrest. This responsibility is now carried by his mother alone. The accused's children, and his mother, will undoubtedly suffer emotional and financial hardship if he is to serve a custodial sentence.

[8] The accused's health is not good. He suffers from several few medical conditions. He informed the probation officer that he receives medication from the prison clinic. He also informed the probation officer of emotional problems which he experiences. They are, in the view of the probation officer, ascribed to his '...his worrying about his mother and children.' The accused informed the probation officer that '... he worries about who will look after them when he is in prison. He is worried that his mother is old and might die leaving his children with no one to care for them.' I accept that incarceration is not ideal for a person with the accused's medical and emotional conditions. One also feels deeply for the accused's family. These are factors that must be weighed against the other factors and they must not be considered in isolation.

[9] Another factor that is relied upon as constituting substantial and compelling circumstances within the meaning of that expression is remorse on the part of the accused. He cooperated with the police after his arrest; he told a family member of the deceased what had happened between him and her uncle, the deceased, and he apologised to her during a prison visit that had been arranged at her request; he incriminated himself when he testified at his criminal trial; he told the probation officer that he is remorseful for what he has done and that he is willing to take responsibility for his actions; and, when he testified in mitigation of sentence, he also expressed remorse saying what he '... did is a sin and a criminal offence' and that he '... would like to ... apologise to the Mashego family who are here in court.'

[10] The accused undoubtedly cooperated with the police. I do not, however, lose sight of the fact that the eyewitness, Mr MM Dlamini, identified the accused to the police shortly after the incident had occurred and before the accused assisted the police in making the pointing out of the place where he had hidden the firearm with which he had shot the deceased and of and at the scene of the crime as well as in making the confession to Col TM Pule. I also do not lose sight of the evidence of Const Sanderson, who testified at the trial-within-this-trial, that when he interviewed the accused he appeared to him '... as if he was free and as if he got rid of something that was in his way' and that of Col Pule, who also testified at the trial-within-this-trial, that the accused mentioned to her that he and the deceased had been chasing each other and that they would '... no longer be suffering from the same suffering.' The probation officer states the following in his report:

'The investigating officer reported that even at the time of his arrest Mr Mlombo appeared not to be shaken by what he had done. Apparently at the time of arrest they took him to his mother and when she asked him what had happened he calmly responded that he had killed Mashego, not showing any signs of being shaken by what he has just done.'

[11] The accused pleaded not guilty to all the charges against him. The pointings out and confession that he had made were hotly disputed on various grounds. They were eventually ruled admissible in evidence against him. I found the accused to have been a most unimpressive witness at the trial-within-the-trial and his evidence on the disputed issues to have been untruthful and unreliable throughout.

[12] By the time the accused elected to testify, the evidence linking him to the offences with which he was charged was overwhelming. In giving evidence he then confirmed and adopted most of what is recorded in his confession. He admitted to pointing out to members of the SAPS the scene of the crime as well as the firearm with which he had admittedly shot the deceased. But he belatedly also raised a defence of self-defence. I found that there was simply no question of self-defence.

[13] The accused did not show any remorse when he incriminated himself in the witness stand before conviction. The probation officer states in his report that during his interview with the accused, which interview I should add occurred after the accused had been convicted, the accused '... showed no emotion. He did not appear sad, stressed or uneasy when he related how he murdered the deceased.'

[14] I am in all the circumstances unable to find that the accused's words and actions translate into sincere remorse and a valid consideration to be taken into account in mitigation of sentence. The accused may well presently regret his conduct '... but that does not without more translate to genuine remorse.' Matyityi (supra), para [13].

[15] The accused has previous convictions. On 25 October 2000, he was convicted of malicious damage to property and sentenced to a fine of R1000.00 or three months' imprisonment (exhibit 'K'). This was his third and last previous conviction. His second one was a conviction on 5 March 1997, when he was convicted of reckless and or negligent driving and sentenced

to a fine of R1, 000.00 or imprisonment for three months. His first previous conviction, on 9 November 1987, was for theft and he was sentenced to six cuts with a light cane. These previous convictions, within the context of the accused's present convictions, merely disqualify him from being regarded as a first offender.

[16] The accused committed a grave crime. He acted in flagrant disregard of the sanctity of human life. He planned the

murder. He went into action and shot at the deceased, who was sitting defenceless in his vehicle, several times. Eight

bullets penetrated the body of the deceased. Cartridges and spent bullets were spread all over the area. The accused's

attack upon the deceased was a surprise one at a stage when the deceased on the accused's own version did not pose any threat

to him. There was no need for the accused to kill the deceased and any threat which the deceased in the past or in the future might have posed to the accused's life or limb could effectively have been avoided by other means. The accused said the following in his evidence before conviction: 'I went there to do what I wanted to do and I did it.' The accused condemned his adversary to death and executed him in cold blood.

[17] It appears from the probation officer's report that the death of the deceased had and still has devastating consequences for inter alia the deceased's wife, Ms Beaty Thwala, and their three children. The family was and still is deeply affected by his untimely death. The deceased was involved in the lives of his three children and they experience great difficulty in coming to terms with the loss of their father. Apart from their emotional suffering and the sequelae thereof, which are set out in the probation officer's report, the death of the deceased brought severe financial hardship to the family. The deceased was their

breadwinner. His death brought about a severe lowering in their standard of living. His children are now deprived of the indulgences that they were accustomed to. His wife is unable to pay the utility bills in respect of their family home in White River. She is financially assisted by members of her family to provide for their basic needs.

[18] Our country at present suffers an unacceptable and distressing incidence of violence. Ponnann J, in a recent judgment of the Supreme Court of Appeal in *Matyiti* (supra), para [23], describes the present situation as follows:

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual.'

The community demands that courts deal firmly and severely with offenders such as the accused and for appropriately severe punishments to be imposed upon them.

- [19] The personal circumstances of the accused and the other mitigating factors and circumstances in his favour cumulatively do not amount to substantial and compelling circumstances within the meaning of the Act when balanced against the gravity of the murder committed by him and the legitimate interests of society.
- [20] In giving due weight to all the circumstances and considerations relevant to the imposition of sentences for the accused's other convictions, I consider appropriate sentences of imprisonment for a period of five years and for a period of one year for his convictions of the unlawful possession of a firearm (count 4) and of the unlawful possession of ammunition (count 5).
- [21] In the result:
1. The accused is sentenced to:
 - 1.1 imprisonment for life pursuant to his conviction of murder (count 1);
 - 1.2 imprisonment for a period of five years pursuant to his conviction of the unlawful possession of a firearm (count 4); and
 - 1.3 imprisonment for a period of one year pursuant to his conviction of the unlawful possession of ammunition (count 5).
 2. The sentences of imprisonment for a period of five years pursuant to the accused's conviction of the unlawful possession of a firearm (count 4) and of imprisonment for a period of one year pursuant to his conviction of the unlawful possession of ammunition (count 5) run concurrently with the accused's sentence of imprisonment for life pursuant to his conviction of murder (count 1).
 3. The accused is declared unfit to possess a firearm.

P.A. MEYER

JUDGE OF THE HIGH COURT

18 February 2011

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