

SOUTH AFRICA / JUDGMENT

S v Mphuthi (CC78/2014) [2017] ZAGPPHC 16 (24 January 2017) [2017] ZAGPPHC 16

COURT

North Gauteng High Court, Pretoria

BEFORE

Thobane

CASE / FILE NUMBER

CC78/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(CIRCUIT LOCAL DIVISION OF THE EASTERN CIRCUIT DISTRICT,

MIDDELBURG)

CASE NO: CC78/2014

24/1/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

THE STATE

AND

THABISO SHADRACK MPHUTHI ACCUSED

SENTENCE

THOBANE AJ,

- [1] The accused, Mr.Mphuthi, was charged with and pleaded guilty to a count of murder. A statement in terms of 112(2) of the Criminal Procedure Act 51 of 1977 was prepared on his behalf and it was read into the record by his legal representative. He confirmed the contents thereof as true. He was accordingly found guilty. It is now the duty of this court to sentence him.

- [2] The various principles applicable in the determination of a fair, balanced and appropriate sentence are trite. "What has to be considered is the triad consisting of the crime, the offender and the interest of society". See *S v Zinn* 1969 (2) SA 537 (A) at 540G. In the determination of what would be an appropriate sentence regard must be had inter alia to the main purposes of punishment. These purposes were described in *R v Swanepoel* 1945 AD 444 at 455 as deterrent, preventative, reformatory and retributive.
- [3] It is common cause that the provisions of section 51 of Act 105 of 1997, the Criminal Law Amendment Act, are not applicable. Not much was disclosed and is therefore known about the facts of this case. The little that was disclosed is to be found in the section 112(2) statement of the accused. I will return to the facts later.
- [4] The accused, against whom the state did not prove any previous convictions, did not testify in person in mitigation of sentence. He also did not call any witnesses. A Probation Officer's report was procured and tendered into evidence with the concurrence of both parties. What follows are the personal circumstances of the accused interspersed with a summary of the Probation Officer's report, but first the testimony of the deceased's mother.
- [5] Ellen Hlamalani Mtshweni testified in aggravation for the state. She stated that the deceased was 14 years of age when she was killed. She was at the time a learner doing grade 8. The deceased had two siblings aged 20 and 11 years. Ms Mtshweni was previously employed as an educator but left her job due to health reasons. Her husband was employed at Highveld until the company closed down. The family of the accused stays across the street from her house. They are neighbors.
- [6] She testified that the death of their daughter has devastated her entire family especially because it was at the hand of a person they knew very well, a neighbor, the accused. The last time she saw her daughter before she was killed was when she left and indicated that she was going to a friend's place to do homework. She was never to be seen alive again. What followed was even more tragic. Her husband received an SMS demanding payment of the sum of R400 000-00 failing which their daughter would be killed. The phone at the time the message was sent through was being charged and was off, so the SMS could not be read. The following day she was phoned by her husband who related the SMS to her. They then went about retracing the deceased's steps. The friend whom the deceased had indicated she was to visit to do homework, stated that the deceased never arrived at her place. They were devastated and kept looking for the deceased. At some point the accused even came to their home and asked one of her daughters if the deceased had returned. This she stated was cruelty on the part of the accused for he knew very well that he had killed their daughter. The police eventually traced a cellphone to the accused who led them to the body of the deceased. Her entire family has been traumatized by the death of her daughter. The family is receiving counseling once a week.

- [7] The accused is 22 years old. At the time of the murder he was 16 years old turning 17 in about 24 days time. He is the last born child in a family of three siblings. He stayed with his parents until the incident after which his parents moved him to a different place in an attempt to shield the family of the deceased from trauma as they were neighbors. He was brought up by both his parents who tried to instill Christian values in his upbringing. He attended formal schooling and passed grade 8. He attended grade 9 but failed it and had to repeat. He eventually dropped out of school.
- [8] He has no dependents and is unemployed. The Probation Officer reports that the accused spends his free time with friends who are abusing substances. She records, without expanding or substantiating, that drugs contributed to the offense. She states further that she was informed by the accused that when the offense was committed he was intoxicated.
- [9] While awaiting trial, the accused spent 7 months in custody. Mr. Pilusa, his counsel, asked the court to take into account the fact that the accused pleaded guilty and therefore did not waste the court's time. He submitted further that the accused is remorseful of his conduct. He had wanted to speak with the family of the deceased to ask for forgiveness however the bail conditions made it impossible for him to do so. His family contributed R10 000-00 towards the funeral service of the deceased which must count in his favour, it was submitted.
- [10] The Probation Officer is further of the view that the environment in which the accused lived contributed to the commission of the offense in that the township is characterized by substance abuse and has a high crime rate. There is also high unemployment in the area. The basic needs of the offender, were well taken care of by his parents. It is further reported that the offender prays about the incident and has asked for forgiveness. He claims that he had a romantic relationship with the deceased and that on the day of the incident things happened so fast. He wishes he could turn back the clock and act differently.
- [11] The Probation Officer discusses the various sentences at this court's disposal. She states that crimes such as the one the accused has been convicted of should not be tolerated by society and that relevant punishment should follow. She is of the view, that the accused has shown remorse about the offense. She is further of the view, in discussing the various sentencing options, that the most suitable sentence is one in terms of section 276(1)(b) of the Criminal Procedure Act, that of direct imprisonment. Sentences in terms of section 276(1)(h) and 276(1)(i) are characterized by her as unsuitable and lenient in the circumstances of this case.
- [12] Mr. Pilusa submits that an appropriate sentence would be one in terms of section 276(1)(i) or that the accused be sentenced to 6 years imprisonment, in that he has pleaded guilty and even took the police to where the body of the deceased was dumped, has shown remorse, has been affected by the incident and had to drop out of school. It was further submitted that the accused is remorseful.

- [13] For the State Mr. Van der Merwe submits that the accused was just a few days shy of his 17th birthday therefore that he was much closer to being 17. He argues that the accused has shown no remorse in that he had many opportunities to apologize for his actions but failed. The first of such opportunities was when he pleaded. Mr. Van der Merwe further argues that the accused could have handed himself over to the police soon after the incident. The failure to do so, it is argued, is inconsistent with a person who is remorseful. He had another opportunity to enter the witness box in mitigation of sentence and tender an apology. His failure, it is submitted, is telling.
- [14] The state is of the view that the defence has failed to place any facts before court why a sentence in terms of section 276(1)(i) would be a suitable sentence. It was further submitted that given the impact of the murder on the family, the fact that the crime is prevalent in this area and the fact that the accused has shown no remorse, a sentence of 6 years imprisonment, if imposed, will send a wrong message. The state argues that ordinarily a sentence of 15 years imprisonment would be imposed for crimes of this nature and that the court should use that as a benchmark and impose a sentence of 12 years imprisonment.
- [15] Below, is my analysis of the mitigating factors as well as argument advanced in aggravation of sentence. This exercise entails a reflection on the approach in *S v Zinn*.

A. THE CRIME

15.1 I now return to the facts of this case. As stated above the facts of this case although accepted by the state are in my view cryptic. All that the accused stated in his section 112(2) statement is that he had an argument with the deceased, fought with her, overpowered her then strangled her. On these facts the court is expected to rely in imposing an appropriate sentence. I am afraid these facts are inadequate. The accused does not state what the argument he had with the deceased was all about. It is also not stated what is meant by the statement that the accused and the deceased "fought". The court is not taken into the accused's confidence how the strangulation took place and whether any instrument was used. What the court can discern from the tendered evidence, cryptic as it is, is that when the body of the deceased was recovered it had started to decompose. The area where the body appeared to have been recovered, according to the photo album, is consistent with an attempt to hide the body, yet nothing is said by the accused.

15.2 Murder is a very serious crime. The life of the deceased who was at the time only 14 years old was taken senselessly. The deceased must have died a horrific death. In the absence of factors which seriously mitigate against the imposition of maximum sentence possible, the court must oblige and impose such a sentence.

B. THE OFFENDER

15.1 The accused comes from a loving family and was brought up within a very stable family environment. He appears to have gone off the rails and was prone to using substances. The court accepts that the accused is very young. There was no submission before me that age played a role in the commission of the offense. It was simply said that he is a youthful offender. Susceptibility

to influence, pliability and immaturity were not advanced as factors that should in the circumstances of this case be considered as factors that should temper the court's approach to sentencing. However case law dictate that youthful offenders deserve to be given a second chance and are therefore given special consideration. In the case of *S v Mabuza & Others* 2009 (2) SACR 435 (SCA) at paragraph 23, the learned Cachalia JA stated that;

"...So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption."

15.2 In *S v Matyityi* 2011

(1) SACR 40 (SCA) at paragraph 14 the learned Ponnann JA stated in respect to 'relative youthfulness'

"It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his deeds rule out immaturity...the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult".

15.3 In the case of the *Centre for Child Law v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 477 (CC) the learned Cameron J recognised that youthful offenders may be in more need of protection and that their crimes may stem from immature judgment, however at paragraph [29] he stated;

"...the children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that "(a) child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail".

15.4 The accused's youthfulness is a factor that weighs heavily against imposition of a long term of imprisonment. Other factors that count in favour of the accused are that he spent 7 months in custody awaiting trial and that he is first offender.

15.5 I am however not persuaded that the accused is remorseful of his conduct. His plea of guilty is not on its own a pointer to remorse. More is expected of a remorseful individual. Ponnann JA, in *S v Matyityi* 2011 (1) SACR 40 (SCA), para 13, had the following to say about remorse;

"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".

From the above it is clear that the accused has failed to open up to the court, as the state correctly pointed out. This court has not been told by the accused what motivated him to commit the murder and he did not disclose to this court whether he has a true appreciation of the consequences of his actions, a hurdle he must clear if he wants to not only express but also demonstrate true remorse.

15.6 The Probation Officer points out in her report that the use of substances by the accused contributed to the offense. She states that the accused started using substances in 2010. The accused in his section 112(2) statement stated that he had smoked dagga on the day of the incident. In the address in mitigation the use substances was not accentuated as having played a role on the day.

C. INTEREST OF SOCIETY

15.1 Murder is one of the most prevalent crimes in our country. Society expects this court to protect it from people who roam the streets at night ready to pounce at defenseless women. It is for this reason that the sentences that courts impose must have an element that speaks to the plight of society. R v Karg 1961 (1) SA 231 (A) at 236G-H, Schreiner JA had the following to say in a passage appearing at 2368:

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment"

See also : S v Flanagan 1995(1) SACR13(A) at 17 d-e.

15.2 Vivier JA writing for the unanimous Appellate Court said the following in S v Di Blasi 1996(1) SACR 1 (A) at 10 f-g :

"..... The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be

brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and to serve as a just retribution for the crime but should also deter others from similar conduct."

- [16] I must, in considering the question of whether the punishment meted out to the accused is fair and just, approach the issue at hand in these sentencing proceedings in a spirit of calmness, guided by what Corbbet JA, as he then was, said in *S v Rabie* 1975 (4) SA 855 (A) at 866 A- C;

"A judicial officer should not approach punishment in a spirit of anger because being human that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity nor on the other hand surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and pressure of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of an appropriate punishment in the light of all the circumstances of the particular case."

- [17] Mr. Pilusa argued that the accused can still be rehabilitated. While agreeing with this submission I remain of the view that retribution and deterrence, should not recede to the background. Rehabilitation can still be achieved even where direct imprisonment is imposed. In *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519d-e; the following is said;

"Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence (cf Windlesham' Life Sentences: The Paradox of Indeterminacy' [1989] Crim LR at 244, 251).

Retribution may even be decisive (*S v Nkwanyana and Others* [1990] ZASCA 95; 1990 (4) SA 735 (A) at 749C-D)."

- [18] It is my judgment that the elements of retribution and deterrence must come to the fore in order to bring it home to the accused that serious crime is not treated leniently by our courts but rather harshly, so that those who may be inclined to commit serious crimes know what fate would befall them when the law catches up with them. I am however not suggesting that the accused is being sacrificed at the altar of deterrence. See in this regard: *S v Sobanda* 1992 (2) SACR 613 (AD). Nor is it to say that individualisation has no role to play when it comes to sentencing of a particular type of crime. It is rather more to re-affirm the trite legal principle that sentences that courts impose must also reflect the gravity of the offence committed, though tempered with a measure of mercy according to the circumstances. A sentence of direct imprisonment is in my view unavoidable.

- [19] In the result after weighing all the relevant and applicable factors, the accused is sentenced as follows;

1. The accused is sentenced to 12 (twelve) years imprisonment.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

HEARD :

23/01/2017

SENTENCE :

24/01/2017

ON BEHALF OF THE STATE :

ADV. Van Der MERWE

ON BEHALF OF THE ACCUSED :

MR. PILUSA

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