

SOUTH AFRICA / JUDGMENT

S v Msweli (Sentence) (SS 20/2023) [2024] ZAGPJHC 987 (25 September 2024)

[2024] ZAGPJHC 987

COURT

South Gauteng High Court, Johannesburg

BEFORE

M V Noko

CASE / FILE NUMBER

SS 20/2023

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG.

(PALM RIDGE)

Case No.: SS 20/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES.

DATE 25 September 2024

SIGNATURE

In the matter between:

THE STATE

and

VELI SIYABONGA MSWELI

Accused

JUDGMENT ON SENTENCE

Noko J

Introduction

and background.

- [1] The accused was convicted of two counts of common assault, one count of assault with intent to cause grievous bodily harm, murder read with the provisions of section 51(1) of the Criminal Law Amendment Act[1] (“CLAA”) and defeating the ends of justice. This is the judgment on sentence.

Parties’

submissions.

- [2] The defence’s counsel submitted that the accused was made aware that he is facing a long sentence as the conviction in respect of murder is covered by section 51(1) of the CLAA in terms of which minimum sentence is prescribed. Further, that departure from imposing the minimum sentence should be backed up by the existence of substantial and compelling circumstances as envisaged in section 51(3) of the CLAA.
- [3] For the purposes of sentencing, the counsel continued that the court should consider the triad principle as set out in Zinn[2] which relates to the personal circumstances of the accused, the nature of the offence and the interests of the society. At the same time the court should have regard to the objectives of sentencing, namely, prevention, rehabilitation, deterrence and retribution.
- [4] The personal circumstances of the accused are as follows: that he is 38 years of age; he is unmarried and has two children, a boy and a girl, both of school going age. The children are receiving government grants as their mothers are unemployed. He has passed grade 11 and had to drop out due financial constraints. He is receiving income in the amount of R 5000.00 per month from rentals received from renting out of the back rooms and applies amount of R 500.00 for maintenance for each child. He has a previous conviction of theft which was committed in 2009. In view of the fact that the said offence was imposed more than 10 years ago and is not linked to the current offences the defence’s counsel submitted that the accused should be treated as a first offender.
- [5] The defence’s counsel further submitted that the

background

with regard to the offences committed were clearly chronicled in the judgment I penned and need not be regurgitated. In brief, counsel continued, the accused out of anger subsequent to an argument he had with the late L[...] P[...] ended up assaulting both her and her children and also ended up killing Rohan Phillips.

[6] The defence's counsel further submitted that it is indeed correct that the crime of femicide is becoming endemic and the courts are enjoined to arrest it. And as a result, the legislature promulgated minimum sentence legislation with the objective of, inter alia, setting out heavier sentences for the said offences. The court is impressed to exercise a balancing act and not find itself over emphasising the interest of the community at the expense of other factors including the personal circumstances of the accused.

[7] With regard to the existence of substantial and compelling

circumstances as envisaged in section 51(3) of the CLAA the defence highlighted the fact that neither the statute nor the courts have provided a definition of what both substantial and compelling circumstances means. This is premised, the argument continued, on the fact that sentencing is within the repository of the trial court's discretion.

[8] The court could evaluate factors in determining a just sentencing and if the conclusion is that injustice would result then in such an instance such factors shall be considered as constituting substantial and compelling reasons to depart from the prescribed minimum sentence.

[9] The factors which the defence contended that they amount to substantial and compelling circumstances in addition to the above are that as the accused is still young, aged 38, he is a good candidate for rehabilitation, that the pre-sentence duration being a period of between June 2022 and July 2024 should be taken into consideration. In this regard the defence referred to Radebe[3] where it was held that there is no prescribed formula as the duration could be due to a variety of factors contributing to the delay. Further reference was made of Dlamini[4] where Supreme Court of Appeal held that the test is not to consider whether the pre-sentence duration constitutes substantial and

compelling reasons to depart but whether effective sentence is just and proportionate to the crime committed. The afore-going factors

when considered cumulatively would constitute substantial and compelling reasons for the court to deviate for the prescribed minimum sentence.

[10] The prosecution on the other hand contended that though there is in general a balancing exercise of various factors by the court prior to deciding on the appropriate sentence, where specific crimes are concerned the courts would be expected to put more emphasis on other factors whilst underplaying others.

[11] In addition, the argument continued, the accused is facing a serious crime and crimes against women and children are so pervasive that the society is expecting more from the courts. The conduct of the accused

in carrying out the offences convicted of was violent, insensitive and planned.

- [12] Whilst remorse is important aspect in the exercise of mercy it is expected of the accused to be genuine in demonstrating that he accepts guilt and prepared to take responsibility.
- [13] As aggravating factors, the prosecution highlighted the following: prevalence of the offences, the complainant and her children were staying together with the accused and therefore expected more from the accused, the offences took place in their home where it is expected to be a safe area, the complainants' children witnessed the murder of their brother and the assault of their mother, the complainant has not found closure since the corpse of her child has not been recovered yet. The accused has failed to show any remorse.
- [14] The prosecution contended further that the factors which the defence identified as substantial and compelling are unsustainable. The accused is 38 years old and cannot be considered a youth for rehabilitation purposes. The question of time spent prior sentence is a factor to determine whether effective sentence would be just and not necessarily to be considered as a substantial and compelling reasons to depart from the prescribed minimum sentence. In any event, so the argument continued, where the probable sentence is life imprisonment which is not determinable the duration spent awaiting conviction would not have an impact on the sentence.
- [15] In addition, the contention by the accused that he is a father of two children should not have any impact on the sentence as he is not a primary care giver of his minor children.

Legal principles.

- [16] It was held in *Malgas*[5] (and correctly referred to by counsels) that the legislature was ordained with the powers to prescribe the minimum sentence and the attendant obligations were discharged through the promulgation of section 51 of the CLAA. In doing so, the legislature was alive to the fact that the presiding officers cannot be mechanical in their endeavour to dispense justice hence included section 51(3) of the CLAA which permit deviation from imposing a minimum sentence where there are substantial and compelling reasons to do so.
- [17] It is correct again as stated by counsels that the courts have not been prescriptive to define what are substantial and compelling

reasons.

The courts would in this regard consider cumulatively factors which are generally employed to determine a just sentence. The court in *Zinn* recommended that the court should look at the offence, the offender and interest of the community.[6] There must be a balancing exercise between the factors for the court to determine a just sentence. Those factors are to be considered in tandem with the main purposes of punishment as mentioned above[7]. The Supreme Court of Appeal stated in *Mhlongo*[8] that a sentencing court "...has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion".[9]

[18] As stated earlier if the prescribed minimum sentence would be disproportionate to the crime, the criminal and the needs of the society a court would be entitled to impose a lesser sentence.[10] That notwithstanding the court cannot impose a lesser sentence for flimsy reasons. Whilst the defence has requested that the court

should show mercy in deciding on the sentence the Supreme Court of Appeal in Chapman[11] stated that the courts are duty bound to send a clear message "... that the courts are determined to protect equality and freedom ..., and we shall show no mercy to those who invade these rights." [12]

[19] The community needs the protection from the courts against being savaged by those who unleash serious offences unto it. Public outcry should not be ignored. That notwithstanding it was held in SMM[13] that the said public outcry "... cannot be permitted to displace the careful judgment and final balancing that are involved in arriving at an appropriate sentence." [14]

Analysis.

[20] I had regard to the personal circumstances of the accused that the accused is an unmarried 38 year old man. He is a first offender; he has two minor children who depends on him for maintenance. The said children resides with their mothers and further that he has already spent almost three years in detention prior to sentencing. It should be noted that the personal circumstances may be found to play a miniscule role in respect of matters where the accused is facing serious charges. The Supreme Court of Appeal stated in S v Vilakazi that:

"In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what period be, and those seem to me to be the kind of flimsy grounds that Malgas has said should be avoided". [15]

[21] It is noted further that the relevance of pre-sentence period is important and at times failure to consider same may may to an unjust sentence. The Supreme Court of Appeal considered this aspect again and stated in Kubai[16] that "...there must be a recognition of time spent in custody in arriving at an appropriate custodial sentence. A failure to do so may result in an unjust sentence that approaches or exceeds the maximum term of imprisonment".²⁴ The period spent in detention prior sentence may become less important where the sentence to be imposed may be as long as is envisaged in section 51(1) of the CLAA.[17]

[22] On the other hand, the contention advanced by the prosecution that aggravating circumstances outweigh the mitigation factors resonates with my assessment. The fact that minor children had witnessed the assault and the murder of Rohan including that the body of Rohan is nowhere to be found make the situation worse. In her Victim Impact statement, the complainant's simple wish was captured in the following words "Just to bury [my son] so

my heart can rest, that's all I want". Is this too much to ask? The traumatic consequences as identified by the complainant and pain she is still suffering from on her chest and hands are hard to bear. She said she is still fearful and stressful.

- [23] The accused had an opportunity to reflect on his conduct after submerging the child into the water at least on two occasions and also having taken a break to assault the complainant to a pulp. He went back and ensured that the defenceless Rohan dies. How inhuman this was.
- [24] The killing of an innocent child for being angry with his mother is unforgiveable. It is normally acceptable for parents to be buried by their children and not the other way. The absence of remorse is indicative of an intentional refusal to acknowledge the crime and pain he caused to the complainant and her children. This posture would certainly have a negative impact on the possibility of rehabilitation. This conduct justify an imposition of a severe punishment. The punishment should also send a message to the general community that reliance could still be placed on the judiciary to frown at the conduct of those who decide to take the law into their own hands. It would also deter the would-be criminals of the likely consequences of their criminal conduct.
- [25] Again, on the question of remorse the court invited the defence to address the court on the question of remorse which would ordinarily form the foundation for possible rehabilitation and the invitation was regrettably rebuffed. It therefore follows that the route to rehabilitation would be riddled with insurmountable hurdles linked to the failure to acknowledge and appreciate the wrong created.
- [26] What contributes more to the aggravation is the fact that all these crimes were unleashed in the presence of the children. Witnessing death of an innocent child who was not fighting back should be a worse sight ever to any normal human being let alone to the children. In addition, the corpse has not been recovered and this would mean that the road to recovery would be tedious and long for the complainant.
- [27] I have considered the factors alluded to in mitigation and am persuaded that they are outweighed by the aggravating factors alluded to. I am not persuaded that the factors exist to call for the departure from the minimum prescribed sentence in terms of section 51(1) of CLAA.
- [28] In the premises the following sentences are imposed:
1. 5 years for the assault of L[...] P[...] with intent to cause grievous bodily harm.
 2. 3 years for common assault of Rowen Phillips.
 3. 3 years for common assault of R[...] P[...].
 4. Life imprisonment for murder of Rohan Phillips read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.
 5. 5 years for defeating the administration of justice.

Sentences is 1,2,3, and 5 will run concurrently with sentence imposed in 4.

M V NOKO

JUDGE OF THE HIGH COURT

JOHANNESBURG

Dates:

Hearing: 19 September 2024.

Judgment:

25 September 2024.

Appearances:

For the State: Adv. NP Tyeku. Office of the Public Prosecutions, JHB. For the Accused: Adv. T. Ndhlovu, Legal Aid of SA.

[1] Criminal Law Amendment Act 105 of 1997.

[2] S v Zinn 1969

(2) SA 537 (A).

[3] S v Radebe 2013 (2) SACR 165 (SCA).

[4] S v Dlamini 2012

(2) SA 1 (SCA).

[5] S v Malgas 2001(1) SACR 469 (SCA).

[6] It was stated in S v Matyityi that the importance of proportionality and balance between the crime, the criminal and the interest of society must be stressed.

Further that "... it remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that

is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored."

[7] See S v Rabie 1975 (4) SA 855(A). Further stated in Malgas that "... the ultimate impact of all the circumstances relevant to the sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardized response that the Legislature has ordained." S v RO 2010 (2) SACR 248 (SCA) where Heher JA stated that "Sentencing is about achieving the right balance (or, high-flown terms, proportionality".

[8] S v Mhlongo 2016

(2) SACR 611 (SCA).

[9] Id at para [9].

[10] See Malgas at para 25.

[11] S v Chapman

[1997] ZASCA 45; 1997 (3) SA 341(SCA).

[12] Id at para 4. This was a rape case and was cited on the basis of parity of reasoning.

[13] S v SMM 2013

(2) SACR 292.

[14] Id at para 13.

[15] S v Vilakazi 2012

(6) SA 353 (SCA).

[16] Mfana Ignitius Kubai v The State

[2024] ZASCA 123 (30 August 2024). 24 Id at para [14].

[16] Mfana Ignitius Kubai v The State

[2024] ZASCA 123 (30 August 2024).

24 Id at para [14].

[17] See SCA in S v Ngcobo 2018 (1) SACR 479 where it was stated that the difference that two years would make to the sentence of life imprisonment is so marginal that it does not render the sentence shockingly disproportionate.

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