

SOUTH AFRICA / JUDGMENT

S v Ndebele (sentence) (SS 50/2022) [2023] ZAGPJHC 936 (21 August 2023)

[2023] ZAGPJHC 936

COURT

South Gauteng High Court, Johannesburg

BEFORE

W J Britz

CASE / FILE NUMBER

SS 50/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: SS 50/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE

SIGNATURE

In the matter between:

THE STATE

and

NDEBELE, NJBULO SIBONELE

ACCUSED

SENTENCE

W J BRITZ, AJ

- [1] The accused, Mr Njabulo Ndebele, has been convicted of the crime of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997, in that the court found that the murder was premeditated. As such, the crime attracts a mandatory minimum sentence of life imprisonment, unless the court finds the existence of substantial and compelling circumstances that call for a lesser sentence.
- [2] In order to determine an appropriate sentence, the court has to carefully weigh and balance the nature and seriousness of the crime, the interests of society and the personal circumstances of the accused, without over or under emphasizing any of these factors. The court must also blend the sentence with a measure of mercy as is called for by the circumstances of this case. (S v Zinn 1969 (2) SA 537 (A)) In addition to this the court must also be alive to the purposes of sentence, which, in general terms, are retribution, prevention, deterrence and rehabilitation. (S v Rabie 1975 (4) SA 855 (A))
- [3] In S v Malgas 2001 (1) SACR 469 (SCA) the Supreme Court of Appeal laid down the law as to how sentencing courts should treat and implement the provisions of the Criminal Law Amendment Act, 105 of
1997. The SCA made it clear that when it comes to sentencing it can no longer be business as usual and that the prescribed minimum sentences should be viewed as generally appropriate for the offences they have been prescribed. The court further declared that those prescribed minimum sentences should not be departed from lightly and for flimsy reasons.
- [4] At the onset of the sentencing procedure Mr Bovu informed the court that it was her instructions not to tender any evidence and to only address the court. I will return to her address in due course. Mr Ehlers on the other hand called a witness, Ms Masesi Nompumelelo Chicorora, to testify.
- [5] Chicorora testified that she was a maternal aunt of the deceased. The deceased was raised by both her biological parents. When they passed away the deceased moved to Chicorora's parental home where Chicorora's parents took care of the deceased. At the time of her demise the deceased was 25 years old. She was residing in Johannesburg and living off the inheritance she received from her parents. She was the biological mother of 2 children – a girl who is 8 years old and a boy who is 5 years old. Both children live with their maternal grandparents who take care of them with assistance of government grants and financial and other contributions from the family. The deceased had a proper funeral that was paid for by a policy held by Chicorora's elder sister. The family of the accused also contributed to the funeral of their own accord.

Chicorora testified further that the death of the deceased had an adverse effect on her family and especially on her personally. It was the first time that she saw the body of a person who had succumbed to that many stab wounds. As a result she was traumatized and could not sleep for many a night. When asked about the accused's apology during his testimony in chief in the trial, Chicorora testified that she did not consider it an apology but merely an expression of

condolences. She formed this view based on the fact that the accused maintained his innocence and showed no respect or remorse. This pained her.

- [6] In her address in mitigation of sentence, Ms Bovu placed the following on record: The accused is 27 years old, having been born on 16/01/1996. He is single. He is the biological father of the deceased's 2 children, who are now residing with their maternal family following his arrest. He suffers from a chronic illness for which he is on medication. His highest qualification is grade 11. Prior to his arrest he worked as a taxi driver and earned R1100 per week. He used part of his income to maintain his children. The offence the accused has been convicted of is serious as shown by the fact that the deceased was stabbed 21 times with a sharp object. The case also falls under the category of domestic violence.
- [7] Ms Bovu submitted that the following should be found as substantial and compelling circumstances allowing the court to deviate from the prescribed minimum sentence: (a) The accused is a 1st offender. (b) He has shown remorse and apologized to the family of the deceased in his testimony. (c) He has been in custody awaiting trial since his arrest on 05/11/2021. (d) He is a father and a life sentence will deprive his children from having a meaningful relationship with him. (e) He also sustained injuries. (f) He was of a young age during the commission of the offence and can still be rehabilitated.
- [8] Lastly Ms Bovu requested the court to show mercy to the accused and impose a sentence of 20 years imprisonment.
- [9] Mr Ehlers submitted that the accused is not a care-giver of his children and that he cannot assist the care-givers in his current circumstances. The accused did not show remorse as he did not accept the consequences of his actions. He further submitted that the accused's age is no excuse for his actions. He submitted that the amount of times the accused stabbed the deceased is aggravating as well as the type of relationship between them. Mr Ehlers referred the court to the case of *S v Kasongo* 2023 (1) SACR 321 (WCC) and at the hand thereof submitted that there are no substantial and compelling circumstances in the accused's case and that the court should therefore impose the prescribed sentence.
- [10] On the subject of s103(1) of the Fire Arms Control Act, 60 of 2000 Ms Bovu elected not to make any submissions and stated that the accused is not in possession of a fire arm or a licence to possess a fire arm. Mr Ehlers requested the court not to make any order and let the *ex lege* position take its course.
- [11] It has been said by many presiding officers and in many courts here and abroad that the sentencing stage of a criminal trial is very often the most difficult stage of the entire trial. I reconcile myself wholeheartedly with these sentiments. It is at the sentencing stage where the trial becomes more people-orientated as opposed to the forensic fact finding mission before the verdict. One therefore has to be careful to ensure that reason prevails and that passion or emotion is not allowed to rear its ugly head and distort what should be a careful balancing

act.

- [12] It stands to reason, on the accepted facts, that the complainant was the victim of systematic domestic violence perpetrated against her by the accused in order to humiliate her for the sake of his own 'toxic masculinity' to borrow a phrase from my learned Brother Thulare J in *S v Kasongo* 2023 (1) SACR 321 (WCC). The evidence show that the deceased was subjected by the accused, to verbal, emotional, psychological and physical abuse as described in the Domestic Violence Act. The accused threatened the deceased's life in the presence of her aunt, Mbongo. On the night of 05/11/2021 he asserted powers of entitlement over the deceased by taking her cellphone, instructing her to unlock it and scroll through it or look at its contents without having been invited to do so by the deceased while the deceased was in the company of her friend, Gama. Not happy with what he saw on the phone, the accused turned to violence and hit the deceased with clenched fists in the face, causing Gama to leave in search of assistance.
- [13] The absolute horror of what happened next is difficult to fathom even as we only heard it second hand from witness accounts. The trauma suffered by actual eye witnesses to the stabbing must have been indescribable. The attack self was savage and only for the benefit of the accused's selfish gratification of the need to be victorious in the constant power struggle he perceived going on between him and the deceased. The accused's actions were brazen and callous. He attacked the complainant in a densely populated area, as can be witnessed from the photographs in exhibit C, while onlookers gathered at the seam of the scene. There he straddled the unarmed deceased while she was laying defencelessly on her back, looking up at him and stabbed her 21 times with a sharp object of which the blade was approximately 20cm long in her face and upper body while she only had her arms and hands with which to block his blows. When he had finished, he simply stood up and walked away.
- [14] The testimony of Chicorora shows that the deceased was a young care-free woman with money from an inheritance and the rest of her life before her. She was also the mother of 2 very young children with whom she still had contact although they were not living together. Her death leaves a void in the lives of her family.
- [15] Society is, rightly so in my view, outraged by the conduct of people acting like the accused did. Law-abiding people, such as the majority of people in our country, can do little more to show their indignation at crimes like this one than to draw up petitions for accused people to be denied bail – as we have heard happened in this case – and toi-toi outside government buildings and courts to make their voices heard.
- [16] Parliament has over the years attempted to stem the plague of gender-based violence and femicide in our country by introducing and amending various pieces of legislation as mentioned in *Kasongo*, above, and by various public campaigns. Our courts have contributed in the fight against gender-based violence and femicide by denying bail and imposing severe sentences in deserving cases. The judiciary has not shied away from

reminding itself of its constitutional obligation to protect the rights of vulnerable members of our society and to adhere to the strands of natural justice as well as new and innovative legislation that attempts to punish offenders and deter would-be offenders from committing gender-based violence, femicide and other serious offences. (*S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA); *S v Malgas* 2001 (1) SACR 469 (SCA)) I respectfully agree with the sentiment expressed by my learned Brother Thulare J in Kasongo, that we should continue to let our voice be heard through the sentences we impose and in doing so protect the interests of society.

- [17] In determining the appropriate sentence it is also necessary to visit the personal circumstances of the accused. As I have said at the beginning of this judgment, sentencing is a people-orientated process. No sentencing court should ever forget that despite the accused being on the wrong side of the law, he remains a human being and by his very nature prone to err.
- [18] I take note of all the accused's personal circumstances as placed before me by Ms Bovu, without repeating them here. It is however necessary to pause and consider the factors Ms Bovu submitted constitute substantial and compelling reasons for deviating from the prescribed sentence.
- [19] The accused is the biological father of 2 minor children. This court is enjoined by s 28(2) of the Constitution to give paramountcy to the best interests of these children when determining the appropriate sentence to impose. It is however common cause that the accused is not the primary care-giver of these children as defined in *S v M* (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2007 (2) SACR 539 (CC). I am therefore satisfied that despite whatever sentence I impose, the children would not be deprived of their primary care-giver and that the effect of the sentence on them would therefore be sufficiently mitigated to give paramountcy to their best interests. The accused is in any event not entitled to use the children as a get out of jail free card, especially in circumstances where he himself has deprived them of their mother. The effect of his actions on the lives of his children was something the accused should have thought of before committing this offence. It can therefore not be regarded as a substantial and compelling circumstance on its own.
- [20] It was submitted that the accused showed remorse. This was disputed by both Chicorora and counsel for the State. The dicta in *S v Matyityi* 2011(1) SACR 40 (SCA) at paragraph [13] is applicable: "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.... Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error... It is the surrounding actions of the accused, rather than what he says in court, that one should rather look at. 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." In this case it is clear that the accused has not taken the court into his confidence. The court still does not know what really happened between him and the deceased, which lead to the savage attack on her. In the circumstances I have to

agree with Chicorora and counsel for the State that the accused apology in court is not true remorse, but the hollow voicing of condolences and an attempt to make him too look like a victim of these sad circumstances.

- [21] As to the submission that the accused acted in the spirit of youthfulness I am not convinced that any immaturity has been shown to lend credence to this submission. On the contrary it appears that the accused knew exactly what he was doing and acted with a mature knowledge thereof. (Matyityi, above)
- [22] The fact that the accused is a first offender cannot on its own be held to be a substantial and compelling circumstance. The rest of the personal circumstances of the accused placed before this court are nothing but ordinary circumstances which courts hear in almost every criminal trial. Such ordinary mitigating factors, it was held by this court in *S v Speelman* 2014 JDR 0916 (GSJ), cannot be elevated to the status of substantial and compelling circumstances.
- [23] Individually and taken together, I am unable to find that there exist any substantial and compelling circumstances in this case that would cause me to deviate from the prescribed sentence. The accused's personal circumstances, however favourable, must bow the knee before a sentence focusing on retribution and deterrence. The accused will have an opportunity in prison to rehabilitate and that may be a factor determining the length of his incarceration.
- [24] For all these reasons the accused is sentenced to LIFE IMPRISONMENT in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997.
- [25] I have not heard any submissions why I should make an order deviating from the ex lege position of s 103(1) of the Fire Arms Control Act 60 of 2000 and therefore I make no order. The accused is automatically, by operation of the law, unfit to possess a firearm.

W J BRITZ

ACTING JUDGE OF THE HIGH COURT

Representations

For the state: Adv. C Ehlers from NPA

For the defence: Ms S Bovu form Legal- Aid

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