

SOUTH AFRICA / JUDGMENT

S v Nesane (079/2008) [2008] ZASCA 122; [2009] 1 All SA 464 (SCA) (26 September 2008)

[2008] ZASCA 122

COURT

Supreme Court of Appeal

BEFORE

Mthiyane, Maya, Boruchowitz

CASE / FILE NUMBER

079/2008

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 079/2008

In the matter between

MMBENGWA

ALFRED NESANE Appellant

and

THE

STATE

Respondent

**Neutral Citation: Nesane v The State (079/2008) [2008] ZASCA
122 (26 September 2008)**

CORAM: Mthiyane, Maya JJA et Boruchowitz AJA

HEARD: 1 September 2008

DELIVERED: 26 September 2008

Summary: Criminal law – appellant convicted

of wife's murder – intention to kill not proved –

conviction

substituted with that of culpable homicide –

**sentence of eight years' imprisonment antedated to the date of
sentence**

imposed.

ORDER

On appeal from: High

Court, Thohoyandou (Lukoto J sitting as court of first

instance).

The appeal is upheld.

The conviction and sentence are set aside and the order of

the court below is substituted for the following:

‘The accused is found guilty of culpable homicide. He is sentenced to undergo eight years’ imprisonment antedated to 26 January 2001. In addition he is declared unfit to possess a firearm.’

JUDGMENT

MAYA JA (MTHIYANE JA and BORUCHOWITZ AJA concurring)

- [1] The appellant was convicted of the murder of his estranged wife, Cecilia Elelwani Nesane (the deceased) by the Venda High Court (Lukoto J). He was sentenced to 45 years’ imprisonment and declared unfit to possess a firearm. He appeals against both conviction and sentence with the leave of this court.
- [2] That the appellant fired the shot which killed the deceased was not in issue. What was in contention was whether or not the shooting was intentional.
- [3] The deceased was last seen alive by her mother, Mrs Gladys Ntsandeni, with whom she stayed at her maiden home around 09h00 on 17 June 2000. She was taking her four-year old mute boy, born of her marriage to the appellant, to a speech therapist. She never returned home and calls to her cellular phone went unanswered. At about 16h45 on the following day the local police received a report from the appellant’s brother, Mr Mbulaheni Nethononda, that the appellant was found at dawn in his motor vehicle near his parents’ home. He was unconscious, seemingly from gassing himself with the aid of a pipe connected to the vehicle’s exhaust pipe, and was rushed to hospital. The police were handed a letter reportedly written by him which (translated from Venda) read as follows:

‘To whom it may concern

Now that I am not married, my wife is gone she is at her home. It was after she destroyed my family, she brought confusion and agony to my children, I tolerated everything in welcoming her with love. I am a maternity person here. I wipe the stools of the child

everyday, I cook, I wash, I take the child to crèche, while the mother wanders all over the country, while regarding life it as life at its best. I tolerated all this.

In the morning of this day 17/06/2000 while I asleep, I was awoken by the window panes being broken and the doors being ploughed by a pick. When I rose up I found Kanakana of Ntsandeni standing before me holding a knobkerrie I retreated she was hitting me with it. I ran into the room and she hit the door three times and it got broken and I ran into another room and I picked a fire-arm so as to threaten her with it. I was surprised having slipped onto the wall, the fire-arm mistakenly fired and I then saw her lying on the floor with blood.

Because I loved her, I then realised that I would not stand for this, I realised that it is important that I should follow her. My children will remain with my mother at the place where they are staying at Nzhelele-Mauluma. The small child whose name is Shakalanga should be taken to Makwarela at her granny one Gladys Ntsandeni.

I am gone!

Nesane Mmbengwa

17/06/2000'

[4] Guided by this letter the police, led by Sergeant Robert Ramala, followed the trail to the appellant's home. There, they found the back and front door handles damaged and a pane in the front door broken. A pick axe, a spade, a garden fork and a pair of pliers apparently used to force entry were found next to the door. Upon forcing their way into the premises the police made a gruesome discovery in the living room. A dead body of a woman subsequently identified as the deceased was lying face down in a pool of congealed blood coming from the mouth. There was a baseball bat between her legs. The room was in utter disarray and it appeared as if there had been a fight.

[5] A letter was found on the coffee table which (translated from Venda) read:

'You decided to go away from your own kraals while you thought that you will get a better future. Of course you are in the process, you came to boast your boyfriends and the house which you are to buy in Louis Trichardt. You destroyed my family, my children are confused.

There is no one who will benefit between you and me, we have all of us come to the end.

This house should be sold, the money should support the children and further to make the final touches for the house at Nzhelele which the children should stay in.

Nesane M.A

You came to destroy the whole house I do not know what was the problem. Now you did well. I shot you with no intention, but my heart is burning. Lets go together to our grandparents'.

[6] According to the ballistics evidence the weapon used in the shooting was a .38 revolver which belonged to the appellant as a bullet and one of the two casings found at the scene were positively linked to it. It does not appear from the evidence that the garden tools suspected to have been used in damaging the points of entry, the baseball bat or any item at the crime scene were tested for fingerprints. The chief post-mortem findings were not

recorded by the court below. According to Sergeant Ramala, they had not been able to determine the precise location of the deceased's injury. The learned judge did, however, mention in his judgment that 'the cause of death was a gunshot wound' and it appears from the summary of substantial facts which was part of the appeal record that the 'post mortem report indicated the cause of death as asphyxia due to ruptured respiratory tract, subdural haemorrhage, fracture of the skull all due to gunshot'. Against this background the post mortem report, which we were told from the bar had gone missing from the high court file, was not placed before us on appeal. More about this below.

[7] The State had no eyewitness and the appellant did not give evidence. The case against the appellant therefore turned on circumstantial evidence, based on the two letters mentioned above tendered in evidence, with the appellant's consent, as his suicide notes. In addition to the contents of the suicide notes, the State relied upon the police and ballistics evidence already set out, Mrs Ntsandeni's testimony, supported by extracts from the deceased's diaries, to the effect that her marriage to the appellant was abusive and unhappy and the appellant's failure to testify.

[8] The essence of the reasoning and conclusion of the court below is reflected in the following extract from its judgment:

'In truth what I have before me here, is the version of the state under oath and as rightly pointed out by [State counsel] the prima facie case may be conclusive where there is no reply from the [accused].

Before me I have the evidence that [the deceased] was shot at ... your own house ... and that is where she died. She died of a gunshot wound. The bullet came from your own gun. You do not deny that you are the one who pulled the gun in order to scare

her because she was very aggressive firstly towards the house itself by smashing its doors and windows and secondly towards your person by beating you up with the baseball bat.

Mr Klaaf on your behalf referred to several decided cases ... [but] I am of the view that the facts in them are not apposite here. In this particular case I am convinced that the state succeeded I proving its case against you beyond reasonable doubt and

I am convinced that you are the one who shot and killed [the deceased] on the day in question and that the said killing was unlawful. You are therefore found guilty ... of murder.'

[9] It is contended that the learned judge misdirected himself in a number of respects; (i) by not referring the appellant for

psychiatric evaluation before the trial proceedings commenced to ascertain his fitness to stand trial;¹ (ii) by allowing an incompetent legal representative to defend him (iii) by not ensuring that the appellant was informed at the outset that he faced the imposition of a minimum sentence if convicted as charged which resulted in the breach of his right to a fair trial; (iv) by admitting the hearsay evidence of the deceased's diary entries without affording the appellant an opportunity to

give evidence; (v) by convicting the appellant of murder on the basis of evidence which at best established culpable homicide and (vi) by imposing an incompetent sentence of 45 years' imprisonment.

[10] I turn to discuss the above points. As to (i), sec 77 of the Criminal Procedure Act 51 of 1977 obliges a court '[i]f it appears to [it] at any stage of criminal proceedings that the accused person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, [to] direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.' Section 79 sets out the mechanisms for an accused's psychiatric evaluation.

[11] I find no merit in this criticism. In my view, the fact of the appellant's failed attempt to take his life without more – which is all that was relied on by his counsel – placed no obligation on the court below to question his mental state. There is no indication at all on the record that the appellant did not follow the proceedings. Any lingering doubt must surely be dispelled by his lengthy and lucid testimony given in mitigation of sentence during which he was, in a rather bizarre twist facilitated in no small degree by the court below, cross-examined at length on the merits of the shooting.

[12] The criticism against the quality of the appellant's representation at trial stage in point (ii) may similarly be given

short shrift. It is not supported by the record which amply reflects that his legal representative raised relevant objections and legal arguments where necessary and in fact withdrew the potentially contentious admissions relating to the shooting.

[13] With regard to the penalty provision in point (iii), it is so that the State failed to bring it to the appellant's attention

in its indictment. Section 35(3)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 grants an accused the right to be informed of a charge with sufficient detail to answer it. As to what the accused's ability to answer a charge entails, Cameron JA remarked as follows in *S v Legoa*²:

'[U]nder the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the [Criminal Law Amendment Act of] 1997 ... should be clearly set out in the charge sheet. The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism,

may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or in a Superior Court, from the summary of substantial facts the State is obliged to

furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'

- [14] The appellant, who was legally represented, was furnished with a comprehensive summary of substantial facts. This document, in my view, contained all the relevant facts that he would have required to place him on guard regarding the nature of the defence he had to put up. It hardly seems to me, in the circumstances, that his ability to answer the murder charge was in any way impaired by the State's omission. The court below thus committed no vitiating misdirection in this regard.
- [15] As to point (iv) I do not believe it necessary to delve in any detail into the admissibility or otherwise of the extracts of the deceased's diaries. As the appellant's counsel conceded, the court below, in any event, clearly accorded them no weight as reflected by its finding that they were couched in such a way that only their author could understand them and indicated only that the deceased was an unhappy woman.
- [16] The next question raised in point (v) is whether the appellant was properly convicted of murder on the available evidence. As appears from the synopsis of the evidence led at the trial, the State did not proffer any version to counter the admissions made in the appellant's suicide notes which, in my view, are not at all improbable. Sergeant Ramala's evidence that there was an attempt to force entry and signs of a fierce struggle inside the house only serves to corroborate the appellant's version. There is absolutely nothing to gainsay the reason alleged by the appellant for getting hold of the firearm and the manner in which the fatal shot (or shots in view of the ballistics evidence that two spent cartridges were recovered at the scene) was discharged. The absence of the post mortem report which would have told us the precise nature and location of the injuries sustained by the deceased; evidence of the location of the spent cartridges found at the scene which could have given a composite picture of the position of the parties when the shots were fired and evidence whether any fingerprints were found on the baseball bat allegedly used by the deceased and the tools suspected to have been used in forcing entry all make it impossible for this court to draw any inferences, least of all inferences that would counter the defence version.
- [17] Whilst there are huge gaps in the evidence which only the appellant could have explained, it nonetheless cannot be said in the circumstances of this case that the appellant exposed himself to any risk of having adverse inferences drawn from his reticence, having had no obligation to give evidence in the first place. There is simply no evidence which shows that he intended, directly or not, to kill the deceased. As was properly conceded by his counsel, all that the evidence establishes is negligence on his part. He took possession of a lethal weapon and must clearly have foreseen that in the mobile scene a shot might be discharged and strike the deceased. He should therefore have been convicted of culpable homicide.
- [18] The conviction of murder and, accordingly, the sentence of 45 years imposed in respect thereof – which was grossly excessive

for a murder conviction considering that the minimum sentence prescribed by law³ is 15 years imprisonment – must therefore be set aside.

[19] It remains to determine an appropriate sentence in the changed circumstances. There are numerous, weighty mitigating factors present in the matter. The deceased was the aggressor whose conduct, ie her desertion and neglect of the children, boasting to the appellant about her affairs with other men and her plans for the future which did not include him, appears to have deeply hurt, humiliated and provoked him. Her aggression, in my view, removes this case from the realm of domestic violence which presents a serious problem in this country. Quite clearly from the facts, there is very little likelihood that the appellant will repeat the offence. He expressed deep remorse for the deceased's death and such remorse is stated in terms in his suicide notes and reflected in the very fact that he attempted to kill himself after the shooting.

[20] The appellant was and still is a valuable member of society despite his incarceration. He reached the mature age of 43 years

without breaking the law. He was a stable family man and hands-on father rearing four young children from a previous marriage and his and the deceased's young son. He presently supports the children from income earned from teaching fellow inmates in prison.

He was a principal of a highly successful high school and community leader sitting in a number of educational boards. He held BA, UEd and BEd degrees before the offence. He has continued his studies in prison and obtained numerous educational qualifications including a Master's degree in education. He is presently pursuing a PhD degree in education. That he is an excellent candidate for rehabilitation is undoubted in the circumstances.

[21] However, regardless of these circumstances which count strongly in the appellant's favour, the fact remains that he took a human life. The deceased was a mother and actively partook in the rearing of her child. She was a highly skilled and educated lecturer rendering a valuable contribution to her community as a key figure in sports development. She was in the prime of her life and was working hard to improve her life and that of her child. From her mother's account it does not appear that she set off to attack the appellant when she left home that morning. What diverted her from her route and brought the unfortunate events about is unfortunately a mystery that will likely never be solved. Any sentence that this court imposes must reflect the sanctity of her life. Taking into account the interests of society and its concerns about fatalities resulting from the use of firearms, the interests of justice clearly dictate a custodial sentence.

[22] The appellant was in detention for a period of seven months awaiting sentence and that must be factored into his punishment. A sentence of eight years imprisonment antedated to the date on which he was originally sentenced, seems to me eminently suitable in all the circumstances.

[23] In the result the appeal succeeds. The conviction and sentence are set aside and for the order of the trial court is substituted the following:

The accused is found guilty of culpable homicide. He is sentenced to eight years' imprisonment antedated to 26 January 2001. In addition he is declared unfit to possess a firearm.

MML MAYA

JUDGE OF APPEAL

Appearances:

For Appellant: S O Ravele

Instructed by

S O Ravele Attorneys

Louis Trichard

Naudes Incorporated, Bloemfontein

For Respondent: A I S Poodhun

Director Director of Public Prosecution

Thohoyandou

Director of Public Prosecution, Bloemfontein

1 In terms of s 77 of the Criminal Procedure Act 51 of 1977.

2 2003 (1) SACR 13 (SCA) paras 20-21. See also S v Ndlovu 2003 (1) SACR 331 (SCA) para 11.

3 Section 51(2) of the Criminal Law Amendment Act 105 of 1997.

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