

SOUTH AFRICA / JUDGMENT

S v Ngcobo (CC72/14) [2016] ZAKZPHC 36; 2016 (2) SACR 436 (KZP) (7 April 2016)

[2016] ZAKZPHC 36

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Poyo Dlwati

CASE / FILE NUMBER

CC72/14

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: CC72/14

DATE:

07 APRIL 2016
REPORTABLE
THE
STATE
V
THEMBELIHLE
NGCOBO

JUDGMENT

DELIVERED ON: 07 APRIL 2016

POYO DLWATI J

- [1] The phrase ‘sentence is a lonely and onerous task in the criminal justice system’ became a reality again in this matter. It is difficult because one must reach a balance of the triad referred to in *S v Zinn*,^[1] namely the crime, the offender and the interests of society in order to arrive at a just sentence. The sentence must be fair to the offender and to the interests of society. None of these factors must be over emphasised more than the other. Having said that, Ms Ngcobo, you have been convicted of a very serious and prevalent offence, which is murder. Because of its seriousness the Legislature has prescribed a

minimum sentence of fifteen years imprisonment to be imposed unless substantial and compelling circumstances exist that justify the imposition of a less severe sentence.[2]

- [2] The substantial and compelling circumstances are those, as described by Marais JA in *S v Malgas*,^[3] that reduce the moral guilt of the offender, which when taken together cumulatively their impact justify the imposition of a less

severe sentence than the one prescribed. Even though the Legislature has prescribed the minimum sentences, the factors that

were traditionally considered during the sentencing stage prior to the enactment of the Act are still applicable and I have referred to them above. Furthermore sentence must also have a blend of mercy where applicable.

- [3] As alluded to above, murder is not only prevalent in our country but is very serious. It is the end of a person's life, which is a right guaranteed in our constitution. You did not only deprive the deceased's family of a son and a brother but you deprived his children of a father, including your now two year old son. You also deprived Ms Khanyile of a husband. As describe in exhibit 'F', the report by the probation officer, the deceased was a loving and caring person who was a bread winner in his family and supported his children. They now suffer from financial difficulties because of your deeds. What you did is unforgettable and one day you will have to answer to your own child as to what happened to his father. The interests of society strongly come to the fore that it will not tolerate such offences and you must therefore be punished accordingly. Our courts can only meet the interests of society by imposing appropriate sentences. You must be prevented from committing similar offences such as this and a strong message must be sent to would be offenders that our courts will not tolerate conducts, such as yours. In the process you must also be rehabilitated.

- [4] However your personal circumstances reflect a rather sad and disturbing background. Even though you were born from the marriage of your parents, according to the report of the Correctional Services Social Worker, Ms Geldenhuys, handed into evidence by consent of the parties as exhibit 'J', your mother passed away when you were eight years old and your father passed away when you were nine years old. After having suffered physical and emotional abuse at the hands of various relatives, you further witnessed domestic violence perpetuated on your grandmother by her partner. At the age of 13 years you had to take care of your siblings and you fell pregnant with your first child at a very early stage as she is now 16 years old. Out of all that you were fortunate in that you passed matric and obtained a secretarial course. You were also fortunate in that you were able to secure employment with the South African Police Services (SAPS) in 2006 and this is where you met the deceased and had a relationship with him since 2012.

- [5] This relationship unfortunately did not work out the way you would have wanted it to. However, prior to this relationship with the deceased, according to the report of the State Principal Clinical Psychologist, A. Kramers-Olen, admitted into evidence by consent as exhibit 'E', during 2006 you had a relationship with a colleague who was physically and

emotionally abusive and reflected on a tendency to be controlling. This led you to consult with a psychiatrist, Dr Moodley, during 2008. During this time you presented a suicidal ideation and depressed mood and were treated for depression. You were hospitalised and started on anti-depressant

medication. It is evident on the various reports that you were not always compliant with your medication, apparently, due to the side effects caused by the medication. At least there were about five admissions for depression between 2009 and 2013.

[6] Kramers-Olen found that the abuse, in particular by your uncle, appears to have resulted in a pervasive distrust of male figures,

which has manifested at times along the developmental trajectory. She found that when you became involved with the deceased you believed you could rely on him and when this did not happen your levels of frustration and anger arose and they appear to have been activated by criticism and the rejection of you and your baby by the deceased. She found that there was evidence of hostility and anger, particularly in the context of interpersonal relationships. She also found that your childhood and adolescent years appear to have been characterized by loss, deprivation and abuse which may have predisposed you to the development of the psychological and psychiatric difficulties in adulthood.

[7] She further found that your personality style is characterised by depression, anxiety and physical complaints as well as strong needs for nurturance/dependence in interpersonal relationships. This, according to Kramers-Olen causes underlying feelings of anger and hostility that are easily activated by criticism. Furthermore, she found that the early abuse you suffered in your life has resulted in pervasive distrust of male figures. The rejection by the deceased on the day of the incident activated a severe emotional response.

[8] According to Clive Willows, another Clinical psychologist, whose report was entered into evidence as exhibit 'D', on the date of the incident, in your state of depression and anxiety it was difficult to formulate any intent or appreciation of consequence that would be worse than what you currently perceived. According to him, a feature of depression is persistent, negative, hopeless thinking which parallels a general emotional state of melancholy. Pessimistic thoughts create a belief that nothing will change and any positive outlook is futile. Sufferers of depression presume the worst and develop a non-caring attitude towards the future which is perceived as providing inevitable sadness and disappointment. Such persons develop a set of beliefs that inform them that any intervention or decision on their behalf is pointless as the outcome will inevitably be negative. With such entrenched cognitions, consequences of actions are not rationally measured and judgment becomes impaired.

[9] He holds a similar view with Kramers-Olen, that you seek nurturance and protection and fear abandonment and desertion. The relationship

with the deceased provided the antithesis of your own deep emotional needs. When this reality was accepted by you, you experienced severe depression. According to Willows, your experiences evoked deep seated emotional anguish and distress and would be a catalyst for severe psychological pathology, which is in itself serious but when provided with a lethal instrument could have and did have traumatic consequences. With such a personality, Willows says you were never supposed to be entrusted with a firearm. Although you had been deprived of your firearm after the domestic violence interdict, you were however given back the firearm, I don't know under what circumstances. This omission on the part of the SAPS, unfortunately, is part of the consequences we have to deal with.

[10] Willows also agreed with Kramers – Olen that your reaction to the deceased's rejection and aggression was one of desperation and your judgment and behavioural control were impaired. Your depressive state would not enable you to consider your alternatives or consequences in any sort of measured or reasonable manner and your ability to control your behaviour was compromised.

[11] Your counsel, Mr Barnard, has argued vigorously that when you committed this act, you acted with diminished criminal responsibility

and this much was conceded by Ms Kander who appeared on behalf of the state. For this reason, he submitted that your conduct is therefore morally less reprehensible. The state has also accepted your explanation as contained in your statement made in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ('the CPA') that immediately prior to the incident you were an emotional mess. We now know from the reports of the two clinical psychologists that your reaction was triggered by the rejection by the deceased. Your power of restraint and self-control, compared to a normal person, was substantially reduced.[4] In light of all the evidence by the experts, read with your section 112(2) statement which was accepted by the state and the concession by the state that you acted with diminished responsibility, I am satisfied that your criminal responsibility at the time you committed this offence was diminished. This therefore reduces your culpability and in due course I will make a comparison of the various cases on sentence where a person acted with a diminished responsibility and they were deemed morally less responsible.[5]

[12] Your other personal circumstances were that you are a first offender and have no previous convictions. You are young, being 32 years old, and that makes you a good candidate for rehabilitation. You are remorseful, hence your plea of guilty. You have two children one aged 16 and the other is almost 2 years old. This is the other concern and major difficulty in dealing with this matter because this court must take into account the best interests of the minor children in sentencing you. It seems, from the reports submitted that the older child is being taken care of by a relative already and, in my view, I do not have to concern myself much about this child. The second child is the one I am most concerned about. This is so because he is of tender age and requires special attention. You are his primary caregiver and you are the only parent he knows and will know nothing of as his father, the deceased, as he is no more. This fact was also accepted by the state in your plea explanation.

[13] It is therefore of paramount importance to consider and take into account the interests of this child when sentencing you, as the High Court is the upper guardian of all children. Section 28(1)(b) of the Constitution provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. As Sachs J pointed out in *S v M (Centre for Child Law as amicus curiae)*[6]

'the question is not whether S 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application'.[7]

He further explained that this section indicates that just as law enforcement must always be gender-sensitive, so it must always be child sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.[8]

[14] It was submitted on your behalf that one of your cousins, Ncediwe Msomi will take care of your child should a term of direct

imprisonment be imposed on you. Furthermore in terms of the report submitted, by Ms Geldenhuys (exhibit 'J'),

Westville Female Correctional Centre, where you might be incarcerated provides for facilities where children are kept with their mothers and are taken care of. In your situation you have chosen that in the event you are incarcerated your cousin will keep and look after your child. However, I do not believe that being separated from your child for a long period would be in the best interests of the child especially due to his age. You are his mother and need to nurture and ensure his development and survival. You need to guide him in life and protect him so that he does not find himself one day in a similar situation as yours.

[15] According to Sachs J at para 20 in *S v M supra* best efforts must be made to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. In situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can. I am of the view that it is best that the child is not kept with you in prison as this would be tantamount to the child being imprisoned with you which is against Article 30 of the African Charter on the Rights and Welfare of the Child[9] which was ratified by this country and we are therefore obliged to comply with its obligations. In my view, whilst there will be an impact on the child as a result of the sentence I am going to impose, that impact will be minimal and the child will be taken care of whilst you are away. I am of the view that the sentence I am going to impose will take into account the best interests of the child but not to the detriment of the other factors that need to be considered.

[16] As submitted by the defence and conceded by the state, I am satisfied that all of your personal circumstances taken together cumulatively are weighty and cogent to qualify as substantial and compelling circumstances justifying the imposition of a less severe sentence than the one prescribed. Whilst I have mentioned that the sentence I must impose must act as a deterrent to you and other offenders, no evidence has been adduced that you have a propensity for violence or you are a danger to society. You are a first offender and given the unusual circumstances of the case you are unlikely again to commit such an offence.[10] As held in *Director of Public Prosecutions, Transvaal v Venter*

[2008] ZASCA 76; 2009 (1) SACR 165 SCA at para 61

‘deterrence of a person who commits murder acting with diminished responsibility is not an important factor when it comes to punishment’.

[17] The question therefore is what is that appropriate sentence? Hence, I now come to the comparison of sentences imposed previously in similar cases dealt with by various courts, although I must mention beforehand that in most of these cases only one is similar to this one in terms of the presence of a history of mental illness. This case is unique in various regards, namely, that unlike in other cases here we are dealing with a woman who perpetuated the killing, has a history of mental illness, acted with diminished criminal responsibility and is a primary care giver to a minor child. As Navsa JA held in *S v Ndlovu*, [11]

‘we must guard against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders’.

[18] For instance, in *S v Mnisi* supra where the appellant had killed his wife’s lover whom he found embracing her in a car after having undertaken to terminate the relationship, the court accepted that he acted with diminished responsibility and sentenced him to 5 years imprisonment. In *S v Mngoma*, [12] the accused had killed his live in partner as he suspected her of being unfaithful to him. The court accepted that the accused had been under serious provocation, hurt and anger and was sentenced to 5 years imprisonment initially but on appeal this sentence was changed to 10 years imprisonment. In *S v Mathe* [13] the accused had shot his partner who had terminated their relationship shortly before the incident. Even though the court found

that no diminished criminal responsibility had been established, it still sentenced the accused to 10 years imprisonment. In *S v Romer* [14] where the accused was found to have acted with diminished criminal responsibility and was convicted of one count of murder and two counts of attempted murder, he was sentenced to 10 years imprisonment wholly suspended for 5 years. In addition he was sentenced to 5 years’ correctional supervision in terms of s 276(1)(h) of the CPA.

[19] It is my view therefore that justice will be served if a sentence of 5 years imprisonment in terms of section 276(1)(i) of the CPA. Accordingly, you are sentenced to 5 years imprisonment in terms of section 276(1)(i) of the CPA.

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- [1] 1969 (2) SA 537 (A).
- [2] Section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the Act').
- [3] 2001 (1) SA 469 (A) at para 24.
- [4] See *S v Mnisi* 2009 (2) SACR 227 (SCA) at para 33.
- [5] See *S v Mnisi* supra at para 6.
- [6] 2007 (2) SACR 539 (CC).
- [7] *S v M* supra at para 14.
- [8] *S v M* supra at para 15.
- [9] States should provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of breaking the law.
- [10] See, *S v Mnisi* supra at para 8.
- [11] 2007 (1) SACR 535 (SCA) at para 13.
- [12] 2010 (1) SACR 427(SCA).
- [13] 2014 (2) SACR 298 (KZP).
- [14] 2011 (2) SACR 153 (SCA).
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