

SOUTH AFRICA / JUDGMENT

S v Sithole (CC54/2019) [2019] ZAGPPHC 497 (22 August 2019) [2019] ZAGPPHC 497

COURT

North Gauteng High Court, Pretoria

BEFORE

P D Phahlane

CASE / FILE NUMBER

CC54/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC54/2019

22/8/2019

In the matter between:

THE STATE

and

NICOLAS SIMPHIWE SITHOLE

ACCUSED

SENTENCE

PHAHLANE, AJ

- [1] The accused has been convicted of one count Culpable Homicide. It is now the duty of this court to pass sentence on the accused. In considering an appropriate sentence, the court must have regard to the triad factors relevant to an appropriate punishment, namely
- the crime, the offender, and the interests of society as enunciated in the case of *S v Zinn* 1969 (2) SA 537 (A)

[2] At the same time, sentencing the accused must also be directed at addressing the judicial purpose of punishment which are deterrence, prevention, retribution and rehabilitation as stated in the case of *S v Rabie* 1975 (4) SA 855 (A)

[3] In *S v RO and Another* 2010 (2) SACR 248 (SCA) at para 30, the court said:

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."

[4] In *S v Swart* 2004 (2) SACR 370 (SCA) NUGENT JA had the following to say:

"In our Jaw, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances.

[5] The State called warrant officer Nathaniel Khathi Makwela (Makwela) in aggravation of sentence. He is the investigating officer of this matter and he testified that after the deceased was reported missing on the weekend of the 27 April 2018, he received information from Mrs Maria, the employer of the accused on the 4th of May, that the accused had disposed off the body of the deceased at the Apies river. He received information from an "informer", who told him

that the accused was at Eastlane, Pretoria. On 27 May 2018, he arrested the accused at Eastlane. Makwela testified that he went to the river with his colleagues and they found the body of the deceased wrapped in a blanket inside a box. He explained that the body was in a state of decomposition. He testified that the accused cooperated with the police by making a pointing out. There was no cross-examination of this witness.

[6] The accused gave evidence in mitigation of sentence. His personal circumstances are as follows: He 31 years old, born on 29 April 1988 in Tembisa; his father passed away in 2013 and his mother Rose Sithole is unemployed but runs a pre-school from her home; the accused is the second born of four siblings; the highest standard he has passed is grade 6; I am told that he could not proceed with his schooling because he is a slow learner; This was apparently caused by the fact that his father was not taking care of the family. The accused worked for Mr Peter Masombuka as a hawker in Mabopane train station earning an amount of R25.00 per day. Before

his arrest, he has been in the employ of Pamplona garden services for a period of 8 years, earning an amount of R2 200.00 per month. The accused has no children and is not married. He is a first offender and has been in custody for 1 year and two months awaiting

finalisation of this matter.

- [7] It is clear from the section 112 statement as well as from the evidence of the accused when he gave evidence in mitigation of his sentence, that this was a crime of passion. The accused had in his statement indicated that he was in a love relationship with the deceased. They were staying together in his room at his workplace. On this fateful day, he came back home earlier than expected and found her sleeping with another man in his room. The accused told the deceased to pack her belongs and leave his room. She embraced him trying to calm him down and because the accused was overcome with emotions, he pushed her. The deceased fell and her head hit the wall and became unconscious. The accused left her lying there and left the room to go and buy beer. When he came back, he realized that she had passed away and he panicked, and decided to dispose off her body. This, he did by wrapping her body with a blanket, placing it in a box and dropping the box near the stream at a park.
- [8] The accused testified that he is remorseful for what he put the family of the deceased through. He explained that at the time of the offence, he was intoxicated. He was angry and could not control his emotions. He wanted to ask for forgiveness from the family of the deceased but could not because he was afraid of the brothers of the deceased. It had appeared that the accused wanted to commit suicide and wrote a suicide note where he explained that he had killed someone that he loved very much and that he is sorry for what he had done. The accused explained to the court that he also pleaded guilty because he cannot live his life properly knowing what he had done. He said after committing the offence, he felt confused and mentally ill. He explained that he loved the deceased very much and they had a very close relationship.
- [9] Under cross-examination, he confirmed that on the 4th of May, he phoned his employer making enquiries about his salary and when his employer asked him about the deceased, he explained to his employer what he had done and that he wanted to kill himself. His employer convinced him not to commit suicide but should rather turn himself over to the police. He explained that he did not do as advised, but went into hiding for days because he was afraid of being arrested.
- [10] Advocate Fourie had in his closing argument submitted that the court should impose a harsher sentence to the accused because violence against women is unacceptable. He submitted that though it was not possible to determine the cause of death during post-mortem, the violence perpetrated by the accused should persuade the court to impose a stricter sentence.
- [11] On the other hand, advocate Moeng on behalf of the accused submitted that the remorse of the accused started at the time when he confessed to his employer and attempted to commit suicide. He argued that by pleading guilty, the accused was accepting responsibility for his actions. He insists that the accused is not a hardened criminal and that the court should take into consideration that he cooperated with the police as also confirmed by the Makwela.

[12] It is true that the offence of culpable homicide does not have a prescribed minimum sentence. This was highlighted and confirmed by both the State and advocate Moeng acting on behalf of the accused. Having said this, each case should be judged according to its own merits in a determination of what constitutes an appropriate sentence. At the same time, the sentence which the court must impose, should be blended with an element of mercy.

[13] In *S v Nxumalo* 1982 (3) SA 856 (A) at 861G-H, Corbett JA stated the following:

"It seems to me that in determining an appropriate sentence in such cases, the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded."

[14] The facts of the case in *State v Warren Vorster* (Case number 125/2009 in the South Gauteng High Court) are not similar to the matter before the court, but the principle that this court will reiterate is what the court said in imposing sentence, that:

"A court should strive for balance between the interests of society, the interests of the accused and the seriousness of the offence. A sentence which over-emphasises one element... cannot be balanced and it is likely to be a wrong sentence.

Finally, in imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused's own particular circumstances at the time of the offence.

Where the offence is one of negligence, I believe this is particularly the case for ordinary everyday people who are not criminals are capable for the kind of negligence that has tragic and lifelong consequences".

[15] The general considerations that are important when a court weighs up the evidence or when it evaluates the evidence at the end of a trial is to first weigh the evidence as a whole. In essence, a trier of facts must have regard to all considerations which reasonably invite clarification. In doing this, the court should take into consideration, aspects such as the reliability and opportunity for observation of the witnesses for example.

[16] I agree with the submissions made by Advocate Moeng that the remorse of the accused started when he confessed to his employer and pleaded guilty. He wrote a suicide note trying to kill himself because he regretted what he had done, and this aspect of asking for forgiveness for killing the person he loved very much, is also contained in his note. He explained to the court that he was overcome with emotions and could not control himself. Though the accused went into hiding, Makwela testified that the accused cooperated with the police. I observed the accused as he testified. He displayed genuine remorse. He explained that he could not live with the thought of having to cause the death of the deceased whom he loved very much. The court accepts the evidence of the accused and find that he was

remorseful.

- [17] Though not charged with defeating the ends of justice, the aggravating factor lies in the fact that the accused tried to dispose off the body of the deceased by binding her with a rope or ligature so as to cramp her to fit in the box; wrapping her with a blanket, putting her body in the box and placing the box next to the stream as depicted in the photos.
- [18] This court has earlier indicated that, not only will it strike a balance between the interests of the accused visa vis those of society and the offence, but it will also look at the purposes of punishment. I have also indicated that in passing sentence, such should be blended with an element of mercy.
- [19] Advocate Fourie submitted that a longer term of imprisonment is suitable as the accused might take life again. I do not agree with this submission because no evidence has been placed before me to indicate that there was a history of domestic violence between the accused and the deceased or that the accused has had any violent outbursts with anyone.
- [20] In arriving to a decision of what appropriate sentence should be passed, I have considered the personal circumstances of the accused and in particular, the fact that the accused is the first offender; that he has pleaded guilty; he is remorseful; and has spend 1 year and two months in custody.
- [21] Having considered both arguments before this court, and taking into consideration all factors, as well as the totality of all the evidence before this court, the following sentence is imposed:
1. The accused is sentenced to 6-year imprisonment, 2 years of which is suspended for a period of 5 years - with a condition that the accused should not be found guilty of culpable homicide during the period of suspension.

P. D PHAHLANE

Acting Judge of the High Court, Gauteng Division, Pretoria

Heard on

: 12-15 August 2019

For the State: Adv Fourie

: Adv Roos

Instructed by

: Deputy Director of Public Prosecutions

For the Defendant : Adv Moeng

Instructed by

: Legal Aid South Africa

Date of Sentence : 22 August 2019

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