

SOUTH AFRICA / JUDGMENT

S v Siyaya (Sentence) (03/2024)

[2024] ZAKZDHC 28; 2024 (2)

SACR 282 (KZD) (16 May 2024)

[2024] ZAKZDHC 28

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Davis AJ

CASE / FILE NUMBER

03/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
NORTH EASTERN CIRCUIT,
PONGOLA
Case No: 03/2024

In the matter between:

THE STATE
and
SIBUSISO
SIYAYA
THE ACCUSED

JUDGMENT

ON SENTENCE

Davis AJ

Introduction

- [1] President Nelson Mandela said; “Educating all of our children must be one of our most urgent priorities. We all know that education, more than anything else, improves our chances of building better lives.[1]” This priority was uppermost in the parents of the children who died on 16 September 2022 when eighteen children and two young adults died from multiple blunt force injuries sustained when a truck carrying 34 tons of coal with a total mass of 55 tons collided head-on with the scholar transport vehicle that they were travelling in.
- [2] Anyone who heard the evidence of the mothers, led by the state in aggravation of sentence yesterday, read the Victim Impact Statements, would have been moved by what has been said and placed before the court. The evidence was tangibly suffused with anguish and pain. That anguish and pain was directly caused by what you did. It is the scale of the net result of what you did, that has made this matter so numbingly tragic and emotional.
- [3] Murder, without fail, brings tragedy. There are always people who suffer when the life of a loved one is unlawfully and unexpectedly taken. The chilling thing about this is that there appears to be no way of guarding against it happening. All the parents here were merely acting in the best interests of their children in ensuring that they went to school[2].
- [4] The only thing that one can do is live one’s life the best as one can, do right by others, obey the law and hope that our fellow man will do so as well. That hope, unfortunately, was not realised in this instance. Mr Siyaya, you decided that the laws governing driving on our roads, that most people observe and obey, did not apply to you, at a scale I think is unprecedented, with devastating results.
- [5] When one absorbs the evidence of those most directly affected by this gruesome tragedy it is a moment of great sadness and pathos, the overwhelming feeling is one of great sadness and desolation. The evidence of mother’s testifying about finding their dead and dying children lying on or near the N2 in the aftermath of the collision, some of whom died in the arms of siblings will forever endure in the memory of those present in court.
- [6] The pain they suffered as evinced by their screams at the scene, dying in the arms of siblings, will forever haunt those who knew cared for and parented those children.
- [7] The photograph albums are replete with disturbing images of the damage caused to the bodies of all the victims, those images too will live forever too all who viewed them.

- [8] The victim impact statements are a testament not only to the horror of the crash but the effect such trauma has on families, with their relationships with other members of the family, who are deeply impacted in different ways. The Nkonyane family was decimated by the death of three boys in the family, the pain of going to the scene seeing the bodies of their dead children, their disfigurement is truly moving and distressing.
- [9] Parents, of course without foundation, blame themselves for not being able to protect their children, they, of course, have done nothing wrong.
- [10] It was distressing to hear that a sibling of one of the deceased became suicidal after blaming himself for insisting that his younger sibling go to school that morning and then seeing the body on the road. He is, like the parents, not to blame but the consequences of the collision caused by the accused that still resonate today.
- [11] Imposing sentence is not always an easy task, as the learned judge Steyn said in *S v IS*[3]:
- “The sentencing phase of a trial is the most difficult for any presiding officer. This case is now different, mainly because the focus now shifts from the merits of the case to factors which are irrelevant to the merits, such as the motive for the crime, the personal circumstances of the accused, the impact of the crime on the victims and society’s interest. One of the reasons for this difficulty is that there is no universal formula to apply to each and every case that results in an appropriate sentence.”*
- [12] In deciding upon an appropriate sentence, it is expected of me to have regard to the purpose of sentencing, which would be deterrent, reformatory and retributive. To achieve it, I should have regard to the accused’s personal circumstances and needs, the nature of the crime and the interests of society. None of these factors must be over or under emphasised. An appropriate sentence is one which gives a balanced consideration to the offender, the crime and society.

Personal Circumstances

- [13] The accused is now 30 years of age, at the time of offence being committed he was 28 years of age. He has been in custody since 17 September 2022, some twenty months. He passed his matric and was employed by BaoBao as a driver of heavy duty vehicles in February of
2022. His father had sold livestock in order for him to pay for the training that is required to obtain a heavy duty driver’s license.
- [14] He has neither previous convictions nor pending cases. He is unmarried with one young child L[...] S[...] [LS] aged 8, she presents with several health challenges and is autistic, it would appear severely so, when one analyses the evidence as to how the autism presents with an inability to walk.
- [15] The accused’s mother died shortly before the trial commenced on 15 April 2024.

- [16] He appears to have been a major source of his extended family's income and his father testified that since his son's incarceration the family, without his income, has been beset by poverty.
- [17] He has a metal plate inserted at or near his cheekbone as a result of a motor- vehicle collision in 2022. His right eye has an uncomfortable discharge as a result and is often painful. The right side of the eye is perpetually swollen and the skin around the eye is dark in colour. Medical intervention has resulted in him being given tablets by medical professionals, but according to the accused they do not seem to assist.
- [18] He tendered an apology to the families of the deceased when he gave his evidence but remains steadfast that he was in no way responsible for the accident that claimed their lives.

Remorse

- [19] I am mindful that when dealing with remorse or the lack of remorse for that matter that the lack of remorse is not an aggravating factor but in certain circumstances where it is shown that the accused is remorseful this will be a factor that will redound to his benefit when the court considers an appropriate sentence.
- [20] The correct approach is encapsulated in *S v Matyityi*,^[4] Ponnann JA after having referred to the authorities said:

‘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. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can

only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. 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. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.’

- [21] Despite the best efforts to show that the accused is remorseful, he apologised in the witness box, the telling response from a mother called in aggravation of sentence is that, for her at least it is too late, he has had ample time and opportunity to do so. The victim impact statement of N[...] M[...] the mother of the deceased in count 18 illustrated this, “the person

who committed the crime to our children did not show any remorse including his family. I could see him in court that he was arrogant and shows no remorse about what he has done. His parent did not even bother to come to us just to show empathy, at least we would have understood that they were being empathetic to us, and we would have understood no parent sends their child to commit crime.”

- [22] The chasm is present here, it is a case of far too little far too late. The accused had ample opportunity to apologise, to acknowledge the parents and their tragic suffering, he did not, a gnawing pang of remorse and contrition motivating the accused to make amends is, with respect, completely absent.

The Offence

- [23] Murder, and I focus on this aspect primarily at this time due to time constraints, is obviously one of the most serious, if not the most serious offence in our law. It infringes on the most important rights enshrined in the bill of rights namely the right to life. Our common humanity must always be acknowledged. The legal system has post constitution acknowledged this common humanity. We, as a society have embraced the fundamental African value embracing dignity, human interdependence, respect, neighbourly love and concern.
- [24] In *S v Mankwanyane*[5], the Constitutional Court recognised it as one of the values underpinning our Constitution when dealing with the question of criminal punishment, including when it arises out of the driving of a motor-vehicle. The victims and your common humanity must be acknowledged when imposing sentence.
- [25] In respect of the first two counts the penalty provisions are ample proof of the seriousness with which the legislature regards these offences. Our courts in the past have viewed violations of traffic laws which also constitute reckless acts of driving in a serious light, and as having to be visited with the strictest form of punishment, even direct imprisonment, this has not acted as a sufficient deterrent, and a culture of responsible road behaviour[6]. This may be because of the fact that the strictest form of punishment would only be imposed in the most exceptional circumstances, this is without doubt the most exceptional circumstances.
- [26] A further consideration would have been, when dealing with this type of offence, the offender would not be regarded as the worst type of offender, in most cases, like in this instance, they are ordinary hard working people deserving of judicial mercy, however judicial empathy should not be maudlin sympathy, moral blameworthiness and the devastating impact of your conduct has to be considered. As the prosecutor said when referring to *S v Swart*[7], when the offence is as serious as this one the accused's personal circumstances recede and the other purposes of punishment

such as deterrence and retribution come to the fore.

Interests of society

[27] The courts have always endorsed the view that in appropriate circumstances, in cases where there is a reckless or wilful disregard

to the rules of the road, a sentence of direct imprisonment would not be inappropriate. In *R v Mahametsa* [8], the following was stated:

"We do not disagree with the view that imprisonment is an appropriate punishment in case of recklessness; if by recklessness is meant gross negligence or a wilful disregard of the rights of other road users, as for example in the case of numbers of accidents which are caused by the dangerous practice of 'cutting in', or driving round a blind corner on the wrong side of the road, or passing another car on the crest of a hill."

[28] In this particular case the moral blameworthiness of the accused is acute. His actions show an aggravated wilful or volitional deliberate disregard of the safety of other road users and for that matter, at least to a degree, himself and his passenger. His of the road and the safety of his passengers. He fully accepted the responsibility as a professional driver to drive a heavy duty vehicle transporting 34 tons of coal in safely and in accordance with the rules of the road. Through his actions, and the manner of driving displayed on the videos, he simply in a disturbing and frightening manner, violated the rights of the children and occupants of the Toyota LDV with the most devastating of consequences.

[29] One must have regard to circumstances that existed at the time of the commission of the offence, which are the following:

- (a) The accused for a substantial period before the collision drove at excessive speeds.
- (b) He appears to be motivated by increasing his earnings in doing so.
- (c) He disregarded a mandatory stop sign.
- (d) Thereafter drove at an excessive speed for the conditions prevailing.
- (e) Disregarded barrier lines.
- (f) When he approached slow moving traffic, he crossed over the double barrier line and accelerated.
- (g) When oncoming traffic approached he made no effort to return to the correct lane of travel.
- (h) Instead he accelerated, never deviating from the lane he was traveling in.
- (i) For 1.2 km this continued, when the road narrowed instead of trying to return to the correct lane he in fact accelerated.
- (j) Numerous near misses did not deter him.

- (k) The driver of the Toyota did what any driver would do, unlicensed or not, he sought refuge in the emergency lane.
- (l) The accused's volitional conduct in driving in the way he did goes beyond the pale, it is by a significant margin the worst driving this court has come across.

Substantial and compelling circumstances

[30] I am guided in the difficult task of determining an appropriate sentence by legislation which requires certain minimum sentences to be imposed for certain offences. The murder counts that you were convicted of were framed with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (the Act) in mind, and, in particular, part 2 of schedule 2 to that Act. That part of the schedule identifies murder committed in these circumstances attract a minimum sentence of 15 years imprisonment.

[31] the court is not compelled to impose the minimum sentence referred to by the Act. I can impose a lesser sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The Act does not define what 'substantial and compelling' circumstances are, this

being left to the courts to determine. Mr. Marimuthu who appears for you and Mr. Shah for the state agree that with the finding of no direct intention to kill but that the prescribed minimum sentence should not be imposed, that in the circumstances of this matter this constitutes substantial and compelling circumstances.

[32] In *Malgas*[9] the Supreme Court of Appeal directed the lower courts:

'The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative

hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

[33] The Supreme Court of Appeal in *Calvin v The State*,[10] stressed what the enquiry is:

'This court in *S v Malgas* set out the approach to be followed when sentencing an accused in terms of s 51 of the Act. It was established that the usual, traditional

factors that were taken into consideration when imposing sentence are still to be taken into account in determining whether there are substantial and compelling circumstances present. Furthermore, if the sentencing court is satisfied that the circumstances of the case are such that the prescribed sentence would be unjust as it would be disproportionate to the crime, the criminal and the needs of society, it is entitled to impose a lesser sentence.'

[34] What the courts are required to consider when deciding if these factors are present was set out in *S v Vilakazi*,^[11] Nugent JA set out this duty as follows:

“It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo^[12] that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. It consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.”

[36] I am in agreement with counsel that as the accused had no direct intention to kill, that he has been in custody for some 20 months that on the specific facts of this matter that a finding that substantial and compelling factors are present warranting a deviation from the prescribed minimum.

[37] However, a reminder is necessary at this point; Cameron JA as he then was said in *S v Abrahams*^[13] said;

‘Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as “ordinarily appropriate” is a consideration that the courts are “to respect and not merely pay lip service to”. When sentence is ultimately imposed due regard must therefore be paid to what the Legislature has set as the bench mark.’

[38] The accused's actions, in my view, constitute a high degree of blameworthiness or culpability and is to be distinguished from the ordinary case of recklessness resulting in death or injury.

[39] The degree of culpability of the accused was commensurate with the devastating consequences of his actions. This is not a case where a minimal degree of culpability resulted in tragic consequences, for example, where a person by means of a momentary and slight lapse or lack of concentration, caused the death or injury of another.

[40] In *S v Nxumalo* ^[14] Corbett JA said:

‘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 of 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. If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. It is here that the deterrent purpose in sentencing comes to the fore.’

[41] Therefore, in deciding the type of sentence to be imposed, a court should have regard to the degree of culpability or blameworthiness of the accused. It is a weighty factor the court must consider before deciding on an appropriate sentence. It is also a determining factor to consider when a court decides whether to impose direct imprisonment. In this matter a lengthy term of imprisonment is inevitable, the moral blameworthiness of the accused and the consequences of this conduct, 20 deaths makes it inevitable.

[42] In R v Swanepoel [15] the appellate division as it then was said;

'It seems to me quite evident that, before a Court can find that it has been proved that an accused person has acted with such reckless

disregard of the rights of others, or even with such gross negligence, as to merit imprisonment, it must first very carefully analyse the evidence and arrive at some precise and accurate conclusion as to what has been proved to have occurred.'

[43] The sentence I impose must reflect this Court's condemnation of the appellant's horrendous driving conduct. Henney J said:

'Moreover, the sentence should reflect our recognition of the acute loss of these invaluable young lives and our identification with the mental anguish and pain endured by their parents and loved ones as a result of this loss.'

In that matter the accused's conduct was, in my view, less blameworthy than the accused's conduct but the court imposed an effective 20 year term on the accused.[16]

[44] The legal representatives have argued that as the incident arose from a single act that the court should take all counts as one for the purposes of sentence. I agree, since the twenty counts of murder all flow from the same sequence of actions I regard it as appropriate that counts 3-22 the murder counts that they should be taken together for purpose of sentencing. I believe counts one and two should not run concurrently with the sentences imposed on the murder counts, that would result in my view on a sentence that would be too lenient and not satisfy the main purposes of sentence.

Sentencing order

[45] I accordingly impose the following sentence:

- (a) On count 1, in respect of the charge reckless driving in contravention of section 63 (1) of the NRTA, 93 of 1996, the accused is sentenced to three (3) years imprisonment.
- (b) On count 2, on the charge of contravening section 61(1) of the National Road Traffic Act 93 of 1996 in that he failed to perform the duties of a driver after the accident and failed to report the accident, the accused is sentenced

to six (6) years imprisonment.

- (c) In terms of section 280 (2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count one is to run concurrently with the sentence imposed on count two.
 - (d) On counts 3 to 22, on the counts of murder, as the deaths flow from the same sequence of actions it is appropriate that the murder counts should be taken together as one for purpose of sentencing and the accused is sentenced to 14 years' imprisonment.
 - (e) The effective term of imprisonment is thus twenty (20) years imprisonment.
 - (f) In terms of Section 34(1) of the National Road Traffic Act 93 of 1996 the licence and public driver's permit of the accused is cancelled with immediate effect.
 - (g) In terms of Section 103 of Act 60 of 2003, the Firearms Control Act, the accused is declared unfit to possess a firearm.
- [46] In order to ensure that the needs of the accused's child is addressed while he is in custody, I make the following order:
- (a) The Department must appoint a designated social worker as contemplated by the Children's Act 38 of 2005 to investigate in terms of ss 47(1) and 155(2) of the Act, whether [LS] is a minor child in need of care and in particular that her health challenges are addressed. The Department

must do this without delay and take all steps necessary to ensure that she is properly cared for in all respects.

DAVIS AJ

APPEARANCES:

Counsel for the State: Mr K Shah Instructed by: Director of Public Prosecutions Durban Counsel for the accused Mr P Marimuthu Instructed by: Legal Aid Board of South Africa, Durban Date of Hearing: 15 and 16 May 2024 Date of Sentence: 16 May 2024

- [1] Nelson Mandela- former president of South Africa Nelson Mandela in a speech at a 'Schools for Africa' campaign, Johannesburg, South Africa, 15 May 2008.
- [2] I am indebted to Mossop J whose remarks in a murder trial resonated with me when preparing for this sentence; see *S v Phakathi and others* (judgment on sentence) (CCD52/2021) [2024] ZAKZPHC 20 (18 March 2024).
- [3] *S v I.S. (Sentence)* (AR 233/05) ZAKZDHC 13 (22 March)2017 at [2] and [3].
- [4] *S v Matyityi* 2011
- (1) SACR 40 SCA at 47a – d.
- [5] *S v Mankwanyane* 1995

(3) SA 391 (CC) See S v Phakathi and Others (judgment on sentence) (CCD52/2021) [2024] ZAKZPHC 20 (18 March 2024) Per Mossop J paragraphs [4] – [7]

[6] See S v Nyathi 2005 (2) SACR 273 (SCA); Per Conradie JA; [11] ‘The collision occurred on a blind rise where a double barrier line prohibits overtaking by vehicles proceeding either to or from

Cathcart. It was common cause at the trial that forward visibility was restricted. The appellant’s case was that he would not have thought of overtaking because he could not see ahead well enough. The fact that the appellant did overtake proclaims grave negligence on his part. Overtaking on a barrier line, and especially on a double barrier line where a motorist should realise that his inability to observe approaching traffic is compounded by the inability of traffic in the opposite direction to see him is probably the most inexcusably dangerous thing a road user can do. And at [13] Road accidents with calamitous consequences are frequently caused by inadvertence, often momentary. Overtaking on a double barrier line is not inadvertence. It is a conscious decision to execute a manoeuvre that involves taking a fearfully high risk.’

[7] Nugent JA in S v Swart (654/02)

[2003] ZASCA 140; 2004 (2) SACR 370 (SCA) (28 November 2003).

[8] R v Mahametsa 1941 AD 83 at 86.

[9] S v Malgas 2001(1) SACR 469 SCA per Marais JA [9].

[10] Calvin v The State (962/2013) [2014] ZASCA 145 (26 September 2014); Malgas (supra); Vilikazi (supra); Matyityi (supra).

[11] Supra.

[12] S v Dodo [2001] ZACC 16; 2001

(3) SA 382 (CC).

[13] S v Abrahams 2002

(1) SACR 116 (SCA), Cameron JA at 126.

[14] S v Nxumalo 1982

(3) SA 856 (A) at 861 H - 862 A.

[15] R v Swanepoel 1945 AD 444.

[16] 12 years on the murder counts to run as one and an additional 8 years on the attempted murder counts.

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