

SOUTH AFRICA / JUDGMENT

S v Tsabane (CC10/2020) [2021] ZAGPPHC 217 (22 January 2021)

[2021] ZAGPPHC 217

COURT

North Gauteng High Court, Pretoria

BEFORE

Broodryk

CASE / FILE NUMBER

CC10/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA (BENONI)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES : YES / NO

(3) REVISED

DATE:22/1/2021

CASE NO: CC10/2020

DATE: 2020.11.23

In the matter between

THE STATE

and

MANNANA SELINA TSABANE

ACCUSED

SENTENCE

BROODRYK, AJ: The accused may be seated during the delivering of the sentence. The accused has been convicted by this court of murder, read with the provisions of section 51(2) of Act 105 of 1997. The General Law Amendment Act. In respect of count 2, she has been convicted of defeating or obstructing the course of justice. In respect of count 1, there is a minimum sentence prescribed in terms of Act 105 of 1997 of 15 years.

Following conviction, Mr Maimela on behalf of the accused addressed the court from the bar. He informed the court that the accused would not testify. The personal circumstances advanced in mitigation are the following:

The accused is 39 years old. She has no previous convictions. Her highest level of education is commensurate with a grade 10 in South Africa. I was told that she has two children, 18 and 14 years old. They live in Lesotho and are looked after by her sister who is a subsistence farmer. There is still a father in the picture, although he is also unemployed.

I was told that accused is the sole breadwinner. She was earning R2 000 per month, paid by the mother of the deceased. The accused comes from an area in the Highlands of Lesotho which is known to be extremely poverty stricken. Kids from this area rarely go past matric. I was told that the accused is very remorseful and as Mr Maimela put it, she states that she is sorry as to what happened.

He referred the court to a well-known case of *State v Zinn* (AD) which states that the court in sentencing an accused must look at the triad which refers to the offence itself, the interest of society, as well as the personal circumstances of the accused. He argued that the court must not overemphasise the interest of society and the seriousness of the offence in respect of the personal circumstances of the accused and that the court must show some mercy to the accused.

Mr Maimela then argued that the mitigating factors as indicated earlier, cumulatively seen does constitute substantial and compelling

circumstances which would allow this court to deviate from the prescribed sentence. He referred me to the case of *State v Scott-Crossley* 2008 (1) SACR 223, a judgment of the Supreme Court of Appeal paragraph 35 where it was stated:

“that a court must not sacrifice an accused on the altar of deterrence and that a sentence of excessive imprisonment does not serve the interest of society.”

He also referred to the well-known of case of *State v Rabie* 1975

- (4) SALR 855 (AD) 862g. This judgment is very much in line with the well-known judgment of *State v Zinn*, but he specifically referred to the fact that the court must sentence an accused with some mercy.

As to count 2, Mr Maimela left the sentence in the hands of the court and he had no address in respect of the provisions of section 103 of the Firearms Control Act. Ms Scheepers before arguing, called the mother of the deceased, Lerato Dora Mnguni. This witness has already earlier testified in this court.

Sentencing is always a very difficult thing for a court to do, but to sit here and to look at the mother of a small baby even more so. A baby of one year and nine months old who died in horrible circumstances, is always difficult. The court's heart goes out to that mother who stood here, fighting back the tears and testifying about what this incident did to her.

She said she was questioned about how this incident affected her and she stated that it was very painful. She disputed the fact that accused was a breadwinner and referred to her sister who apparently look after the children of the accused. There is also a dispute whether the accused in fact has children, but this court is not going to enquire into that.

What is important though is that this witness stated that the deceased was her only child and therefore the death of the child was very painful to her. She does not have any siblings and the family gave her strength to deal with his case. She referred to the fact that the accused had told lies to this court from day one. She says this whole incident affected her extended family. The family is broken and she referred to the Mnguni and the Tshabalala family. The deceased was the first grandchild of the Mngunis. She pointed out that what she wants to know in able to deal with this is why the accused committed to the offence as alleged. She wants answers as to what happened, what exactly happened.

Mr Maimela briefly cross-examined her and told the witness that the accused said, she is very sorry for what has happened. The witness understandably did not accept it. She disputes the fact whether the accused in fact has children. She testified that the accused had a sister, who would be able to pay the necessary school fees as she was apparently able to pay the legal fees.

There was no re-examination and the court enquired as to how old the deceased was and I was informed that the deceased was one year and nine months old. Ms Scheepers on behalf of the state then addressed the court. She pointed out to various aggravating factors such as the fact that the deceased was a boy of one year nine months old and that he had his whole life ahead of him.

She pointed to the fact that the accused was the caregiver of the deceased and she was in a position of trust which she abused. She referred to the fact that the deceased was attacked in his own home, a place where he should have felt safe. She referred to the fact that the accused clearly misled the mother of the deceased as to what happened.

The parents have lost their only child. The extended family has also suffered. It was pointed out that the deceased was a defenceless child. It was pointed out that the accused showed now respect in respect of the deceased, the child when she was testifying. She absolutely showed no emotion and that the killing of children is obviously very serious.

She argued that the court should find that there are no substantial and compelling circumstances and that a sentence in excess of 15 years should be imposed in respect of count 1, the murder count. In respect of count 2, the state argued that defeating the ends of justice undermines the rule of law and that it cannot be allowed and that the court should impose a sentence of imprisonment in this regard to be served concurrently with the sentence imposed in respect of count 1, the murder.

As referred to earlier in sentencing an accused, the court has to have regard to the triad referred to in *State v Zinn 1969(2) SALR 537(AD)* a very well-known Appellate Division case, which says that the court must look at the interest of society, the nature and the seriousness of the offence as well the personal circumstance so the accused and balance these three interests.

The court must also look at the purposes of punishment which is prevention, reformation, retribution and rehabilitation. In the well-known case of *State v Malgas*, referred to in argument, it was set out by our Supreme Court of Appeal that the court should not deviate as it was put, for flimsy

reasons from the prescribed minimum sentences. I was also referred to the case of *State v Vilakazi* 2009 (1) SACR at 552 (SCA) 58 where it was stated in cases where an accused is convicted of such serious offences, personal circumstances

such as the age of an accused, whether he was working or not, whether he has previous convictions or not, as a natural consequence recede into the background when the seriousness of the offence is considered.

I was also referred to the well-known case of *State v Matyityi* which dealt with difference between regret and remorse.

I am satisfied on what was placed before me that the aggravating factors vastly outweigh the mitigating factors in this case. In fact, the mitigating factors completely pale into insignificance when weighed up against the aggravating factors.

Nothing can be more aggravating than a baby boy of one year nine months old being killed in his own home where he was supposed to be safe and where the perpetrator is his caregiver. A person who is in the position of trust.

As to the seriousness of the offence and the interest of community, as I pointed out in argument this is already the second case of the infanticide that I have dealt with in the last month. It shows the high incidence of these offences within the area of jurisdiction of this court. I find it a vicious, brutal attack on a defenceless baby.

To my mind, there is absolutely no question of any remorse or any regret or taking of responsibility for the actions by the accused. Her allegation that she is sorry has a hollow sound to it and I reject it. I found on the facts of this case that there was no motive. Now, after hearing arguments in respect of sentence, I am not any wiser. I still do not know what the motive for the offence was and I will proceed to sentence the accused on the basis of that, that there was no motive shown and that is severely aggravating as far as the accused is concerned.

It was a vicious attack on the deceased and the true facts of the case which only the accused knows was not placed before court. I refer to the fact that in the Whatsapp, which she sent to her sister, she refers to the word blackmail even in the vernacular. On the merits, I have rejected her version that that means that she was attacked. As I stated in my judgment on the merits, blackmail is usually hand in hand with kidnapping and money then comes into play, but there are no facts for this court to find in that regard.

The accused had the key in her pocket. She just had to take out the key and tell this court what motivated her, but she decided not to do so and must now suffer the consequences.

On behalf of the state, I have been requested to consider imposing a sentence in respect of the murder count, in excess of 15 years imprisonment. I agree with that proposition of the state on the facts placed before this court. It is clear that the sentence of 15 years would be wholly inappropriate. I intend imposing a sentence in excess of 15 years. Both Ms Scheepers and Mr Maimela, did not have any address as to the provisions of section 103(1) of the Firearms Control Act which relates to the accused being declared unfit to possess a firearm. They both agree that once accused has been convicted of an offence such as murder, she is automatically declared unfit to possess a firearm.

Accused must please stand. In respect of count 1 you are sentenced to 25 years imprisonment. In respect of count 2, the defeating of the ends of justice, you are sentenced to five years imprisonment. In terms of the provisions of section 280 of the Criminal Procedure Act 51 of 1977, I order that the sentence imposed in respect of count 2, that is the five years' imprisonment, be served concurrently with the sentence imposed in respect of count 1.

No order is made in terms of the provisions of section 103(1) of the Firearms Control Act. Do you understand your sentence?

BROODRYK, AJ

ACTING JUDGE OF THE HIGH COURT

DATE: 2021.01.22

For the State : Adv S Scheepers instructed by the Director of

Prosecutions, Gauteng Division, Pretoria

For the Defence : Adv Maimela

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