

SOUTH AFRICA / JUDGMENT

S v Tshabalala (SS30/2022) [2022] ZAGPJHC 881 (11 November 2022)

[2022] ZAGPJHC 881

COURT

South Gauteng High Court, Johannesburg

BEFORE

M S Makamu

CASE / FILE NUMBER

SS30/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: SS30/2022

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

11/11/2022

THE

STATE

V

NOMASWAZI

RACHEL TSHABALALA

JUDGMENT

ON SENTENCE

MAKAMU AJ:

INTRODUCTION

- [1] Before dealing with the judgment on sentence, the Court has to refer to and deal with an application by the Defence, which sought the Court to make special entry of an irregularity it alleged occurred when the accused pleaded. The Defence tendered a plea in terms of Section 112(2) of Criminal Procedure Act, 51 of 1977 (CPA) pleading guilty to murder read with Section 51(2) of Criminal Law Amendment Act, 105 of 1997 (the CLAA). The irregularity according to the Defence is that the Court ought not to have found that the accused was in fact pleading guilty to murder read with Section 51(1) of CLAA.
- [2] The State accepted the accused's plea but stated it was not accepting the accused's plea read with Section 51(2) as it was clear to it that the plea was indicative of the fact that the accused was pleading guilty to murder read with Section 51(1), and further stated that it would lead evidence to prove that the murder had been in terms of Section 51(1).
- [3] The Defence applied that the court should, in terms of section 317(1) of Criminal Procedure Act 51 of 1977 (CPA), make a special entry of an irregularity which occurred when the accused pleaded. The alleged irregularity was that the accused had pleaded guilty to murder read with Section 51(2) of the CPA, whilst the Court found that the charge, in light of the accused's plea, was murder read with Section 51(1). The Defence argued that they had not been given an opportunity to address the Court on Section 51(1) of the CPA. The Court read the plea and realised that the plea, as it stood, a plea of guilty to murder in terms of section 51(1) of CLAA and not section 51(2). The Defence alleged that they were not given an opportunity to address the Court before it decided to find the accused guilty of murder read with section 51(1) of CLAA. This, according to the Defence, constituted an irregularity.

THE ACCUSED'S APPLICATION IN TERMS OF SECTION 317 OF CPA

- [4] Section 317(1) of the CPA reads as follows:

"If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court."

- [5] The Court made an order that the special entry be made on the record. The accused was convicted on 23 August 2022 and the matter was postponed to 7 October 2022. No application in terms of Section 317(1) of the CPA was brought by the Defence. On 7 October 2022 the

case was remanded to the 12 October 2022, and still no application in terms of Section 317(1) was brought. The application was only brought on the date to which the case was postponed. For the late bringing of application for condonation in terms of Section 317(1) of the CPA was not brought, even though Section 317(1) of the CPA specifically provides that the application should be made within 14 days after conviction. This, notwithstanding, did not cause the Defence to bring such application for condonation.

[6] Section 112(2) of CPA provides that:

“if an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the Court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the Court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purpose of determining an appropriate sentence”.

SECTION 105A OF THE CPA

[7] The accused’s complaint is that they were not invited to address the Court on the applicability of Section 51(1) of the CLAA. The other issue that they raised is that the Court ought not to have found the accused guilty, in terms of Section 51(1).

[8] It must be remembered that the State did not accept the accused’s guilty plea to murder read with Section 51(2). What the State argued was that the Section 112 (2) statement of the accused amounted to a plea of guilty in terms of Section 51(1). The State was even prepared to tender evidence to that effect. Given this scenario the Defence ought to have realised that the time for them to address the Court on Section 51(1) had come. The accused had an opportunity to testify in mitigation of sentence that was the opportunity to canvas that the murder was not planned but she failed to do so. Indeed, the time came and it is gone. Their argument to say that they were not invited to address the Court on the aspect therefore holds no water.

[9] It will be understandable had Section 105A of the CPA been applicable because in such an instance the State and the Defence would specifically have been invited to deal with the matter. Section 105A deals with plea and sentence agreements, and this Section is not applicable. This is the nearest Section which one can think of, where the invitation by the Court to the State and the Defence is involved.

THE ISSUE

[10] The issue in this matter is that the accused pleaded guilty to murder read with Section 51(2) of CLAA. The State did not accept the plea as it stood. The rejection by the State was informed, as the State argued, by the fact that Section 112(2) statement in its form amounts to a plea of guilty to murder in terms of Section 51(1). The Defence was well aware of the contents of the statement which they drafted. A proper and a closer consideration of the statement has one result namely, that the accused was happy with the statement. A proper analysis of the statement, however, clearly shows that the guilty plea of the accused as it stands is one in terms of section 51(1). The facts of this matter at this stage are such that it was not even necessary for the Court to have entered the special entry.

SENTENCE

[11] The Court has now reached a critical stage where an appropriate sentence has to be determined. This has never been an easy job, however, courts consider all the aspects relevant to sentencing before the appropriate sentence is imposed. The Court in sentencing the accused will have regard to the triad as stated in Zinn 1969 (2) SA 537 (A) consisting of personal circumstances of the accused, the seriousness of the offence and the interest of the society.

PERSONAL CIRCUMSTANCES OF THE ACCUSED

[12] The accused is currently 33 years of age. She is not married but has one four-year-old son. She was once employed but she was not employed when the offence was committed. She was a primary care giver at the time of the offence, although it appears that she was not staying with her son on the day of the offence. She provided the child with emotional support. The son's father also supported the child and still is. The accused whilst incarceration suffered a stroke. This happened after she committed the offence. The accused is recovering well and fast and is still receiving therapy. Her speech is proper and her body functions well, with no impairment of any of her limbs. Friedman J stated, in *S v Banda and others* 1991 (2) SA 352 (BG) that; "elements of the triad contain equilibrium and tension. A Court should, when determining sentence, strive to accomplish and arrive at the judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and or to the exclusion of others. This is not merely a formula, nor a judicial incantation; the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns."

SERIOUSNESS OF THE OFFENCE

[13] No doubt the offences that the accused has been convicted of are all serious. Removing a person from the face of the earth is the worst thing that can happen to a living human being. Life is lived ones and once taken that become the end of the story. The deceased did not deserve to die in the manner she did. Particularly having regard to the fact that she

according to the accused, was her surviving pillar, emotionally and financially. The accused always sought and found guidance from the deceased. She, one time, bought the accused a Volkswagen Polo motor vehicle. This demonstrated the deep love the deceased had for the accused. The pre-sentence report on page 6 the second paragraph the officer pointed out that the deceased did not want the accused to feel like an orphan and that she provided the accused with most of the things that she needed. The accused notwithstanding the love that the deceased had for her bludgeoned her to death, strangled her and ultimately buried her without anyone knowing. She lied to the members of the family, claiming that the deceased had simply vanished. She involved the police knowing fully well that she had killed and buried the deceased, the accused had ample time to think about this, yet she drifted away from the truth.

- [14] In *State v Zondi* 19912(2) SACR 706 (A) the court said;” “Such serious crimes strike at the very root of an orderly society and the sentence of the Court should serve not only to deter others from committing such crimes, but also to reflect the revulsion which any reasonable person feels for such crimes, but also to reflect the revulsion which any reasonable person feels for such heinous deed. The deterrent and retributive objects of punishment were decisive in the present case.”

INTEREST OF THE SOCIETY

- [15] Society always want to know the outcome of the cases that the Courts are handling. This is because the commission of offences has the effect of disturbing the peace that exist in communities. Society expects harsh sentences in fitting and appropriate cases, where offenders are convicted of very serious crimes. This is so because failure to act appropriately by the Courts leads to society taking the law into its own hands.
- [16] In *S v Karg* 1961 (1) SA 231 (A) Schreiner JA said;” It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons, may incline to take the law into their own hands. Naturally righteous anger should not becloud judgment.”

THE CURRENT CASE

- [17] The accused has been convicted of very serious offences and in particular she has been convicted of murder read with section 51(1) of CLAA. In this instance before the accused is sentenced she has to prove that substantial and compelling circumstances exist for the Court to deviate from the imposition of the prescribed minimum sentence. The issue to be determined is whether the murder was premeditated or not. In *S v Malgas* 2001(1) SACR 469 (SCA) the court said;” “the term premeditated was not given an exclusive meaning which may be the same as planned murder but it still covers premeditated sufficiently, to convince the Court, that this was premeditated murder.”

[18] Having regard to the accused's plea which deals extensively with the conduct of the accused on the day of the incident, it becomes very clear that the murder of the deceased was pre-planned. This is born out by the fact that after burying the deceased the accused went about and withdrew money from the deceased accounts. She hid the fact that she had killed the deceased until evidence surfaced which conclusively pointed her out as the culprit.

[19] The facts of this matter clearly demonstrate that substantial and compelling factors which justify the deviation from the prescribed

sentence are none existent.

[20] The Court is well aware of what was said by the Court in *S v Mhlakaza* 1997 (1) SACR 515 (SCA) that; "The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly and appropriate and fair sentence even if it does not satisfy the public."

[21] The Defence argued in mitigation of sentence that the accused was remorseful. The facts of this case clearly show that the accused is not remorseful. As remorse, as clearly stated in *S v Matyityi* 2011

(1) SACR 40 (SCA) and said that; "The Court said;

"that remorse is a gnawing pain of conscience for the plight of another. This genuine contrition can only come from appreciation and acknowledgement of extent of one's error...In order for the remorse to be valid consideration, the penitence must be sincere, and the accused must take the Court fully into its confidence."

The accused in this case regrets her actions after her arrest. And this cannot be interpreted to mean the remorse that the accused refers to.

[22] Malgas decision was confirmed in *Dodo* 2001(3) SACR 382 (EC) and explained in *S v Vilakazi* 2009 (1) SACR 552 (SCA) that, "substantial and compelling factors need not be exceptional they must be truly convincing reasons, or weighty justification, for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly; and should ordinarily be imposed."

[23] The factors that exist in the accused's case are that the accused planned the murder. Having said this the Court cannot deviate from the imposition of the prescribed minimum sentence. The accused was aware of what she was doing and even realised the seriousness of what she was doing. What she did after the commission of the offence supports this. The accused, had she been remorseful, would and could have taken her family into her confidence and told them the truth rather sending them on a wild goose chase, looking for her grandmother whom she had buried behind her house.

[24] The Court is satisfied that the guilt of the accused has been proved beyond reasonable doubt and she is sentenced as follows;

1.Count 1: The accused is sentenced to life imprisonment

2.Count 2: The accused is sentenced to five (5) years imprisonment

3.Counts 3-9: The counts are taken together as one for purposes of sentence and the accused is sentenced to five (5) years imprisonment

4.Count 10-27: The counts are taken together as one for purposes of sentence and the accused is sentenced to Ten (10) years imprisonment

5. Count 28: The accused is sentenced to two years' imprisonment

In terms of Section 280 of the CPA the Court orders that the sentences in counts 2 to count 28 shall run concurrently with the sentence in Count 1

In terms of Section 103(1) of the Firearms Control Act 60 of 2000 no determination is made and the accused remains unfit to possess a firearm.

The South African Police services are ordered to search and seize any firearm and licence that the accused may have and have them forfeited to the State.

In terms of section 31 of Older Persons Act 13 of 2006, accused's name is to be recorded in the register contemplated in subsection 1 of the Act, that he should not be allowed to work in any older persons institution.

M.S MAKAMU

ACTING JUDGE OF THE HIGH COURT

DATE: 11 NOVEMBER 2022.

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