

SOUTH AFRICA / JUDGMENT

S v Tumaletse (KS08/2019) [2020] ZANCHC 3 (4 March 2020)

[2020] ZANCHC 3

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

KS08/2019

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case Number: KS 08/2019

Heard on: 02/03/2020

Delivered on: 04/03/2019

In the matter between:

THE STATE

v

THATAONE BOITUMELO TUMAELETSE

ACCUSED

JUDGMENT ON SENTENCE

MAMOSEBO J

[1] The accused was convicted of murder read with s 51(1) of the Criminal Law Amendment Act [1](CLAA) on 21 May 2019. I found that there was planning and premeditation that preceded the act of killing. The case was postponed for a pre-sentencing report for the sentencing phase.

[2] Section 51(1) of the CLAA stipulates:

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.”

- [3] When considering an appropriate sentence a court must have regard to the triad consisting of the crime, the offender and the interests of society as enunciated in *S v Zinn*[2]. The main purposes of punishment were reiterated as being deterrence, prevention, reformation and retribution. In *S v Rabie*[3] the following remarks were made:

“The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or explanation.... The other theories, reformatory, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment.”

- [4] The following are the accused's personal circumstances. He was 25 years old when he committed the offence and is now 26 years old. He is a first offender. He dropped out of school in Grade 11 due to his family's financial hardship. He is unemployed and has no children. He is unmarried and enjoys good health. He has been in custody since 06 November 2018 awaiting trial. He is the eldest of five siblings.
- [5] The pre-sentence report compiled by Ms Lenah Mahumapelo, a social worker and probation officer, sketched the family background of the accused succinctly in this manner. He was not raised by his parents but by his paternal grandmother whom he regards as his mother. Both his parents are still alive but his father has married someone else. A submission was made by his counsel Adv H Steynberg of Legal Aid South Africa, that he lacked the role of a father figure in his life. The accused subsists

on the pension grants of his grandparents. His grandmother describes him as a good, helpful, flexible and quiet child who

disliked getting involved in fights or violence. Notwithstanding that description the grandmother expressed the view that the accused is safe in custody for fear of reprisal by the community should he be released.

- [6] In as far as the nature and seriousness of this offence is concerned, it is undoubtedly one of the most gruesome murders involving a school-going 19 year old teenager. Dr Gideon Anizoba concluded that the cause of death was multiple stab wounds to the body with a sharp instrument with lethal consequences. The injuries as depicted in the photographs and as explained by the doctor are ghastly. The force applied in respect of the stab wound to the scalp ruptured the blood vessels and led to the bleeding on the temporal part of the brain. The doctor opined that had the deceased survived these injuries, she would have been left with some neurological deficit like deficiencies in her speech or the functionality to the right side of the body impaired.
- [7] The incision on the right posterior part of the neck severed the major blood supply to the right side of the brain. Without blood supply to the brain and depending on the reaction of emergency services to the scene, the brain would die and a person is then declared clinically

dead. There is also an incision located on the left half of the back, passing through the 4th intercostal space muscle left chest, which penetrated the lower lobe of the left lung causing it to collapse. Another incision passed through the 8th intercostal space muscles penetrating the lower lobe of the right lungs, also causing them to collapse. Both lungs had two stab wounds on each side. The 7th rib was broken in the process of stabbing. The chances of survival, said the doctor, with both lungs collapsed were very slim.

- [8] The knife used by the accused was handed in as “exhibit 1”. Its blade was 16.5cm long and its metal pipe or metal tube handle was welded into the blade, more like a handmade or self-made knife. One does not ordinarily walk around in the community with this type of knife without a reason. The injuries on the deceased were fatal, the doctor concluded. It cannot be that a person inflicting such type of injuries can disclaim a lack of preplanning or premeditation. Finding otherwise would result in a gross miscarriage of justice.
- [9] The accused claimed that he was angry with the deceased and apportioned blame to her for the loss of their child. It is an aggravating factor that he also wanted to control the freedom of movement of the deceased. He also claimed that the deceased failed to inform him of her whereabouts over the weekend. This cannot justify such merciless killing. What

further aggravates the situation is the fact that the accused had breached the protection order that the deceased had obtained against him. The deceased was wearing her school uniform and walking to school in the morning when her life was mercilessly cut short.

- [10] Women and girl children are still battling to achieve what the former Mahomed CJ had pronounced in 1997 in *S v Chapman*[4] when he said:

“[4] ...Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

- [11] The right to life for everyone is entrenched in the Bill of Rights in the Constitution. The accused showed no respect for the deceased’s life. After inflicting indiscriminately the multiple stab wounds on her person, he left her sprawled on the tarred road, slaughtered like an animal. In the circumstances the denial by the accused of a planned and premediated murder is a fallacy. In *Kekana v The State*[5] Mathopo AJA remarked:

“[13] In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.”

- [12] Turning to the interests of society. Undoubtedly, society expects appropriate sentences from the courts in order to maintain public confidence in our criminal justice system. It is undeniable that there is an alarming increase of violent crimes

against the vulnerable members of our society like women and children. Rejection of an expired love relationship in this

instance led the accused to claim the deceased's life out of a sense of entitlement. The sentence imposed must give a true

reflection of the community's resentment for the senseless killing.

[13] The accused's grandmother describes him as a good and flexible child who eschewed fighting or violence. To the contrary, the accused stated in his plea explanation: "the relationship between myself and the deceased was not flawless as we were fighting a lot after the death of our child." In the pre-sentence report the probation officer recorded the following: "the accused promised his family that he will stay away from the deceased" but did not. The accused maintained that he and the deceased were still in a romantic relationship but experiencing problems. However his family informed the probation officer that it had terminated because the deceased had even obtained a protection order against him.

[14] Mr Steynberg, arguing for the accused, said that a protection order can be obtained for many reasons and other forms of abuse and just because it has been obtained does not necessarily make the accused a violent person. It must be borne

in mind that the interim protection order was granted on 19 December 2017 and confirmed on 25 January 2018. The accused was ordered not to assault or intimidate or insult the deceased. Counsel's argument is therefore hollow.

[15] Counsel also submitted that the accused displayed remorse by pleading guilty and cooperated with the police and handed himself over after committing the offence. A plea of guilty in the face of an open and shut case against an accused person is a neutral factor. See *S v Barnard*[6]. The Supreme Court of Appeal went to great lengths detailing what remorse entails in *S v Matyityi*[7] stating the following:

"[13]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.”

[16] In as far as the accused's age is concerned, the following remarks by Ponnann JA in Matyityi[8] are relevant:

“[14] --- Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness.”

[17] The following were further submitted by the accused's counsel as substantial and compelling circumstances which justifies the imposition of a sentence less than the prescribed minimum sentence: That he was 25 years old when he committed the offence; he grew up without both his parents; he left school during Grade 11 to look for employment to assist his family; his grandmother described him as a good, helpful, flexible and quiet child who did not like to be involved in fights or violence; he plays an important role in his family; he pleaded guilty; he showed remorse for his actions; he handed himself over to the police on 06 November 2018; he awaited trial in custody for a period of one year and three months; he took responsibility for his actions, he is a first offender capable of rehabilitation.

In my view, the facts I dealt with and the authority cited above strongly militate against counsel's submission.

[18] The following pronouncements were made by Makgoka JA in the unreported judgment of Kekana v The State[9]

“[41] In S v Mhlakaza & another 1997

(1) SACR 515 (SCA) at 519c – e this court pointed out that given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence. Harms JA went on to explain, with reference to S v Nkwanyana & others [1990] ZASCA 95; 1990 (4) SA 735 (A) at 749C –D, that in other instances retribution may even be decisive. See also S v Nkambule 1993 (1) SACR 136 (A) at 147c-e; S v Swart 2004 (2) SACR 370 (SCA) paras 11 and 12; S v Govender & others 2004 (2) SACR 381 (SCA) para 32.

The learned Judge concluded at para 42 with the following:

“[42] The upshot of all these authorities is that whatever the appellant's personal circumstances and his prospects of rehabilitation, those pale into insignificance when weighed against the aggravating factors. In all the circumstances, I am of the view that life

imprisonment on each of the murder counts is the only appropriate sentence.”

[19] State counsel, Mr Rosenberg, has urged me not to accept the aforementioned as substantial and compelling circumstances and rather to have them recede to the background based on the nature and seriousness of the offence. He also relied on the Victim Impact Report compiled by the probation officer, Ms Nomonde Ntshona, dated 12 April 2019. The deceased came from a structured family of two parents with two younger siblings aged 13 and 8 years. She was in Grade 11 and had an ambition to study further in life. Her untimely death has resulted in psychological and emotional distress to her parents, grandparents and siblings. They require further professional interventions which includes counselling. The probation officer remarked in conclusion that society is concerned about femicide in the country. This incident is a species of femicide.

[20] Regard being had to the above considerations and authorities cited, I cannot deviate from the prescribed minimum sentence for flimsy reasons as pronounced by the Supreme Court of Appeal in *S v Malgas*[10]. The personal circumstances of the accused must indeed recede into the background. I find no substantial and compelling circumstances

to ameliorate the moral turpitude of the accused’s vile conduct.

[21] In the result the accused is sentenced to life imprisonment.

MAMOSEBO J

NORTHERN CAPE DIVISION

For the State:

Adv Rosenberg

Instructed by:

Director of Public Prosecutions

For the accused:

Adv H Steynberg

Instructed by:

Legal Aid South Africa

[1] Act 105 of 1997

[2] 1969 (2) SA 537 (A) at 540G

[3] 1975 (4) SA 855 (A) 862 A - B

[4]

[1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A) at para 4

- [5] (629/2013) 2014 ZASCA 158 (1 October 2014) at para 13
- [6] 2004 (1) SACR 191 (SCA) at 197
- [7] 2011 (1) SACR 40 (SCA) at para 13; also reported at [2010] 2 All SA 424 (SCA) (30 September 2010)
- [8] At para 14
- [9] (37/2018) [2018] ZASCA 148 (31 October 2018) at para 41
- [10] 2001 (1) SACR 469 (SCA) at para 9
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