

SOUTH AFRICA / JUDGMENT

S v Vaaiboom (K/S11/2022) [2023] ZANCHC 33 (3 February 2023)

[2023] ZANCHC 33

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S11/2022

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: K/S11/2022

Heard on: 01/02/2023

Delivered on: 03/02/2023

In the matter between:

THE STATE

v

SANDILE VAAIBOOM

ACCUSED

JUDGMENT ON SENTENCE

MAMOSEBO J

- [1] The accused was convicted on 02 December 2022 on the following five counts: Count 1: Housebreaking with intent to commit murder and murder read with the provisions of s 51(1) of the Criminal Law Amendment Act[1] (CLAA); Count 2 murder read with the provisions of s 51(1) of the CLAA; Count 3: Malicious injury to property; Count 4: Housebreaking with intent to commit murder and murder read with the provisions of s 51(1) of the CLAA; and Count 5: Malicious injury to property. The provisions of s 51(1) in Counts 1, 2 and 4

prescribes a minimum sentence of life imprisonment unless the court found substantial and compelling circumstances justifying the imposition of a lesser sentence. All these charges emanated from a single incident, which occurred on 18 March 2022. The details of the incident appear from the judgment on the merits but the crux of how the murders were carried out will emanate from the sentencing phase.

[2] The remarks by Majiedt JA (then) in *Mudau v The State*[2] are apposite:

“[13] Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried with equanimity; as Corbet JA put it in S v Rabie [1975 (4) SA 855 (A) at 866 A – C]:

‘[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.’”

[3] Mr Thipe, appearing for the accused, called the accused to testify in mitigation of his sentence and he tendered the following evidence. He was born in Kimberley on 10 June 1985 and is 37 years and 7 months old. He is the second of four siblings. He attended school at Vuyoletu Secondary School in Kimberley up to Grade 11 which he failed and dropped out. He performed casual work at Lezmin Construction Company in Kimberley and Douglas as general labourer (“handlanger”) and earned R600.00 per fortnight for about five years; he worked at the Spar store in Barkly West earning R1,000.00 per month for two years; he washed cars at Oranje Toyota for two years for R1,800.00 per month and was a taxi marshal and earned between R50.00 and R200.00 a day.

[4] Both the accused’s parents are deceased. His mother passed on in 1998 when he was 13 years old and was raised by his paternal grandmother. He then moved in with his father and step-mother who ill-treated him. His father passed on in 2020. He has a good relationship with his paternal relatives but only one cousin visited him in prison after his incarceration. The deceased in Count 1, Mr Petrus Vaaiboom, is his uncle and the

deceased in Count 2, Ms Kerileng Angelina Modise, is his uncle’s life partner, while the deceased in Count 4, Vuyisile Joel Vaaiboom, is his brother.

[5] Dr NK Kirimi, State Psychiatrist, and Dr ME Seitshiro, Psychiatrist appointed by the Court for the defence, evaluated the accused and compiled a report on 22 September 2022. They found that in terms of s79(4)(c) of the Criminal Procedure Act[3] (the CPA) he had the mental capacity to follow court proceedings so as to make a defence. The doctors further found in terms of s 79(4)(d) of the CPA that at the time of the alleged offence, he had the ability to

appreciate wrongfulness of the crimes but his capacity to act accordingly was diminished by polysubstance intoxication. The psychiatrists recommended that the law take its course. The accused testified that on the day of the incident he did not consume any alcohol but ingested drugs only in the morning. He has been on drugs, (cannabis and methamphetamine) as specified by Dr Kalandula, since 2010 without any intervention from a rehabilitation centre.

- [6] He asks for forgiveness from his relatives and claims to be remorseful for what he has done. He says should an opportunity for rehabilitation arise he would take it and turn his life around by

staying away from drugs. Mr Thiye made the following additional submissions: He asked the Court to show mercy when sentencing the accused. He submitted that the mere fact that the accused pleaded guilty and did not waste the court's time shows remorse on his part and that he will live with a guilty conscience for the rest of his life. That the court must take into consideration that he comes from a dysfunctional family. Cumulatively, the circumstances raised constituted substantial and compelling circumstances which warrant a deviation by the Court from imposing the prescribed minimum sentences, counsel urged.

- [7] The State proved one previous conviction, which the accused admitted, of theft committed on 01 April 2010 where he was sentenced to R240.00 or 30 days imprisonment wholly suspended for a period of three years on specified conditions. It is older than 10 years. Section 271A of the CPA determines that the lapsing of a previous conviction is automatic after the expiration of 10 years. The accused is therefore treated as a first offender.
- [8] Ms Weyers-Gericke, counsel for the State, handed in, by consent, two victim-impact reports marked exhibits "J" and "K" compiled by Ms Wilma Roux, a qualified Social Worker employed by the

Department of Social Development, with 26 years' experience of which 5 years were served as a probation officer.

- [9] Starting with the report of the family of the deceased, Vuyisile Vaaiboom (Exh "K"). The deceased is survived by his wife, Lerato Vaaiboom and three children, M[...], a son born on 15

March 2001; U[...], a daughter born on 03 June 2011 and A[...], a son born 04 August 2020. A[...] was only 18 months old when his father met his untimely death. This family has not only been deprived of a breadwinner, a father and a husband, but their dream of moving to a new and bigger home in 2022 has been shattered by his death. They, together with the Oliphant family, comprising 10 people in total, reside in a 2-bedroom RDP maternal family home with limited space and privacy. Ms Larato Vaaiboom is employed as a VCT counsellor at a local clinic and Ms Baratang Oliphant, Mrs Vaaiboom's sister, is employed at the local CWP (the report does not give full description of the acronyms "VCT" and "CWP"). The families are struggling financially. Mrs Vaaiboom has not received her husband's pay-out benefits and is struggling to make ends meet. She has had to obtain a protection order against her brother-in-law who threatened her and her

children demanding her late husband's pension money and his vehicle. They have very little contact with the Vaaiboom family.

[10] The family still requires counselling to heal. M[...], their eldest son, was at school in Welkom when his father lost his life. He has since not returned to school not only for financial reasons but also because he is struggling to cope with his father's loss. U[...], on the other hand, has become withdrawn since her father's passing. She spends most of her time in the room gazing into space and does not play outside with other children. She frequents her father's grave. A[...], the last born, demands to see his father. The entire family is still grieving the loss of Mr Vaaiboom.

[11] The other report, Exh "J", pertains to Ms R[...] N[...] K[...], the daughter of the deceased in Counts 1 and 2, Mr Petrus Vaaiboom and Kerileng Angelina Modise. She is a Grade 12 pupil at Boresetse High School and is five months pregnant. She comes from a family of twelve, six of which reside in a 4-roomed shanty while there are six shanties in the same yard where each of the other six occupies his or her own shanty. She is maintained by her

uncle. She has not only lost her parents but her younger sibling who was placed in another family member's care after

the death of her parents. She is still grieving their loss.

[12] When the Court considers the question of sentence, inevitably, the triad as espoused in *S v Zinn*[4] is pivotal. It involves the nature of the crime committed, the personal circumstances of the accused and the interests of society. The personal circumstances of the accused have already been addressed. The offence of murder is in itself a very serious and heinous crime. In the facts before me it was committed under brutal and senseless circumstances. All three of the deceased were butchered by a relative with a knife, unprovoked and for no apparent reason. They were all unarmed and in the sanctity of their homes where they were supposed to be safe in their proverbial fortresses. All three deceased were deprived of their constitutionally entrenched rights to life, dignity and bodily integrity.

[13] Nugent JA, writing for a unanimous court in *S v Swart*[5] pointedly remarked:

"[12] ...[I]n our law 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. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role. Moreover, as pointed out in S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222) in para [25] at 482f (SACR) and 1236E (SA), where a court finds that it is not bound to impose a prescribed sentence 'the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.'"

[14] The deceased in Count 2 was a woman. All the deceased were the accused's relatives and the deceased in Count 4, Vuyisile Vaaiboom, was a police officer. The accused gained access into their homes by breaking in. The deceased in counts 1 and 2 took the accused in to their home after he lost his employment and offered

him shelter. As the saying goes, he bit the hands that fed him. After killing the couple, not even deterred by the distance between the couple's home to the deceased in count 4's place and still armed with the bloody murder weapon, he broke into the home of Mr Keith Thamsanqa Vaaiboom and killed his unsuspecting and unarmed brother who was at that time an off-duty police officer who had paid his brother a visit.

[15] It must be pointed out that although the accused indulged in drugs, his own testimony was that he did so in the morning whereas the incidents occurred in the evening. It can therefore be safely inferred that at the time when the incidents occurred the effect thereof had, at the very least, waned. It was not a classic drug-fuelled indiscriminate attack. He had time and space to consider his evil intentions. In fact, and in short, the murders were premeditated. The psychiatrists wrote in their report that he was able to follow the proceedings and formulate a defence. The writer and law lecturer, SS Terblanche[6], wrote the following regarding the seriousness of the crime:

"Almost every kind of crime has its own inherent set of factors which aggravate that crime and, therefore, call for a more severe sentence. In crimes of violence major factors which may aggravate the crime include the degree and extent of the violence used, the nature of any weapon, the brutality and cruelty of the attack, the nature and character of the victim, whether the victim was unarmed or helpless, and so on." (own emphasis added)

[16] The body of Petrus Vaaiboom had multiple incised wounds. The chief post-mortem findings by Dr Charles Kanaomang were the following: A body of Black adult male with multiple stab wounds. The blade of the sharp object penetrated the neck on the right through 4.1.3 and 4.1.4, and partially transected the right internal jugular vein (through 4.1.4). The right carotid is intact. The stab wound (4.1.3) extends into the mouth cavity through the side of the tongue. There is blood in the mouth, trachea and bronchi. The lungs are congested and have red round areas on the inside surface on cut sections (positive macroscopic sign of blood aspiration). There is also blood in the stomach.

The liver is slightly pale; and the kidneys are also pale, due to blood loss. The cause of death is blood aspiration.

[17] The chief post mortem findings by Dr Charles Kanaomang on the body of Kerileng Engelina Modise are: A body of a Black adult female with multiple stab wounds. The blade of the sharp object penetrated the neck on the right side through 4.1.4 and partially transected the internal jugular vein. The right carotid artery is intact. Two

stab wounds penetrated the chest cavity with no injury to the lungs or any other vital structures. The brain, lungs, liver and kidneys are pale, due to blood loss. There is subendocardial bleeding on the posterior wall of the left ventricle (suggestive of excessive blood loss). The cause of death is exsanguination (excessive blood loss outside the body).

[18] The chief post-mortem findings by Dr Charles Kanaomang on the body of Vuyisile Vaaiboom are: A body of a Black adult male with multiple stab wounds. The blade of the sharp object penetrated the right chest cavity (through the 10th cartilage) and stabbed the diaphragm and then the right lobe of the liver. The blade of the sharp object penetrated the abdomen and then stabbed the transected colon and right kidney, both of which were removed surgically. The brain is swollen. Both lungs are oedematous and congested. There is also pleural fluid in the chest cavities. The abdominal wall and cavity are inflamed. The small bowel is inflamed. There is chicken fat in the heart chambers (suggestion of underlying infection). The cause of death is complications of stabbed abdomen.

[19] The nature of the offences in Counts 1, 2 and 4 fall within the purview of s 51 (1) of the CLAA, which prescribes minimum sentences, namely, life imprisonment for each of the murder counts unless substantial and compelling circumstances are found to be present. In respect of a plea of guilty the Supreme Court of Appeal (the SCA) pronounced in *S v Barnard*[7] that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor.

[20] The SCA in *Matyityi*[8] remarked that many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Whether the accused is sincerely remorseful and not feeling sorry for himself at having been caught is a factual question. The Court expressed itself in these terms:

“[13] 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] Bosiello JA in *S v PB*[9] remarked:

“[21] The most difficult question to answer is always: What are substantial and compelling circumstances? The term is so elastic that it can accommodate even ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part of a sentencing court.”

[22] This case, in my view, is one of those cases where, because of the seriousness of the offences committed and all the other aggravating factors considered, the accused's personal circumstances must recede into the background because the crimes are deserving of a substantial term of imprisonment. See *S v Vilakazi*[10] The pre-sentencing or the awaiting trial incarceration of the accused for a period of about one year pales into insignificance on the sketched overall picture.

The malicious injury to property charges

[23] Counts 3 and 5 are for malicious injury to property. Accused also pleaded guilty on both counts. In Count 3 he damaged the Polo motor vehicle by smashing its windows the property belonging to Vuyisile Joel Vaaiboom, the deceased in Count 4. In Count 5 the accused damaged the house windows, burglar bars, curtain rail, curtains, wall unit, Hi-Fi music system, smashing the windows of an Isuzu vehicle and a Hyundai vehicle, the property of Ratlala Jeremiah

Douw. This conduct is demonstrative of the fact that the accused ran amok and was bent on a criminal and murderous spree.

[24] It is the duty of the Courts to promote public confidence and respect for the rule of law and the rights and bodily integrity of fellow human beings. The community of Barkly West was shocked by these senseless killings and destruction of property. The families of the bereaved and the victims of these damaged properties remain without answers for the loss of their loved ones and their damaged goods. A retributive punishment is the only appropriate punishment under the circumstances. Ponnani JA in *S v Matyityi*[11] remarked that sentencing must also be victim-centred. It is necessary for the families of the deceased and the society at large to experience a sense of vindication through the punishment meted out. A deviation from the ordained legislatively prescribed sentence cannot be justified but would, on the contrary, make a mockery of the administration of justice.

[25] On a conspectus of all the evidence, the submissions and authorities considered the accused is sentenced as follows:

25.1 In respect of Count 1 of Housebreaking with intent to commit murder and Murder read with the provisions of section 51(1) of Act 105 of 1997: the accused is sentenced to life imprisonment.

25.2 In respect of Count 2: Murder (read with the provisions of section 51(1) of Act 105 of 1997: the accused is sentenced to life imprisonment.

25.3 In respect of Count 3: Malicious Injury to Property: the accused is sentenced to five (5) years imprisonment.

25.4 In respect of Count 4: Housebreaking with intent to commit murder and Murder (read with the provisions of section 51(1) of Act 105 of 1997: the accused is sentenced to life imprisonment.

25.5 In respect of Count 5: Malicious Injury to Property: the accused is sentenced to five (5) years imprisonment.

25.6 The sentences in respect of Counts 2, 3, 4 and 5 are to run concurrently with the sentence of life imprisonment in Count 1.

MAMOSEBO J

NORTHERN CAPE DIVISION

For the State: Adv SK Weyers-Gericke Director Public Prosecutions For accused: Mr. K Thipe
Thipe Attorneys Legal Aid South Africa

[1] 105 of 1997

[2] (764/2012) [2013] ZASCA 56 (09 May 2013) at para 13; 2013 (2) SACR 292 (SCA)

[3] 51 of 1977

[4] 1969

(2) SA 537 (A) at 540G

[5] 2004

(2) SACR 370 (SCA) at para 12

[6] Guide to Sentencing in South Africa 3 ed (2016) at 211

[7] 2004

(1) SACR 191 (SCA) at 197

[8] S v Matyityi 2011 (1) SACR 40 (SCA) at page 47 para 13

[9] 2013

(2) SACR 533 (SCA) at 539 para 21

[10] 2009

(1) SACR 552 (SCA); (2012 (6) SA 353 (SCA)

[11] 2011 (1) SACR 40 (SCA) at 48G to 49H

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