

SOUTH AFRICA / JUDGMENT

S v Van Staden (KS21/2016) [2017] ZANCHC 21 (20 March 2017)

[2017] ZANCHC 21

COURT

Northern Cape High Court, Kimberley

BEFORE

M C Mamosebo

CASE / FILE NUMBER

KS21/2016

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IN

THE HIGH COURT OF SOUTH
AFRICA

(Northern

Cape High Court, Kimberley)

Case

No: KS

21/2016

Heard: 15/02/2017

Delivered: 20/03/2017

In

the matter between:

STATE

V

NEVILLE VAN

STADEN

ACCUSED

JUDGMENT**ON SENTENCE****MAMOSEBO.J**

[1] On 07 December 2016 the accused, Mr Van Staden, was convicted as follows: Count 1 : murder read with the provisions of s 51 of the General Law Amendment Act 105 of 1997, as amended; Count 2: assault common; Count 3: assault with intent to cause grievous bodily harm and Count 4: assault common.

[2] It is trite that the triad comprising the personal circumstances of the accused, the nature and seriousness of the offences as well as the interests of the society must be taken into consideration when imposing sentence. See *S v Zinn* 1969 (2) SA 537 (A) at 540. The offences with which the accused has been convicted are prevalent in this province. However, taking cue from the

pronouncements by the Supreme Court of Appeal in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at 241 para 35:

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. Against that must be weighed the appellant's prospects of reformation and rehabilitation, It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

[3] The personal circumstances of the accused are the following: He is a 43-year old man and resides in Prieska in the Northern Cape. He is unmarried and has six children two of whom are with the deceased. Their ages range from 15 to 23 years old. Before his incarceration his highest academic achievement was Grade 10 (Standard 8) but he furthered his studies and completed Grade 12 in prison. At the time of his arrest he was employed by a company called Schletter whose trade is the installation of solar panels. He earned R5200 per month. He was in a love relationship with the deceased since 1995.

[4] The accused admitted all his previous convictions. Counsel conceded that it would be difficult to argue that his previous convictions do not make a sorry reading. Also conceded is that the accused is short-tempered and gets infuriated quickly wondering which may be a personality problem. The last concession by counsel was not based on any expert reports of either a psychologist or a psychiatrist. Counsel added that the assault charges on counts 2, 3 and 4 support his assertion that the accused is a short-tempered person.

[5] Adv Schereuder submitted that the fact that the accused did not plan to kill the deceased should serve to warrant a deviation from the imposition of life imprisonment. He suggested that in relation to the murder count, a sentence of 15 years or even 20 years would serve as a deterrent. Counsel further urged me to order the sentences in counts 2, 3 and 4 to run concurrently with the sentence on the murder count. Counsel made no submissions in as far as the accused's fitness to possess a firearm. The Court has already declared the accused unfit to possess a firearm on 30 July

2004. In as far as the suspended sentence of 17 September 2015 is concerned, counsel for the state did not apply for it to be put in operation.

[6] In aggravation of sentence Adv Kgatwe called the deceased's brother, Mr Hendrik Jas, to testify on the impact the deceased's death has on the family. He is the uncle to the deceased's daughters, J. and N.. He resides with J. , the 16 year old younger daughter who still attends school

and in Grade 9. N. is 20 years old and has a child. She dropped out of school and is unemployed. He explained that the deceased's death was a tragedy. His niece, J., failed a class and had to repeat it, she continuously speaks to the deceased 's photo that is displayed on the wall at his house. Although she is receiving therapy at Prieska hospital twice a week her behaviour has changed.

[7] Mr Jas testified that the accused has not contributed towards the maintenance of his children. Charity organizations, FAMSA and Hospice, donated clothes to his niece. The accused contributed an amount of about one thousand rand (R1 000.00) towards transportation of the children to attend their mother's funeral and did not contribute towards funeral costs. Mr Jas stated that the deceased ran away from the accused at some point and went to live in Johannesburg. He and the accused fought physically because the accused broke his grandmother's rib s. When the deceased was six months pregnant with his child he pushed her in front of a moving vehicle which, fortunately, was not fatal.

[8] The accused has been convicted of murder with direct intent (*dolus directus*). The cause of death was asphyxiation due to strangulation, as well as the consequences of multiple assault injuries. The doctor had already confirmed that the deceased had no chance of survival after sustaining such injuries. All the deceased' s ribs were fractured. The accused cannot stand before Court and claim that with such extensive use of blunt force that broke all ribs, caused sub-cutaneous bruising of the scalp on both sides, a laceration in the upper lobe of the right Jung, a pulpified left lung, as well as the pulpification of the right lobe of the liver, plus strangulation intention was not to kill the deceased. The colour photographs of the deceased' s multiple external and internal injuries are too ghastly to view.

[9] The accused has a catalogue of previous convictions, comprising 5 (five) pages, which, on the face of it, may show a propensity for criminality but more pertinently violence. He had his first clash with the law in 1990 and his last conviction and sentence was on 17 September

2015. He has one previous conviction of rape.

- [10] Section 27IA of the Criminal Procedure Act, 51 of 1977 (the CPA), determines that certain convictions fall away as previous convictions after the expiration of 10 years unless during that time the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed. See Du Toit: Commentary on the Criminal Procedure act, Service 56, 2016 at 27-8. Although most of the accused's previous convictions are older than the 10 years, the number and nature of the convictions do signify a trend hence I hold the view that they should be taken into account.
- [11] In *S v Kruger* 2012 (1) SACR 369 (SCA) the Supreme Court of Appeal held that, even where previous convictions are an aggravating factor, it remains the duty of a sentencing court 'to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence'.

The remarks by Majiedt JA in *Mudau v The State* (764/2012) [2012] ZASCA 56 (09 May 2013) at para 13 are apposite:

"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 out with equanimity, as Corbett JA put it in *S v Rabie* [1975 (4) SA 855 (A) at 866 A-CJ:]

'[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 interest 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. '"

- [12] In Count 1: murder, the accused undermined the deceased and insulted her dignity by brutally assaulting her and eventually strangling her. His defence of an alibi was bizarre. He was placed at the scene by state witnesses whose evidence I found to be credible. The accused has not shown any sign of remorse throughout the trial. The remarks on remorse by Ponnar JA in *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13 are paramount.

- [13] In *S v Malgas* 2001

- (1) SACR 469 (SCA) at 481j Marais JA exhorted judicial officers not to depart from the specified sentences for flimsy reasons. See also *S v Fatyi* 2001 (1) SACR 485 (SCA) at 488 para 5. The accused has already been convicted of murder with direct intent to kill. Sec 51(1) of the General Law Amendment Act, 105 of 1997 finds application in that the prescribed minimum legislation is applicable. Counsel for the accused did not point out any compelling or substantiating circumstances that would warrant a deviation from the prescribed minimum sentence. I did not find any either. The circumstances under which this murder was

committed are, undoubtedly, such that the imposition of the prescribed minimum sentence is consequential.

- [14] Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased's partner, who had the duty and the responsibility to protect her and not to harm her. It is killings like the one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes.

In the unreported judgment *S v Mudau* 2014 JDR 0641 (SCA); (547/13) [2014] ZASCA 43 (31 March 2014) (at para 6 Mathopo AJA pronounced:

" Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in *S v Chapman* [1997] ZASCA 45; 1997

- (3) SA 341 (SCA) at 345A-B when the Court said the following: 'Women in this country 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. '"

[15] In *S v Siluale en Ander* 1999

- (2) SACR 102 (SCA) from the headnote at 103 Grosskopf JA remarked:

"If the circumstances of a case require that an offender should receive a sentence which for all practical purposes removes him permanently from society, life imprisonment is the only appropriate sentence. It is intended to be the most severe sentence that can be imposed."

- [16] In considering whether the accused is a candidate for rehabilitation or not I am mindful of the pronouncements by the Supreme Court of Appeal in *Ravele v S* (20079/14) [2014] ZASCA 118 (19 September 2014) where Mocumie AJA (concurring in by Cachalia and Bosielo JJA) pronounced:

"[19] He has a long list of previous convictions which, on the face of it, shows a propensity for criminality. He had his first clash with the law at the tender age of 13 years. Amongst his previous convictions is one of indecent assault for which he was convicted when he was 14 years old. Nonetheless, it was wrong for the court a quo to look at the appellant's previous convictions and conclude therefrom that there were no prospects for his rehabilitation. There is no evidence to inform the court of his upbringing, his social and cultural background, his family structure and whether his upbringing had any influence on his susceptibility to crime and his anti-social

behaviour and whether he would have been receptive to any rehabilitation program. What is clear is that he is still relatively young. He requires correction and rehabilitation, but not destruction,[9] lest he returns to the very society from which he comes more hardened and desensitised to living amongst law abiding citizens. Programs aimed at rehabilitation of young offenders may give him an opportunity to change his behaviour, especially that towards women. "

As alluded to earlier, the accused is not youthful anymore but 43 years of age. He still has an option to avail himself for rehabilitative

programs that will assist him to mend his ways and to change his approach to women and people in general. It is unclear at this stage what informed the accused' s behavioural patterns.

[17] In respect of the assault on Mr Wewu in Count 2: The assault was on a 55 year old man and was unprovoked. Although Mr Wewu suffered a 1 cm laceration which was healed his dignity of being assaulted for no apparent reason by the accused was affected. The accused displayed utter lack of respect for the older folk which must be frowned upon.

[18] The fear that the accused instilled in his victims is inexcusable. Mr Wewu abandoned his plans for the evening after the incident at the tuckshop. Mr Phillip Kers, the complainant in Counts 3 and 4, had to flee from the accused neglecting his visitors on the same evening . He was forced by circumstances imposed by the accused to flee from his own home due to fearing him. Seeking refuge from his relatives was also short-lived because the accused caught up with him and assaulted him again. Mr. Kers' fear was glaring to Ms Patosi the

community leader in the area who was summoned by Mr Kers to intervene between them. This is blatant terror on the members of the community. I find no justification in the conduct of the accused attacking defenseless people. That evening his belligerent behavior was like a ticking-bomb waiting to explode. It is conduct similar to the accused's that justifies

protection of the members of the society by the courts. In my view the aggravating circumstances by far outweigh the mitigating circumstances.

[19] In S v SD 2015

(2) SACR 363 (SCA) at 368 para 16 Brand JA's remarks are instructive:

"[16] When one looks at the offences under present consideration and the interests of society, 1 can come to one conclusion only: the offences for which the appellant has been convicted are so severe that incarceration cannot be avoided. In that sense it is 'the last resort of punishment'.Any sentence which fails to recognise the severity of these crimes may lead to society losing its confidence in the criminal justice system. Especially in a society where violence has become prevalent and endemic, one simply cannot afford that risk"

[20] In the result, the following sentences are imposed:

1. On Count 1: Murder: Life Imprisonment

2. On Count 2: Assault Common: 12 Months Imprisonment
 3. On Count 3: Assault with intent to cause Grievous Bodily Harm: Two (2) years imprisonment.
 4. On Count 4: Assault Common: 12 Months Imprisonment.
 5. The sentences in respect of Counts 2, 3 and 4 are to run concurrently with the sentence of Life Imprisonment for murder in Count 1.
 6. The Registrar of the South African Police Service is directed to enter an endorsement in the register in terms of s 13 STYLE="font-size: 12pt">03
- (3) of the Firearms Control Act, 60 of 2000.

M C MAMOSEBO

JUDGE: NORTHERN CAPE HIGH COURT

On behalf of the State: Adv. K Kgatwe

Office of the Director Public Prosecutions

On behalf of the Accused: Adv. JJ Schreunder

The Justice Centre, Kimberley

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Prepared on 9 October 2026 · Esheria