

SOUTH AFRICA / JUDGMENT

S v Zitha (CC38/2021) [2022] ZAMPMBHC 54 (24 February 2022) [2022] ZAMPMBHC 54

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

CC38/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA (MAIN SEAT)

CASE

NUMBER: CC38/2021

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:-

THE

STATE

versus

MXOLISI

JOSEPH

ZITHA

Accused

JUDGMENT

(SENTENCE)

GREYLING-COETZER AJ

- [1] The accused (“Mr Zitha”) was charged with the murder of Ms Goodness Ncanekile Peke Masina his long-standing girlfriend and mother of his four children (“the deceased”). The State alleged in the charge sheet that the murder of the deceased was premeditated and/or planned and read with Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“Minimum Sentence Act”). Mr Zitha pleaded guilty as charged and did not place the premeditation or planning in dispute. He admitted that he was guilty of premeditated or planned murder and submitted a Section 112(2) statement in terms of the Criminal Procedure Act 51 of 1977 (as amended) (“the Act”) to the court.
- [2] On the strength of his plea and Section 112(2) statement Mr Zitha was convicted of Murder, as read with the Minimum Sentences Act. The conviction attracts a minimum sentence of life imprisonment. This court thus does not have a clean canvass to work from. Differently put, unless I am satisfied that there are substantial and compelling circumstances as envisaged in Section 51(3) of the Minimum Sentence Act, I shall be obliged to impose life imprisonment.
- [3] Imposing a sentence pursuant to conviction has been described as a “painfully difficult problem” which involves a careful and dispassionate consideration of all the relevant factors. The court must consider the factors referred to in *S v Zinn*[1] being:-
- (a) the interests of society,
 - (b) the personal circumstances of the accused; and
 - (c) the nature of the offences that have been committed.
- [4] The court must also in considering above factors, be alive to the recognised objectives of sentencing, being prevention, rehabilitation, deterrence and retribution. The seriousness of the offences, the circumstances under which it was committed and the victim are also relevant factors in respect of the last element of the triad.
- [5] The ultimate objective is that the punishment must fit the crime. In *S v Rabie*[2] it was held as follows:-

“Punishment should fit the criminal as well as the crime, be fair to society and be blended with the measure of mercy according to the circumstances.” [own emphasis]

- [6] A sentencing court, faced with the application of a prescribed minimum sentence such as in this case, may depart therefrom if said court, upon a consideration of the circumstances of the particular case, is satisfied that such circumstances render the prescribed sentence unjust, in that it would be disproportionate to the crime, the accused and the need of society, so that an injustice would be done by imposing that sentence.[3]
- [7] A sentencing court is expected to balance all the relevant factors and must endeavor not to over- or under emphasize any one of them.

PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [8] Mr Zitha was born in 1988 and is currently 33 years of age. According to him he passed Grade 8, but left school in order to provide for the deceased and their eldest child when the deceased fell pregnant. The deceased and Mr Zitha commenced a romantic relationship when they were approximately 18 or 19 years of age. Their relationship was blessed with four children – the oldest being 14 years of age, the second born 12 years of age, the third born 6 years of age and the youngest being 4 years of age. There is nothing to suggest that their relationship in the large was unstable.
- [9] Mr Zitha was predominantly employed in the building industry, and depending on the project, on average earned R3 000.00 per month. The deceased was also contributing as a cleaner alongside the road works, her salary depending on the contract was R1 200.00 per month.
- [10] Mr Zitha's father is alive, and his mother died when he was in school. He has three siblings, two of who are older and one younger than him.
- [11] Mr Zitha has been in custody for approximately 8 months, since this incident on 11 June 2021. His four minor children are currently staying with their maternal uncle, being the brother of the deceased.
- [12] Mr Zitha did not testify in mitigation of his sentence. Had he done so, it would have been taken into account as a mitigating factor. That he elected not to do so, will however not be viewed as an aggravating factor.
- [13] The State led no evidence in aggravation of sentence.
- [14] Mr Zitha admitted two previous convictions, one in respect of Assault with the intent to do grievous bodily harm which incident occurred on 18 April 2017, and for which he was convicted on 13 May 2021. He was sentenced to 6 months imprisonment, wholly suspended for 5 years on condition that he is not again convicted of assault with the intent to do grievous bodily harm during the period of suspension.

- [15] The second conviction was for possession of stolen goods, which was committed on 16 February 2018, and for which he was convicted on 10 June 2021. He was sentenced to 3 years imprisonment wholly suspended for 5 years on condition that he is not convicted of the same crime committed during the period of suspension.

NATURE OF THE OFFENCES

- [16] From the Section 112(2) statement and formal admissions in terms of Section 220 of the Act, the facts on which Mr Zitha was convicted can be summaries as follows. The deceased left Mr Zitha and their joint place of residence in March 2021, and did not return. During the same period Mr Zitha was arrested for the possession of stolen goods and remained in custody. Mr Zitha and the deceased did not have any contact with each other since then. He did not know her exact whereabouts but he knew that the deceased was staying with a friend.
- [17] On 10 June 2021 (the day of the incident) Mr Zitha was convicted for the offence as referred to in paragraph 15 herein above and which he was arrested for in March 2021. He was released from custody on the same day and he returned to their residence just to find that the deceased was still not there.
- [18] Mr Zitha went look for the deceased and found her at a friend Lindi Dube's home. He confronted her as to why she was not at their residence. She indicated that she no longer staying there.
- [19] Mr Zitha pressed the deceased to return to their place of residence in order for them to speak alone. Lindi Dube interjected, and indicated that the deceased will not go with Mr Zitha. He again requested the deceased to go with him, but she intimated that she would not accompany him as she was afraid of him.
- [20] The aforementioned exchange resulted in an argument, during which the deceased indicated that their relationship had to end. Mr Zitha then grabbed the deceased and pulled her out from Lindi Dube's residence. He explained that he did so as he wanted to remove the deceased from Lindi Dube's house, who according to him, was the person causing the problems.
- [21] Mr Zitha slapped the deceased after she persisted that she was not going with him. She indicated that she had another boyfriend. Mr Zitha then armed himself with a stick and started hitting the deceased. This escalated by Mr Zitha commencing to strangle the deceased until she fell to the ground.

- [22] He knelt next to her and continued to strangle her, saying to her that he would stop if she told him why she was still friends with Lindi Dube. Mr Zitha continued to strangle her. After the deceased lost consciousness, Mr Zitha “wake her up”. The deceased regained consciousness, whereafter Mr Zitha went to find an object to conduct the kill with. He armed himself with a bow saw, which he fetched some meters away next to the house. With the saw, Mr Zitha slit the deceased’s throat.
- [23] The photographic evidence and post-mortem report show that the deceased’s neck was not merely slit by the saw but the incision wound was 14cm deep. Her head was basically cut off, save for the trapezius muscle (upper back muscle) and longus coli which was connecting the neck and the body.
- [24] The murder was brutal with more than one weapon being used, a stick, a mop with a steel head and a saw. The bloody mop was standing up straight next to the side of the house, as if it had been replaced, next to the house some meters away from where the deceased body was found.
- [25] Our courts have consistently held that where death occurs because of jealousy or anger as between lovers, that this is a crime of passion due to the emotional condition in which the guilty finds himself/herself. It is dependent on the facts of each matter whether such a situation would give rise to a mitigating factor.[4]
- [26] As remarked in *S v Khwela*[5] a court should be careful to guard against the perpetuation of the often held misperception that in every case where there is a killing, consequent upon a breakup of a love relationship, of an ex-lover or the ex-lover’s new lover, the very existence of such relationship alone is sufficient for the perpetrator to be regarded in such sympathetic a light as to justify the imposition of a sentence upon him or her markedly more lenient than that which would be imposed had the love relationship not existed, and had there been some other motive for the killing that one connected with such love relationship.
- [27] It is unavoidable that this was yet another case of brutal gender-based murder. A case where a decision of a women to leave her partner, be it for whatever reason, was not respected. Mr Zitha simply refused to accept that the deceased left him.
- [28] One can understand the emotion involved when your heart is broken by a person whom you love, but it is incomprehensible that the person who loved you enough to share parenthood of four children with, can be the same person who can decide to cause your death in such a brutal manner. It is deplorable. It leaves a thought that, if you cannot find it within you to respect the decisions of your life partner, how can you have any respect for the lives of strangers.

INTEREST OF SOCIETY

- [29] Domestic violence has become the norm and femicide seems to be how many a love story end. I cannot express it better than it was by Ratshibvumo AJ (as he then was) in the matter of S v Mhaule:-[6]

“The community deserves to live in a better world than this. A world in which a woman is able to move out of a relationship without fear of losing her life. A world in which one needs only a voice to say ‘no’ as oppose to strength to display it. A world in which a woman’s life is valued by all and her fate is not in the hands of a man who crept into her heart guised as a lover: one who will one day decide when her time on earth is over and that she should die. A world in which she is able to determine her own destiny and put her fate in the hands of the creator according to her beliefs. But that world remains far-fetched and in our dreams; as long as cruel and heartless murderers like the accused are still free to roam the streets, mingling with other humans. For on the face value, they look like other humans showing no sign of inhumanity on their appearance, especially when dressed in beautiful human clothes. The community demands that when these beings are unmasked, they should be removed from their minds for a long time and only rejoin them when the element of humanity is part of their character.”

- [30] When it comes to domestic violence and femicide, the community wants only one thing, and that is for it to stop.
- [31] This case does not involve a woman who was killed for known infidelity or for being caught cheating, as in many of the authorities dealing with “spur of the moment” murders. In the present matter the deceased was not married to Mr Zitha, but involved in a long-standing romantic relationship, having four children together. The deceased decided, for whatever reason, shortly before or due to Mr Zitha’s arrested, that she did not want to continue with the relationship. She left their communal home and him more than two months, before the dreaded day. Unwilling to accept the termination of the relationship, the very day on which he was released from incarceration, Mr Zitha made it his mission to find the deceased, he went to look for her and brought and end to her life.
- [32] It was argued on behalf of Mr Zitha that there are substantial and compelling circumstances that justify a deviation from the prescribed minimum sentence of life imprisonment. In this respect it was argued that Mr Zitha was remorseful, that he pleaded guilty and that a lot of emotion was involved in the incident. It was implored upon the court that Mr Zitha’s actions were as a result of a build up of almost three months, since the day that the deceased left him, and for the period that he was incarcerated. Compassion was argued for as Mr Zitha is the person who will have the ultimate responsibility of explaining to his four minor children that he took their mother’s life.
- [33] It was submitted that the present matter can be equated to the matter of S v Pillay[7] and that a sentence of 20- or 25-years imprisonment would be just in the circumstances. In Pillay supra it was found that the accused in murdering his long-standing girlfriend was not premediated or planned although the accused

pleaded guilty to premeditated murder, and the State accepted such plea.

- [34] In the Pillay matter supra, the sentencing court proceeded to consider the issue of premeditation in circumstances where an accused has pleaded guilty and the State accepted such plea. I respectfully disagree that a sentencing court can revisit the issue, in the circumstances of a plea to premeditation, which plea has been accepted by the state and on which plea the court was satisfied to convict the accused.
- [35] The court in Pillay approached the matter on the basis that the accused was convicted of Murder, committed under circumstances contemplated in Section 51, Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Although the court did not specifically make reference to which sub-section of Section 51 was applicable, the court proceeded from the basis that life imprisonment is the prescribed minimum sentence. The court then heard evidence, which was inter alia termed as “evidence to show that the offence was planned and premeditated” during the sentencing part of the proceedings.[8] It was inter alia argued that one factor which constituted substantial and compelling circumstances, warranting a deviation from the prescribed minimum

sentence, was that it was a crime of passion, and that the State accepted the facts as contained in the Section 112 statement, and said plea contained no evidence of premeditation or planning. The court then proceeded to consider the facts on which the accused was convicted, as set out in his Section 112 statement, and found that there was nothing on the facts and accepted by the State to indicate premeditation or planning. This, to my mind, is bad in law for the obvious reason that the accused had already at that point in time been convicted of premeditated murder, therefore the issue has been pronounced on. The only enquiry left would be whether substantial and compelling circumstances exist and this too can be a vehicle for reconsideration of issues already pronounced on.

- [36] The minimum sentencing legislation requires for its application that an accused must have been convicted of an offence referred to in the Schedule. This foreshadows that the elements of the offence, including the specific form of the offence, must be established before conviction and found the basis for conviction.
- [37] It is trite that a criminal trial has two stages, being the verdict and sentencing stages. The verdict concerns the guilt or innocence of the accused on the offence he or she was charged with. The sentencing stage relates to that which is spelled out by the word “sentence”. During both these stages a court would be engaged with finding of fact, but the facts in respect of the first stage would relate to the elements of the offence (and/or the specific form of the offence). In the second stage the mitigating or aggravating facts, in respect of the sentence appropriate to the form of the offence of which the accused has been convicted, would come to play.

- [38] The Supreme Court of Appeal in *S v Legoa*[9] explained as follows:-

“[17] Where the accused was charged with Robbery, the question whether the robbery was committed with aggravating circumstances had to be determined as part of the verdict – that is, as part of the court’s finding on guilt or innocence in the first stage. The aggravating circumstances were elements of the form of the offence of robbery with which the accused was charged. Hence they had to be proven in the first stage of the trial and the finding regarding the presence or absence was part of the main verdict...”

[39] Therefore, and as held by the Supreme Court of Appeal *supra*, the legislature through the enactment of the minimum sentence legislation did not create a new type of offence. They are specific

forms of existing offences, and where their commissioning is proven in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires this jurisdiction however only if the evidence relating to all the elements of the form of the scheduled offence is led before conviction on guilt or innocence, and the trial court finds that all the elements specified in the schedules are present.

[40] When a court is faced with a plea of guilty, which the State accepts, the trial court ought not to convict the accused on the strength of said plea and during sentencing revisit the issues and come to a different conclusion. A trial court in circumstances of a guilty plea, which has been accepted by the State is still tasked to ensure that it is satisfied that the accused is guilty of the offence to which he or she has pleaded guilty.[10] Only after confirming that the trial court is so satisfied ought a conviction to follow.

[41] Should a court at any stage of the proceedings under Section 112 (this is inclusive of subsection (1)(a) or (b), or subsection (2)) be in doubt whether the accused is in law guilty of the offence to which he or she had pleaded guilty, or if it is alleged or appears to the court that the accused does not admit to an allegation in the charge, or that the accused had incorrectly admitted any such allegation, or that the accused has a valid defense to the charge, or if the court is of the opinion for any other reasons that the accused’s plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution.[11]

[42] A court is therefore not bound, as seems to be suggested in the Pillay matter, to a plea which has been accepted by the State, and then during the sentencing proceedings, attempts to undo or smooth over that of which the accused had already been convicted of. It seems that the trial court in the Pillay matter had in mind the trite principle that the State is entitled to accept an accused’s plea of guilty on a lesser or alternative

charge, in which circumstances the court has no power to refuse the State's acceptance of such plea.[12] But that is not what transpired in the Pillay matter, as the accused had not pleaded to a lesser or alternative charge, or at the very least from the judgment that does not appear to be the case. Allowing that where an accused has pleaded guilty to Murder, as read with Section 51(2), it might become relevant to consider for the purposes of sentencing and mitigating or aggravating circumstances, whether such murder was planned or premeditated.

[43] I can thus not agree that on the strength of the matter of Pillay, and notwithstanding the conviction of Mr Zitha pursuant to a guilty plea to premeditated or planned murder, that this sentencing court can revisit that issue. Nor can it be reconsidered in mitigation of sentence to the extent that a finding contrary to that found at conviction can be produced. The issue of premeditation and or planning and the evidence in respect thereof or against it, should be presented before conviction.

[44] Life imprisonment is the most severe sentence which a court may impose. It endures for the remainder of the natural life of the offender. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of the case, as dealt with above, requires careful consideration.

[45] The cruelty with which the crime was committed, warrants the severest possible penalty. Your circumstances are not sufficiently substantial and compelling for this court to come to a different conclusion.

[46] In the result, Mr Zitha this court sentences you as follows:-

46.1 Count 2: For the murder of GOODNESS NCANEKILE PEKE MASINA, you are sentenced to LIFE IMPRISONMENT;

46.2 In terms of Section 103(1) of Act 60 of 2000, a person is by the operation of law automatically declared unfit to possess a firearm. The court declines to determine otherwise, in other words, you are declared unfit to possess a firearm.

DATE OF HEARING: 16

February 2022

DATE OF JUDGMENT: 24

February 2022

FOR THE STATE: Adv

Mathebula

National Prosecuting Authority

Mpumalanga, Mbombela

FOR THE DEFENSE:

Adv Erasmus

Legal Aid South Africa

- [1] 1969
- (2) SA 537 (A)
- [2] 1975 (4) SA 855 (AD) at 862G-H
- [3] S v Malgas 2001
- (1) SACR 469 (SCA) at par [25]
- [4] S v Meyer 1981 (3) SA 11 (A)
- [5] 2001
- (1) SACR 546 (NPD)
- [6] Unreported (CC05/2020) [2020] ZAMP MBHC 8 (12 February 2020)
- [7] 2018 (2) SACR 192 (KZD)
- [8] At par [14]
- [9] 2003
- (1) SACR 13 (SCA)
- [10] Section 112(2) of the Criminal Procedure Act 51 of 1977 (as amended)
- [11] Section 112(1) of the Criminal Procedure Act 51 of 1977 (as amended)
- [12] See also S v Kekana[12] where the State accepted the accused's plea of guilty on a lesser or alternative charge as opposed to on the main charge.

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