

SOUTH AFRICA / JUDGMENT

Speelman v S (A410/2013) [2014] ZAGPJHC 79 (3 April 2014)

[2014] ZAGPJHC 79

COURT

South Gauteng High Court, Johannesburg

BEFORE

B Mashile, I Opperman

CASE / FILE NUMBER

A410/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A410/2013

In the matter between:

SITHEMBILE SPEELMAN..... Appellant

and

THE STATE..... Respondent

J U D G M E N T

MASHILE, J:

- [1] This is an appeal emanating from the regional court for the region of Gauteng held at Protea before which the Appellant stood accused of one count of murder in that he intentionally stabbed Mzuyanda Ncanda with a knife from which he sustained fatal injuries.
- [2] The Appellant was warned that the provisions of the Criminal Law Amendment Act No. 105 of 1997, concerning minimum sentences, could be invoked in the event that he was subsequently found guilty.
- [3] The Appellant was legally represented throughout the proceedings. He pleaded not guilty and elected to proffer no plea explanation. In the proceedings that ensued culminating on 5 December 2013, the trial court found him guilty as charged and sentenced him to an effective direct imprisonment of 14 years on 6 December 2013.

- [4] In response to the Appellant's application for leave to appeal, the trial court granted him leave against sentence only. For that reason, this appeal concerns sentence only.
- [5] The Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years for murder with aggravating circumstances for a first offender unless there are substantial and compelling circumstances justifying a deviation therefrom.
- [6] Counsel for the Appellant argued that the trial court failed to have regard to the circumstances under which the offence was committed in that it could be culpable homicide and not murder. The trial court is also said to have failed to consider that the death was caused by a single stab wound to the deceased's chest.
- [7] In addition, Counsel for the Appellant asserted that the trial court did not consider that the Appellant and the deceased were friends and that the murder was not premeditated when it impose the sentence.
- [8] Lastly, Counsel for the Appellant is of the view that the trial court should have taken into account that the death of the deceased was brought about by consumption of alcohol by both the deceased and the Appellant.
- [9] The circumstances outlined above, argued Counsel for the Appellant, should have led the trial court to conclude that there were

substantial and compelling circumstances sanctioning it to depart from the prescribed minimum sentence.

- [10] In *S v PB*, 2013 (2) SACR 533 (SCA) Bosiello JA formulated the approach by a court on appeal as follows:

"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

- [11] Mitigating factors such as that he was a first offender, age, has a family to maintain, unemployment, etc listed by Counsel for the Appellant cannot be elevated to substantial and compelling circumstances as envisaged in Section 51 of the Criminal Law Amendment Act No. 105 of 1997. A balancing exercise of the Appellant's personal circumstances as against the factors that aggravate the commission of the crime dictates that the minimum sentence should be imposed.

- [12] The fact that the trial court did not impose more than the 15 years prescribed in the Act means that it took into account the mitigating factors of the Appellant otherwise it could have exercised its discretion to increase the sentence beyond the minimum. The only substantial and compelling circumstance that the trial court could find is the period that the Appellant spent in jail prior to his conviction and sentence hence the imposition of a 14 year direct imprisonment sentence.
- [13] Other than as aforesaid there would have been nothing warranting a departure from the minimum sentence. Counsel for the Respondent has contended that the fact that the Appellant inflicted one fatal blow should not count as a substantial and compelling circumstance.

I agree with this approach because whether it was one or two the position is that a life was lost. Perhaps there would be merit to the argument of Counsel for the Appellant if this were an assault case.

- [14] It is common cause that the two were drinking alcohol but the level of intoxication of both the deceased and the Appellant is not known. If anything, it seemed that the Appellant was still in full control of all his limbs when he left the scene of crime. The mere fact that he hurriedly left the deceased as he was dropping to the ground suggests that he knew exactly what he had just done and that it was unlawful.
- [15] The evidence that he was in the habit of murmuring that he would be stabbing someone to death stands unchallenged. That he said so on several occasions indicates that he had been planning the murder of the deceased albeit that no one knew at the time who the victim would be.
- [16] Counsel for the Respondent also referred this court to the decision of *S v Malgas* 2001 (1) SACR 469 (SCA) where it was stated that specific sentences are not to be departed from lightly and for flimsy reasons. The minimum sentence legislation and the reluctance to depart from it are ways in which the society expresses its indignation against the continued commission of certain crimes.
- [17] A persistent unwillingness to impose these minimum sentences especially under circumstances that call for it, may lead the society to lose the respect that it has for courts.
- [18] In the premises the appeal cannot succeed and I make the following order:

The appeal on sentence is dismissed.

B MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

I OPPERMAN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing: 25 March 2014

Date of Judgment: 03 April 2014

Counsel for Appellant: Adv. GJ Lidovho

Instructed by: Legal Aid Board South Africa

Counsel For Respondent: Adv JG Wasserman

Instructed by: The Office of the Director Of Public Prosecutions

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