THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: A118/2020

[1] REPORTABLE: NO

[2] OF INTEREST TO OTHER JUDGES: NO

[3] REVISED

_____ _____

Date **M.JORDAAN**

In the matter of:

SHABANGU PHUMZILE APPELLANT

versus

THE STATE RESPONDENT

JUDGMENT

Jordaan AJ

[1] The appellant was arraigned in the Regional Court Soweto on the charge of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997(the CLAA). On 06 May 2016 the appellant was convicted as charged and sentenced to 15 years imprisonment.

[2] Aggrieved with his sentence, the appellant lodged an application for leave to appeal, which leave was granted by the court *a quo*.

[3] The appellant applied for condonation of the late filing of their heads of argument, which were due to be filed on 14 September 2022, but only filed on 28th of September 2022. This application was not opposed by the State. The application for condonation was granted.

[4] The gravamen of the appellant's heads of argument was that the court *a quo* did not consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and imposed a shockingly inappropriate sentence.

[5] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. In S v Bogaards[1] Khampepe J stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[6] It was submitted that the court *a quo* erred in that it did not consider the traditional factors relevant for sentence and did not adequately take into account the appellant's personal circumstances when imposing the sentence.[2]

[7] It was conceded by the respondent that the court *a quo* failed to provide reasons for the sentence.

[8] In Maake v DPP[3] the court stated**:**

"It is not only a salutary practice but obligatory for judicial officers to provide reasons to substantiate conclusions."

[9]This court is satisfied that the court *a quo* misdirected itself in that it did not exercise its sentencing discretion judiciously when imposing sentence, as a creature of statute the court *a quo* failed to apply the principles laid down in Malgas and the age old triad of Zinn and gave no reasons for imposing sentence. We are thus at large to consider sentence afresh subject to the sentencing jurisdiction applicable to the Regional Court in terms of section 51(2) read with subsection 3(a) of the CLAA[4].

[10] The submissions on sentence were:

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[1][2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41
[2] Appellant's HOA para 19
[3] 2011(1) SACR 263 SCA
[4] *Supra*

The appellant is a 36 year old first offender, married, father of his two minor children and a breadwinner to his family, as he was employed prior to arrest.

[11] The following was submitted as substantial and compelling circumstances:

There was a fist fight between the deceased and the appellant, during which the appellant was overpowered and then ran to the shack. He was close to his neighbour who was the deceased. He had the police called, he handed himself over to the police and co-operated with police.

[12] The State submitted the sentence was totally inappropriate no reasons were submitted. There is clear misdirection. However the state wanted court to have regard to the lack of defensive wounds.

[13] The most important principle at the imposition of sentence is the so-called triad of Zinn. In S v Zinn 1969 (2) SA 537 (A) AT 540G it was held that the court should impose a sentence which in its view is appropriate: *"What has to be considered is the triad consisting of the crime, the offender and the interests of society"*. It requires the court to consider the seriousness of the offence, the personal circumstances of the accused and the public interests and exercise a balancing act between these competing interests wherein equity in consideration should be given to each of these interests.

[14] In this particular case the offender is a father of two minor children. In assessing the most appropriate sentence this court is guided by the guidelines proposed in the Zinn triad. However, the process does not stop there. Section 28 of the Constitution[5] protects the rights of the child and the court has to approach this sentence with that in mind. The fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.

[15] In a case where a primary caregiver sentence is being considered, the sentencing officer must go beyond the Zinn triad requirements. It would be proper, in appropriate cases, to take into account the impact of imprisonment on dependents. Every child needs the care and support and involvement of both parents in their lives. The two minor children of the offender were in the care and custody of the appellant and his wife. The appellant was the sole breadwinner for his family earning R500 to R700 per week as a taxi driver.

[16] The offender in the circumstances of this case can be said to be an active present father and participant in his children's life. Bearing the case of S v M[6] in mind the court finds:

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[5] Constitution of the Republic of South Africa Act108 of 1996

[6] 2007 (2) SACR 539 (CC)

- That the offender is a primary care giver in conjunction with his wife
- That the children will be adequately cared for should custodial sentence be considered as their mother as their co-primary care giver is their custodial parent and have been providing for them since the appellant's incarceration, balancing their rights with those of the deceased who lost his right to life
- The best interests of the children are protected should a custodial sentence be considered

[17] Holmes JA held in *S v Rabie*[7] punishment should 'fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'. The court needs to exercise a value judgment in order to determine if substantial and compelling circumstances do exist to justify deviation.[8]

[18] In considering the appropriateness or otherwise of the sentence, I have regard to the nature and circumstances of this case while considering factors stated hereunder.

- **Seriousness of the offence**

Murder is undeniably a heinous crime; it defiles the sanctity of life and right to life as enshrined in the Constitution[9]. In this particular case it robbed the deceased of his life and his wife of her partner and protector. She will never see her beloved husband nor have the comfort of his support again. The biggest threat to our hard won democracy is serious and violent crimes of which murder is the pinnacle one of them.

- **The interests of society**

In this case involve a broad interest in maintaining societal confidence in the criminal justice system. The criminal justice system exists to serve the interest of the community; and punishment, as an integral part of that system exists for that purpose. In R v Karg[10] the court held: "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentence that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured parties may feel inclined to take the law into their own hands".

- **Personal circumstance of the offender**

The appellant is a 36 year old first offender, married, father of his two minor children and a breadwinner to his family, as he was employed prior to arrest.

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[7] 1975 (4) SA 855 (A) at 862G-H.
[8] S v Vilakazi 2012 (6) SA 353 (SCA) paragraph 15
[9] *Ibid*
[10] 1961(1) SA 231 (A)

- **Substantial and Compelling Circumstances**

There was a fist fight between the deceased and the appellant, during which the appellant was overpowered and then ran into the shack. The deceased followed the appellant. The appellant relying on the case of S v Peterson and Another[11] submitted that the fact that the court found that the murder was committed with intent in the form of dolus eventualis, may be a factor to be taken into account in reaching the conclusion that there are substantial and compelling circumstances.

- **Aggravating circumstances**

The deceased was stabbed in the chest and neck. The appellant was extremely aggressive, he stabbed the deceased in circumstances where the deceased intervened and prevented an assault. The appellant is not young at nearly 40years of age.

[19] Having regard to the seriousness of the offence, the circumstances under which it was committed, the court finds that there are substantial and compelling circumstances that exist that warrant this Court to deviate from imposing the minimum sentence of 15years imprisonment as this court finds that the deceased played a role in his ultimate demise in that he followed the appellant after the appellant removed himself from the scene of their initial physical altercation by running away to the shack.

[20] After careful consideration of the totality of the facts, we find that the imposition of 15years imprisonment on all the factors cumulatively considered would be disproportionate. We however have regard to what was stated in Malgas[12] that:

" If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that 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."

[21] In the result the following order is made:

1. The appeal against the sentence of 15years imprisonment is upheld.

[11] 2017 ZAWCHC 32

[12] [2001] para 25I-J ZASCA 30; [2001] 3 All SA 220 (A)

2. The sentence of 15years is set aside and substituted with the following:
   'The accused is sentenced to 12years imprisonment'

3. The sentence set out in paragraph 2 above is antedated to 06 May 2016.

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M.T. Jordaan
Acting Judge of the High Court
Gauteng Division, Johannesburg

I agree and so order

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M. Mdalana-Mayisela

Judge of the High Court

Gauteng Division, Johannesburg

APPEARANCES:

FOR THE STATE: Advocate A. De Klerk

INSTRUCTED BY: National Prosecuting Authority, Johannesburg

FOR THE ACCUSED: Advocate L. Mosoang

INSTRUCTED BY: Legal Aid South Africa, Johannesburg

Date heard: 14 November 2022
Judgment: 15 November 2022